

THE HIGH COURT

[2012 No. 992 P.]

BETWEEN

ANTHONY J. FITZPATRICK

IN HIS CAPACITY AS LIQUIDATOR OF BALLYRIDER LIMITED TRADING AS THE HAZEL HOTEL (IN VOLUNTARY LIQUIDATION)

PLAINTIFF

AND

MICHAEL PHIBBS

DEFENDANT

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

1. In this application, the defendant seeks an order from the court staying the further prosecution of the action herein by the plaintiff, until judgment is given by the Court of Appeal in the action bearing the title: *Revenue Commissioners (Applicant), v. Anthony J. Fitzpatrick* (Respondent) [2014 No. 391 COS]. The defendant moved the application on the basis of an affidavit sworn by his solicitor on 23rd February, 2016.

2. In the present proceedings, it appears that on or about 11th May, 2011, the plaintiff, as liquidator, held an auction to sell the Hazel Hotel as part of the liquidation of a company known as Ballyrider Limited. It appears that the property was knocked down to the defendant for the price of €630,000.00. A deposit of €34,000.00 was provided by the defendant and the sale was to close by 8th July, 2011. However, the sale did not close on that date. It appears that the defendant had difficulty raising the balance of the funds necessary to complete the sale. In August 2011, following re-advertisement of the premises, a new buyer was found for the hotel. It appears that the hotel was sold to the new buyer for €479,000.00.

3. On or about 24th January, 2012, the plaintiff initiated the present proceedings against the defendant for non-performance of the contract for sale entered into in May 2011. The purpose of the proceedings was to seek damages of €150,000.00 being the difference between the original purchase price of €630,000.00 and the €479,000.00 for which the property was eventually sold. The purchase price allowed for a discount of €1,000.00 for damage to the premises caused by vandals.

4. In his grounding affidavit, Mr. Conor O'Toole, the defendant's solicitor, has stated that the proceedings against his client were commenced by way of plenary summons dated 1st February, 2012. An appearance was entered on behalf of the defendant on 8th March, 2012. He states that by a notice for particulars dated 22nd May, 2012, he raised particulars arising from an incomplete statement of claim delivered on 30th April, 2012. He requested a complete statement of claim, which was delivered on 13th August, 2012. Arising from the fresh statement of claim, he raised a further notice for particulars dated 30th August, 2012. Mr. O'Toole states that he has not received a reply to either notice for particulars. Replies to the notice for particulars of 30th August, 2012, have remained outstanding for a period of three years and six months.

5. Mr. O'Toole went on to state that no subsequent steps were taken to prosecute the within proceedings, until the plaintiff sought judgment in default of defence by a notice of motion dated 7th May, 2015. By order of Cross J. dated 22nd June, 2015, the plaintiff's application was dismissed with an order for costs in favour of the defendant.

6. On 23rd June, 2015, the plaintiff served a notice of intention to proceed. A further motion seeking judgment in default of defence has been issued and was returnable before the High Court on 7th March, 2016.

7. Mr. O'Toole states that in the interim, he became aware that the plaintiff had been removed as liquidator of Ballyrider Limited by order of Murphy J. dated 21st July, 2015, in proceedings bearing the title: *Revenue Commissioners v. Anthony J. Fitzpatrick* [2014 No. 391 COS].

8. Mr. O'Toole states that as appears from a consideration of the judgment of Murphy J., she found that the within proceedings were instituted without the knowledge of the Committee of Inspection and in the absence of any formal legal written advice as to the merits of the case or its likelihood of success. It is alleged that Murphy J. found that the plaintiff had not properly considered the merits of the within proceedings and to have prosecuted them in defiance of the express instructions of the Committee of Inspection.

9. Mr. O'Toole states that by virtue of the plaintiff's continued disregard of the requests from the Committee of Inspection, the Revenue Commissioners, as principal secured creditors in the liquidation, issued proceedings seeking orders preventing the continuation of the within proceedings and removing the plaintiff as liquidator of Ballyrider Limited.

10. Murphy J. acceded to the application and removed the plaintiff as liquidator of Ballyrider Limited for cause shown pursuant to s. 277 of the Companies Acts 1963, as amended. In her judgment delivered on 21st July, 2015, Murphy J. considered that the best interests of the liquidation required the removal of Mr. Fitzpatrick as liquidator. Mr. O'Toole alleged that the prosecution of the within proceedings served as the principal basis upon which it was demonstrated that the plaintiff was not acting in the best interests of the liquidation.

11. It appears that the judgment given by Murphy J. is under appeal to the Court of Appeal. By order of the Court of Appeal dated 3rd September, 2015, a stay was placed on the orders made by Murphy J. pending appeal and subject to certain conditions. The conditions imposed by the Court of Appeal were in the following terms:-

"(1) That the Respondent not withdraw any monies from the AIB bank account No. 60743002 or otherwise make any

dispersement from funds standing to the credit of the liquidation.

