

THE HIGH COURT

[RECORD NO. 2016\1707P]

BETWEEN

CLARE GIBB

PLAINTIFF

AND

PROMONTORIA (ARAN) LIMITED, BRENDAN HANRATTY AND DECLAN TAITE

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered at 2pm on Tuesday, the 12th day of July, 2016

Introduction

1. In this judgment the Court determines the application for an interlocutory injunction made on behalf of the plaintiff seeking to restrain the defendants from interfering with 54 New Road, Clondalkin, ("the Clondalkin property") Dublin 22 and Unit 1 at 1-3 the Coombe ("the Coombe property") Dublin 8 pending the determination of proceedings issued by the plaintiff against Ulster Bank Ireland Limited ("Ulster") on 11th December, 2012.

2. The plaintiff herself issued the Plenary Summons and Notice of Motion on 25th February, 2016 following receipt of letters of demand to repay facilities dated 8th February, 2016 and the appointment of the first named defendant ("PAL") of the second and third named defendants as receivers ("the Receivers") over the Clondalkin property and the Coombe property.

Legal representation

3. Following the initial return date for this application a solicitor came on record for the plaintiff around 11th May, 2016. The present solicitor on record, Mr. Paul Kelly, filed and served a notice of change of solicitor on 9th June, 2016 and he has instructed Ms. Sallar as counsel for the plaintiff. Therefore, the original Endorsement of Claim and the terms of the Notice of Motion issued had no input from Mr. Kelly or Ms. Sallar. Nevertheless, following the outline of the application last Thursday, the Court requested Ms. Sallar to serve and file written legal submissions that evening with a view to focusing on the issues of facts and law relevant to an interlocutory injunction application. The Court now has the benefit of those written submissions along with the earlier written submissions prepared by Ms. McGrath for the defendants together with the oral exchanges last Friday.

Plaintiff's claim in 2012

4. The plaintiff, in her 2012 Statement of Claim, alleged that she was induced to enter into two interest rate swaps or hedging products on 3rd March, 2008 and 20th June, 2008. The plaintiff alleged that the purpose of the borrowings was for private and domestic purposes. Ms. Sallar submitted that an interest rate swap is a financial instrument known as a contract for difference. She stated that it is a contract to exchange sums of money on a quarterly basis calculated by reference to a notional sum. Each financial instrument has a value to the bank in the calculation of its capital reserves. Essentially, the foundation of the plaintiff's claim in her 2012 proceedings against Ulster is that the 2008 swap arrangements were subject to the European Communities (Markets in Financial Instruments) Regulations 2007 which were introduced pursuant to the similarly named Directive 2004\39\EC.

5. Ms. Sallar further submitted that the consequence of the swap arrangement was that the plaintiff's obligation to pay Ulster under her 2007 loan facility for some €745,000 shifted to the 2008 swap arrangement.

6. Various breaches of the regulations in the sale, organisation and management of the swap arrangement are then relied upon for the plaintiff in claiming losses due to Ulster's alleged breach of duty to the plaintiff.

7. It was further outlined to the Court how in August, 2010 the plaintiff was given a break cost of about €118,387.90 for the swap arrangements which indicated the magnitude of the plaintiff's claim for the alleged breach of duty at that time.

Assignment of Ulster's debt to PAL

8. By mortgage sale deed dated 16th December, 2014 which was novated to PAL by deed of 12th February, 2015, PAL purchased the plaintiff's loans among many other loans on 27th February, 2015. The plaintiff was informed that her facilities and mortgages with Ulster were then transferred to PAL.

9. Following the issue of letters of demand issued on 8th February, 2016, the receivers were appointed on 15th February, 2016.

The 2016 proceedings

10. The plaintiff in the 2016 proceedings alleges that PAL was on notice of her claim against Ulster being a chose in action which has the effect of reducing or allowing a set off of the sums that may be due under the 2007 facility between Ulster and the plaintiff.

11. Moreover, the plaintiff disputes the validity of the assignment to PAL of her debt to Ulster as the requirements of s. 28(6) of the Supreme Court's Judicature Act 1877 were not met. More specifically, Ms. Sallar pointed to the requirements of express notice in writing to the debtor of the assignment and that any assignment is subject to pre-existing equities. Such equities mean that PAL took the assignment from Ulster subject to her claim in the 2012 proceedings and that PAL cannot be put into a better position than Ulster. Various other issues are raised on behalf of the plaintiff but suffice to say at this stage that the plaintiff claims that:-

1. PAL has acquired the benefits and obligations of the swap arrangements between Ulster and the plaintiff which in turn affects any sum due by the plaintiff;
2. The assignment from Ulster to PAL is ineffective for various reasons.

