Neutral Citation: [2014] IEHC 653

THE HIGH COURT

[2012 No. 609 S]

BETWEEN

LOMBARD IRELAND LTD

PLAINTIFF

AND

KEVIN DEVLIN TRANSPORT AND KEVIN DEVLIN

DEFENDANTS

JUDGMENT of Ms. Justice Donnelly delivered the 12th day of December 2014.

Introduction

1. The plaintiff ("Lombard") seeks relief in two separate motions. The first motion in time is a motion headed "Notices of Appeal". In that motion, dated 20th February 2013, the plaintiff seeks the following relief:

> 1. An order by way of appeal pursuant to O.63 r.9 setting aside the Order of the Master of the High Court of the 15th February, 2013 striking out the plaintiff's summons and notice of motion seeking liberty to enter final judgment dated the 29th March, 2012 (*A similar order is sought in relation to the granting of costs to the defendant*).
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> 2. An order in terms of the notice of motion dated the 29th March, 2012, that is an order granting liberty to enter final judgment against the defendants in the sum of €227,175.93 together with continuing interest under clause 3 (v) of a lease agreement made between the parties on the 4th November, 2009.
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> 3. If necessary, an order granting liberty to the plaintiff to amend the civil bill (this should read the summary summons) in the terms of the orders of the Master dated the 16th January, 2013 and the 13th February, 2013.
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> 4. Such further or other orders as this honourable court may deem fit.

2. The second motion issued on the 11th February, 2014 and Lombard seeks the following orders:

> 1. An order substituting Vanguard Auto Finance Ltd as plaintiff in the proceedings.
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> 2. In the alternative, an order joining Vanguard Auto Finance Ltd as a co-plaintiff in the proceedings.
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> 3. All necessary and consequential amendments, and
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> 4. An order providing for the costs of and incidentals to the proceedings.

3. Lombard's claim against the first defendant is for judgment for a liquidated amount arising from two business lease agreements both dated the 4th November, 2009, for the hire of a number of Komatsu construction vehicles. Lombard's claim against the second defendant is also for judgment on foot of the second defendant's liabilities as guarantor on the same business lease agreements. The business lease agreements required the first defendant to repay various monthly instalments commencing on the 12th November, 2010. The said lease agreements provided that the first defendant would discharge the monies due from time to time. They also provided that Lombard was entitled to terminate the agreements with the first defendant in the event of a breach, and in particular, if there was a failure to pay any rentals as they fell due.

4. Lombard's case is that the first defendant failed to make repayments of the rentals as they fell due and that it lawfully served separate notices of termination on foot of the lease agreements dated the 17th November, 2011 and the 8th March, 2011. The said notices required return of the goods. The goods were duly returned and the sales proceeds of same were used to reduce the liability outstanding to Lombard on foot of those agreements. In an affidavit, Mr. Colm McLoughlin, the specialist relationship manager with Lombard, has provided the relevant proof in relation to the making of the agreement and the breach of the agreement and also the termination of the agreement by way of notice. Mr. McLoughlin has set out in his affidavit that there is still due and owing the sum of €227,175.93 being the total liabilities on foot of the said lease agreements. He has exhibited a copy computation of the liability in respect of each of the agreements.

History of the proceedings.

5. On the 16th day of January, 2013, the solicitor for Lombard made an *ex parte* application to the Master of the High Court for an order amending the summons. Two amendments were made: a) the addition of the letter "S" after the word DEFENDANT in the title of the proceedings on page one of the summons and b) the deletion of the text "the plaintiff who registered office is at Lombard Ireland Ltd, Group Centre, Georges Quay, Dublin 2 is a limited liability company" which appears on the second paragraph on page six of the summons (the final page) and the insertion therefore of the following text "the plaintiff whose registered office is at Lombard Ireland Ltd., Ulster Bank Group Centre, Georges Quay, Dublin 2 is a limited liability company".

6. A further order granting the plaintiff an extension of time within which to comply with the order of the Master made on the 16th January, 2013, was granted and five weeks were given for compliance therewith.