(2) That in the event the Respondent is unsuccessful in the appeal against his removal as liquidator, no further remuneration or expense shall be paid or reimbursed to the respondent out of the funds of the liquidation from the date of this Order."

12. At the hearing of this application, counsel for the defendant informed the court that to the best of his knowledge, the liquidator's appeal in the other action is due for hearing before the Court of Appeal on 23rd June, 2016.

13. Mr. O'Toole stated that the proposed prosecution of the within proceedings, was in breach of the specific terms and overarching objective of the conditions imposed by the Court of Appeal. He further stated that the within proceedings should not proceed in the circumstances where the plaintiff's position as liquidator is uncertain and the proceedings should be stayed pending the determination of the appeal of the order removing the plaintiff as liquidator.

14. He further stated that as the within proceedings were brought by the plaintiff personally in his capacity as liquidator of Ballyrider Limited, the defendant is unlikely to recover legal costs in the event that these proceedings are defended successfully. It was submitted that the defendant is severely prejudiced by the prosecution of the within proceedings and that they are in breach of a condition imposed on the stay granted by the Court of Appeal. In contrast, the plaintiff cannot be prejudiced by an order granting a stay of the proceedings pending the determination of the appeal, where the plaintiff has been guilty of an inordinate and prejudicial delay having neglected to take any step in the proceedings for a period, in excess, of three years. In these circumstances, it was submitted that it was appropriate and reasonable for this Court to place a stay on the further prosecution of this action, until the appeal in the other proceedings brought by the Revenue Commissioners, has been determined.

15. In response, the plaintiff indicated that in the judgment of Murphy J., it was accepted that the plaintiff had obtained advices orally from solicitors retained to act on behalf of the company in relation to the proceedings which were instituted against the defendant herein. It was submitted that where the property had been knocked down to the defendant at auction and where he had subsequently not been in a position to pay the purchase price agreed, there was a good case to be made against the defendant in respect of the loss suffered by the company on the resale of the property.

16. The plaintiff pointed out that in her judgment, Murphy J. had referred to a letter from the plaintiff's solicitors, Hunter and Company, dated 24th October, 2014, which stated:-

"Having reviewed the documentation made available to us, we are of the view the proceedings against Mr. Phibbs are well founded, legally correct and necessary in the liquidation."

17. It was submitted that in such circumstances, it was reasonable for the plaintiff to proceed with his action against the defendant.

18. The plaintiff further pointed out that he was not obliged to obtain the sanction of the Committee of Inspection, prior to instituting any proceedings against the defendant. It was submitted that in all the circumstances, it was appropriate to allow the within proceedings to continue in the usual way, without putting a stay on those proceedings pending the determination of the Court of Appeal in the proceedings involving the Revenue Commissioners.

19. I am satisfied that in the circumstances outlined, where the defendant had agreed to purchase the hotel for a particular price, and where he had subsequently been unable to pay the agreed purchase price, thereby necessitating the hotel being placed back on the market and where it was subsequently sold for a lesser figure, it was appropriate for the plaintiff to institute proceedings in respect of this shortfall against the defendant. It is noteworthy that in the judgment of Murphy J., the objection taken by the Revenue Commissioners in relation to the continuance of these proceedings, was not based on any view that the proceedings were legally unsound, but was based on a decision made by the Revenue Commissioners, that it was not in the best interests of the liquidation to continue with the proceedings, having regard to the fact that the defendant did not have the funds to complete the purchase of the property. In these circumstances, the Revenue Commissioners took the view that the company was unlikely to be in a position to recover any damages which it may be awarded against the defendant in these proceedings. It may well be that some of the creditors will take the view that it is not worthwhile pursuing the defendant in these proceedings. However, that does not mean that the plaintiff was prohibited from instituting the within proceedings. If the judgment of Murphy J. is affirmed on appeal and the plaintiff is removed as liquidator, it may well be that a new liquidator will decide not to pursue this action against the defendant. However, this does not mean that the defendant is entitled to have the present proceedings stayed until some indeterminate date in the future, when such a decision may or may not be made by a new liquidator, if the plaintiff is removed from his position as liquidator.

20. As the present proceedings are at the stage where replies are outstanding to two notices for particulars, it is almost certain that the proceedings herein, will not be in a position to be brought on for trial before the judgment is delivered by the Court of Appeal in the case brought by the Revenue Commissioners. The defendant will not have to incur any substantial costs prior to the delivery of that judgment. In the circumstances, I am of the view that the defendant would not be prejudiced by having to proceed with this action, pending the judgment from the Court of Appeal. Accordingly, I refuse to grant a stay of the proceedings herein until the judgment is delivered by the Court of Appeal in the case brought by the Revenue Commissioners.