Reply of the defendants

12. Ms. McGrath, for the defendants, questioned the applicability of the MIFID regulations to the plaintiff's claim in her 2012 proceedings, the conflation of the swap arrangements with the facility and mortgage and the reliance of the plaintiff on the

Judicature Act, given the determination of McGovern J. in the application for summary judgment in *PAL v. Wallace* [2016] IEHC 50. Most significantly, Ms. McGrath drew the attention of the Court to the fact that at its highest the plaintiff remains indebted for the principal as opposed to the interest arising under the 2007 facility given by Ulster to the plaintiff and other members of her family. In brief the plaintiff has unilaterally ceased repayments for a significant period of time.

13. Overarching all of this is the fact that the Coombe property and the Clondalkin property are the subject of mortgages by the plaintiff's estranged or former husband and sons which are the subject of the assignment to PAL. The plaintiff does not and cannot rely upon any right of those parties.

14. Therefore, although the Court recognises that there may be an issue to be tried in relation to the interest part of the facility granted by Ulster to the plaintiff and the extent of the assignment to PAL of the plaintiff's debt, the Court has not been persuaded that the plaintiff was not indebted to Ulster for the principal or that the mortgages granted by other members of the plaintiff's property in 2007 and 2008 may be relied upon by Ulster and now PAL. The Court finds that the argument based on s. 28 (subs. 6) of the Superior Court of Judicature Act, 1877 to be tenuous as there is clear evidence of notification in writing of the assignment which is not disputed.

15. Much of the hearing last Friday concerned the question about whether the first floor of the Clondalkin premises constituted the home of the plaintiff. Over the years there has been considerable contradictory representations or indications of the plaintiff in relation to this recently developed argument. The origin of communications and stances in her private and public life do not always converge. Nevertheless, the Court on an application like this cannot make a determination of such a fact and it remains for the plaintiff to prove whatever equity and right arising from such an argument now.

16. Even if the Court were incorrect about the height of the plaintiff's claim being confined to the interest which she may owe and the claim in regard to the first floor of the Clondalkin premises, the Court is concerned with the very broad extent of the interlocutory injunction relief sought without having any offer of assurance from the plaintiff about her obligations in regard to maintenance of and income from the properties which she co-owned with other members of her family.

17. It may be that the plaintiff, when drafting the Endorsement of Claim and particularly the Notice of Motion, was not aware of the principles which this Court must apply when considering an application for an interlocutory injunction as opposed to the permanent relief which may be granted at the plenary hearing of these proceedings. Ultimately, the plaintiff's claim is all about money and the potential damages due.

18. If the plaintiff succeeds in her claim against Ulster no question has been raised as to Ulster's ability to pay that sum. Similarly, if the plaintiff succeeds in her claim that PAL was not assigned the entire of the debt due by her to Ulster or that PAL was only assigned a portion, the ultimate figure may be adjusted in the final reconciliation of the receivership account. In other words, damages will be an adequate remedy and the Court finds no merit in the suggestion that the damages which the plaintiff may claim are not ascertainable.

19. The plaintiff has alluded in her affidavits to her impoverished state and the necessity for her to return to work to pay her living expenses when she had hoped to retire at this stage in her life. In those circumstances, and without any potential for an assurance about the recommencement of repayments under the loan facility by the plaintiff, it seems to the Court that the balance of convenience favours the defendants in refusing the wide ranging order sought in restraining any activity by them as receivers. The Receivers following this determination may proceed to secure the properties for the benefit of PAL and any interest which the plaintiff may have depending on her success in her claims against Ulster in the 2012 proceedings and PAL in these proceedings. No reason has been offered by the plaintiff as to why the Receivers should not now proceed, as in other receiverships, to take in and account in the usual way for rents and outgoings.

20. The *status quo* is that the Receivers have been appointed (whose appointment is indeed challenged by the plaintiff) and the plaintiff is entitled to proceed with her claim for damages against Ulster and such other parties as she will be advised to proceed against for damages. The plaintiff is also entitled to proceed to deliver a focused Statement of Claim in these proceedings which may include a claim that the Receivers were not validly appointed. If she succeeds in such a claim, the Court can then give directions as to the assessment of damages, if any, arising from the purported invalidity.

21. Insofar as the Court has not determined whether the plaintiff's primary residence is on the first floor of the Clondalkin premises, the Court is not in a position to grant the injunction sought by the plaintiff as details of the dispute between the Receivers and the plaintiff in this regard have not been addressed adequately for the Court to make a determination even at an interlocutory stage. The Court therefore refrains from making any further ruling or comment other than that the plaintiff will be well minded to consider the judgment of Keane J. in *Szabo v. Kavanagh* [2013] IEHC 491.

22. Having considered the application for consolidation of proceedings last Friday and the difficulties which the plaintiff's present legal team had in delivering a Statement of Claim for these proceedings, the Court gives liberty to the plaintiff to deliver a Statement of Claim and to plead during the long vacation. The Court can hear counsel about a proposed timeline for the delivery of a Statement of Claim in these proceedings with suggestions for a timetable for a request for particulars, replies to that request and then the delivery of a defence on the part of the defendant.