7. The summary summons (as apparently amended by the Central Office) and which I have before me, records that instead of the deletion of the final paragraph and putting in a separate paragraph on page six of the summons, the words "Ulster Bank" were inserted and underlined just prior to Group Centre. Thus, the paragraph now reads:-

> "this summons was issued by McKeever Rowan Solicitors who (sic) registered place of business is at 5 Harbourmaster

> Place, International Financial Services Centre, Dublin 1, solicitors for the plaintiff who (sic) registered office is at Lombard Ireland Ltd., Ulster Bank Group Centre, Georges Quay, Dublin 2 and is a limited liability company."

Therefore, except for the failure to change the word "who" to "whose", the new paragraph reads virtually identically to that which had been ordered to be substituted by the Master. In fact, the address of Lombard is now quite clearly set out.

8. It appears that the Master was unhappy with the failure to amend the summary summons in exactly the same manner as the Order directed. In any event, he struck out the plaintiff's summons and notice of motion seeking liberty to enter final judgment.

The motion to substitute or add a new plaintiff.

9. The motion to substitute Vanguard Auto Finance Ltd. as plaintiff in the proceedings is grounded on an affidavit of Jonathan Hanley. This affidavit asserts that matters have altered by the coming into force of an agreement dated the 18th December, 2012, under which parts of the asset finance facilities of Lombard Ireland Ltd., including those the subject matter of these proceedings, were transferred to Vanguard Auto Finance Ltd. The agreement was subject to a further deed of amendment and restatement dated the 28th February, 2013, dealing with certain technical issues which had arisen.

10. Mr. Hanley avers that the effect of the transfer of assets was to vest the continuing legal ownership in the goods and the rights to the monies collected in these proceedings in Vanguard Auto Finance Ltd. He further avers that in order to recognise the alteration in rights which has occurred since the 28th February, 2013, it is proposed that Vanguard Auto Finance Ltd. be joined as a party to the proceedings and this be done by its substitution for Lombard Ireland Ltd or, alternatively, by being added as an additional plaintiff. He has exhibited a redacted copy of the agreement dated the 18th December, 2012, and says that Lombard is reluctant to provide information of a commercially sensitive nature when the relevant portion of the document is that which relates to the transfer of assets and rights in those assets. He states that the closing date of the sale and transfer of the assets was the 28th February, 2013. The copy of the agreement provided is substantially redacted.

11. Counsel for Lombard, (who confirmed that she acted for the intended new plaintiff), submits that this is the motion which more appropriately should proceed first. She handed in an Order of Peart J. in which he apparently made a large number of orders relating to entirely different proceedings substituting Vanguard Auto Finance Ltd as plaintiff in place of Lombard Ireland Ltd. Those orders were made pursuant to Order 17, rule 4 of the Rules of the Superior Courts. She states that the proofs are contained in the affidavit of Mr. Jonathon Hanley. She contends that there could be no unfairness to the defendant in circumstances where the transfer of rights and assets did not affect the defendant, but she says that if there was a counterclaim to be advanced, then Vanguard could be added as a plaintiff and not substituted.

12. Counsel for the defendants, says that in relation to the motion to add Vanguard as a plaintiff that, in fact, this cannot be done as there are no proceedings in being. He submits that the order of the Master striking out the plaintiff's summons brought an end to the proceedings. He contends that the proceedings would have to be reinstated before there is any basis for amending the title to the proceedings. However, he further submits that counsel for the plaintiff cannot seek to reinstate proceedings where she does not represent the plaintiff (appearances were confirmed by counsel for the plaintiff).

13. The word "proceedings" is not defined in the Rules of the Superior Courts. The High Court (Finnegan J.) in the case of the *Minister for Justice v. the Information Commissioner* [2001] 3 I.R. 43, held that in s.46 of the Freedom of Information Act 1997, the word "proceedings" meant a step in an action held in public. In that case, English case-law which made clear that the word "proceedings" covers proceedings of a legal nature, was referred to approvingly. In my view, where a party exercises his or her right under Order 63, rule 9 to apply to court against an order of the Master, that is to be considered a step in the proceedings. I do not have to consider the situation where a party is seeking an extension of time in which to appeal. However, it is clearly the case that the proceedings are in being where an appeal has been taken within time, even if the appeal is against an order either striking out or dismissing the proceedings.

14. In those circumstances, the issue is whether the plaintiff is entitled to the order adding or substituting Vanguard as a new plaintiff. The appropriate order under which this is sought is O.17, r.4 which states:-

> "Where by reason of death or bankruptcy, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence."

This application was not made *ex parte* but was on an interlocutory basis. That has merely permitted the defendants the opportunity to make any arguments against the adding or substitution of the plaintiff.

15. Counsel for the defendants submits that the motion to substitute the plaintiff cannot be dealt with until after a notice to produce that he has been served has been dealt with. The notice to produce arises out of the heavily redacted exhibit. He submits on the basis of *Fyffes plc v. DCC plc and others* [2005] IESC 3 and the earlier Supreme Court decision of *Hannigan v. the DPP and Another*, the 30th January, 2001, that once the document has been deployed in proceedings, there is a right of the opposing party to have access to it to see whether indeed it supports the proposition in support of which it has been deployed. Those cases referred to discovery applications. Counsel submits, however, that he could not issue a motion for discovery on an interlocutory application and, indeed, he could not issue one at this summary stage of these proceedings.

16. A number of difficulties with the document were pointed out, including, for example, the closing date. Counsel highlights this by saying that, in fact, the closing date may not have passed. He says that he is entitled to know these matters. In essence, he is submitting that the court should not rule on this motion until he has had sight of documentation upon which it is brought.

17. I am of the view that the determination of an issue arising under Order 17, rule 4 is primarily to be determined on the basis of whether the Court is satisfied that the plaintiff has satisfied the court of the relevant matters that arise therein. That is the reason why it is a matter that can fairly be dealt with without prejudice to a defendant. Any suggestion of prejudice might fairly be dealt with by adding the new plaintiff instead of making the substitution.

18. I take the view that the affidavit of Jonathon Hanley is sufficient proof to ground the application under Order 17, rule 4. An event occurred after the commencement of a cause or matter which caused a change or transmission of interest or liability from the existing

plaintiff to Vanguard. The summary summons is dated the 17th February, 2012, and the initial agreement between Lombard and Vanguard is dated the 18th December, 2012. This agreement was subject to a further deed of amendment and restatement dated the 28th February, 2013, on which date the purchaser and the seller agreed to the sale of purchased assets and the transfer of purchased obligations. The closing date of the sale and transfer was the 28th February, 2013, according to the affidavit of Mr. Hanley.

19. The defendants' objection at this point of the proceedings is to the substitution of Vanguard for Lombard. The defendant has not put forward any particular basis for saying that there is no proof that the interests were transmitted, except to refer to the issues concerning the redacted agreement as set out above. The defendants have not sought to raise any issue regarding a counterclaim.

20. In my view, the redacted document arises in a wholly different context in this motion from the situation which arose in the *Hannigan* and *Fyffes* cases. In those cases, the documents were part of the substantive matter at issue between the parties. In the present case, the document has been deployed to show that an interest of the plaintiff has transferred to another party and for the purpose of proving same so that the plaintiff can persist in its application to be substituted by another party.

21. On this motion, the issue of the closing date relating to the transfer of assets and purchase of assets is a matter between the plaintiff and the intended plaintiff. The closing date has been given in evidence through the sworn affidavit. There is nothing to suggest to the court that such closing date did not occur.

22. The defendants have also referred to other matters that they say have been redacted, such as part of the definition section of the contract. Again, this is not a submission which on the issue of substitution creates any difficulty. Mr. Hanley on behalf of Lombard has stated why the agreement is redacted. Again, that is a matter between Lombard and Vanguard but for the purpose of this motion, the court is satisfied that the transmission of interest has been proven.

23. The application to substitute the plaintiff is the very type of application that may be made *ex parte*. In my view, that is recognition that these are matters that are fundamentally between the plaintiff and a proposed new or additional plaintiff. If there is a true defence, this may still be pursued, and, if there is a counterclaim, that might also have been pursued. In this case, no counterclaim is asserted. I therefore propose to make the order substituting Vanguard for Lombard as the plaintiff. In my view, the arguments of the defendants are more properly addressed to the issue of whether the plaintiff is entitled to summary judgment.

Notice of Appeal.
24. The motion is entitled "Notice of Appeal" but it is, in fact, an application under O.63, r.9 permitting an aggrieved party to apply to court to either discharge an order of the Master or to make the order refused by the Master.

25. The plaintiff has relied upon the case of *ACC Bank PLC v. Thomas Heffernan and Mary Heffernan* [2013] IEHC 557. In that case, Hogan J. held that in a contested case, the Master had no jurisdiction to strike out the case, even if of the view that it should have been commenced by plenary summons but, instead, the Master was required to transfer the case to the judge's list of the High Court in accordance with O.37, r.6 once the case was administratively ready for this purpose. Counsel for the defendants points out that there are two distinct and separate jurisdictions conferred on the Master by O.34 insofar as one relates to contested matters and the other relates to uncontested matters. He says that on the plaintiff's case, this was an uncontested matter and therefore r.4 applies. He submits that under O.37, r.4 the Master was entitled to dismiss the action and generally may make any order for the determination of the action as may seem just. He further submits that the strike out was a determination of the action and that this seemed just to the Master. Thus, he distinguishes the *ACC Bank PLC v. Heffernan* case.

26. As stated above, the "appeal" from the Master is an application to the High Court for the order applied for or a discharge of the order granted. The wording of O.63, r.9 makes clear that this is a full application to court to either discharge an order or to make an order previously refused by the Master. I note that the authors of *Discovery and Disclosure* (Thomson Roundhall, 2007) state at para. 758 that "appeals from the Master's court are heard in the relevant High Court motion list by way of rehearing". I am therefore not reviewing the Master's Order nor am I limited in hearing the matter to the principles set out in *Hay v. O'Grady* [1992] 1 I.R. 210. Thus, it seems to me, I have a full jurisdiction to consider this matter anew.

27. The amendments that were actually made to the summary summons were, in essence, the amendments directed by the Master in his order of the 16th January, 2013. Instead of the deletion of a paragraph and substitution of another, the essential amendment which would have been in the substituted paragraph was instead inserted in the original paragraph as outlined above. The essence of the amendment was to ensure that the registered office of the plaintiff was identified correctly. This amendment was made on the summary summons. There can be, and in fact, there is, no contention that the amendment as made caused any prejudice or indeed was in any way misleading. The failure to amend in the precise terms of the order of the Master's Court is not a matter which would justify the striking out of these proceedings where there has been an amendment entirely consistent with the substance of the amendments and where there is no possible prejudice.

28. Furthermore, the plaintiff's notice of appeal has sought "such further or other orders as this honourable court may deem fit". Counsel for the plaintiff has sought an order deeming the amendment sufficient compliance with the previous order of the Master. Counsel for the defendants objects to that on the basis that there is no motion to deem it good. I consider the terms of the notice of appeal sufficiently wide to permit me, in the circumstances of the case, to make the order as requested. Further, and in particular, I am of the view that there can be no prejudice to the making of that order. There can be no objection to the amendment made as it gave, in substance, the full registered address of the plaintiff company.

29. The reality was that this was a matter which was uncontested in any substantive manner before the Master. I am of the view in all the circumstances that the order of the Master of the High Court striking out the plaintiff's summons and notice of motion seeking liberty to enter final judgment should be reversed, and the said summons and notices of motion reinstated.

The application for an order granting liberty to enter final judgment
30. The affidavit of Colm McLoughlin, sworn on the 21st March, 2012, attests in detail to the business leases entered into by the defendants in this case. The leases are exhibited, the guarantees are exhibited. The notices of termination are exhibited and full details of the computation of the sum of €227,175.93 are also exhibited. Clause 3(V) of the said leases set out that interest shall be payable by the lessee from the date of the termination until payment or judgment on the balance of the amount due by the lessee under clause 3 (II) of the agreement, at the rate of one month Euribor plus 3% or if there be no such rate, the nearest equivalent rate.

31. The defendants in this case have not filed an affidavit, either in this court or in the Master's Court. They have not made out any case as to a *bona fide* defence by way of affidavit. The defendant has relied on the cases of *Starkey v. Purfield* [1946] 1 I.R. 358 and

the case of *Seales v. McSweeney* [1944] I.R. 25 to say that if this court is to set aside the order of the Master striking out the summons, the only consequential order is to adjourn to plenary hearing. The defendants submit that this case is identical to the case of *Starkey v. Purfield* where no affidavit on the merits had been filed.

32. That is not my reading of the case of *Starkey v. Purfield*. In that case, it was held that the order made by the Master, *"being a substantive order for amendment of the summons"*, was wrong, but that the Master, on the basis of the decision in *Seales v. McSweeney*, would have had jurisdiction to make such an order in conjunction with adjourning the summons for plenary hearing. It was on that basis that the Supreme Court adjourned the case for plenary hearing, as if it had been commenced by plenary summons. Those cases do no more than establish that the Master was obliged to adjourn for plenary hearing any case where he had heard and granted a substantive order for amendment of the summons.

33. This was not a substantive amendment of the summons. It was an amendment of the address of the plaintiff in a very limited manner by the addition of the words "Ulster Bank" before "Group Centre". Therefore, I am not of the view that the only order the Master could have made was to set this matter down for plenary hearing.

34. Accordingly, I reject the defendants' submission that the only power of the Master, and indeed this court, is to adjourn the matter to plenary hearing, the summons having been amended.

35. The defendants also submit that the history of these proceedings is of great cautionary note. They contend that the proceedings are replete with confusion and reference the amendment of the summons, the amendment of the title and the circumstances of this appeal. They further contend that it would be wrong for the court to accept the evidence of Mr. McLoughlin. They ask for an adjournment to file an affidavit on the merits, if necessary. In essence, they submit that this is a case that must go to plenary hearing. They say that it is through no fault of the defendants that all parties were present in court at the hearing of the motion.

36. In my view, there is nothing abnormal in the history of these proceedings. There were clerical errors in the summons which required to be amended. There was a delay in compliance with that order by Lombard and it appears that the amendments were not made in literal compliance with the order. Nonetheless, the amendments actually made were, in reality, compliant with the substance of the order. The issue with the title is not a difficult or confusing one. It is a matter of commercial reality that rights and interests in assets may be transferred from one commercial entity to another. The reality of the case is that the defendants have not, at any stage in the course of the long history of these proceedings, filed any affidavit dealing with the merits of the case. In my view, it would be quite inappropriate to permit the defendants, at this stage, an adjournment to file an affidavit on the merits. While any defendant is entitled not to file an affidavit and instead rely upon perceived flaws in the plaintiff's case, if those points are rejected, the defendant cannot be entitled to an adjournment at that stage for the purpose of seeking to make out some other *bona fide* defence. To do that would unduly lengthen proceedings, waste court time and render an unfairness to a plaintiff by the further delays entailed.

37. I now consider whether, in light of the substitution of the plaintiff in these proceedings on foot of the redacted agreement, I should send the matter for plenary hearing, so that an application for discovery might be made and dealt with. The application for discovery is sought on the basis that the defendants contend that the redacted agreement, as a whole, may not be sufficient to transmit the interest of Lombard to Vanguard. Thus, the defendant says there is an arguable ground that Vanguard is not entitled to the relief claimed against the defendants.

38. I refer my reasoning above as to why the Order of substitution is permissible in the case. The decision there was based upon the provisions of Order 17, rule 4 and that the *ex parte* nature of the application showed that the issue of substitution was primarily a matter for the moving party. That is no longer the position where the substituted plaintiff is seeking judgment. It is a matter for the substituted plaintiff to prove its entitlement to the order sought.

39. Counsel for the defendants asserts that it will only be after he has sight of the full documentation that he will be able to maintain the defence that Vanguard is not entitled to pursue him. This is not a defence based upon an allegation that there could never have been an assignment of the leases, but is based upon a claim that, arguably, there may not have been a legally effective one.

40. At paragraph 60 of *Keating v. Radio Telefís Éireann & Ors.* [2013] IESC 22, the purpose of discovery was said by the Supreme Court to "aid a party in the progress of litigation: it is not designed to identify grounds capable of establishing a cause of action." It is quite clear that a plaintiff cannot be permitted to launch his proceedings and then hope, by discovery, to be able to amend his pleadings and thereby make his case. Fishing expeditions or exploratory operations are prohibited. In my view, a defendant is not entitled to a fishing expedition or exploratory operations. On the other hand, a defendant is brought (almost invariably) unwillingly to court. The onus is on the plaintiff to prove the case. A defendant is entitled to insist upon that proof. In certain situations, that could result in a defendant being entitled to have discovery of the documents upon which the plaintiff will seek to prove his or her case.

41. Are the defendants on a fishing expedition here? Are they in reality attempting to assert a defence that is not open to them and simply seek discovery of same?

42. This is a case where the defendants now have an entirely new plaintiff bringing proceedings against them. The defendants were not a party to the agreement between Lombard and Vanguard. This is not a situation where they are aware of the contents of that agreement. On the contrary, they are being told by Lombard (and Vanguard) that the agreement contains confidential matters and they should not see it.

43. The defendants have not filed an affidavit but I do not consider that on this issue an affidavit could add anything to the determination of the matter. In this case, it is precisely the absence of knowledge of the defendants that raises the possible ground of defence. The question for the court to decide on a motion for summary judgment is whether there is a *bona fide* (or arguable) defence. In *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, it was held that the hurdle for a defendant was a low one and that the jurisdiction to grant summary judgment was to be exercised with great care. In that case, Hardiman J. stated at p.623:-

> *"In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined?*

44. Is it very clear that the defendant here has no case? Is there no issue to be tried or an issue which is simply and easily determined? In my view, it is not at all clear that the defendant has no case. It is possible that an application for discovery might produce the full agreement complete with the full definition section. If, as seems likely, there is a claim for privilege, that will have to be determined by the court. It is perhaps possible that the full agreement will be revealed not to be a legally effective transfer of the interests of Lombard to Vanguard in relation to these business leases. That, it must be said, is an unlikely outcome. An unlikely

outcome is not sufficient reason for the court to conclude that there is no arguable defence.

45. I am of the view that the court cannot, at this stage, say that the defendant has no case. There is an issue to be tried. This issue has arisen due to the substitution of the plaintiff Vanguard for the plaintiff Lombard. The issues which arise are not matters that are within the knowledge of the defendant, but they arise on foot of a redacted agreement produced by the former plaintiff and the substituted plaintiff. It is also not possible for the court to decide that no issue arises from the transfer of interest because the unredacted papers are not before the court.

46. In the ordinary course, I would be bound to send this matter for plenary hearing. However, there are unusual features in this case. Counsel for the defendants stated that he required discovery in order to be able to articulate his defence. He said that he could not seek same, as it was not appropriate to grant discovery pre-defence. In general, that is so – a defendant would usually be met with a claim that discovery is inappropriate in an application for summary judgment. Given that the issue of discovery is the only matter outstanding in this case, I am prepared to adjourn this motion for judgment to permit the defendant to bring such an application at this time. This leave of course would not determine the outcome of the motion - that will be for the judge hearing that matter to decide. This seems a sensible, less costly and more expeditious manner in which to deal with this case where the outstanding issue is very clearly delineated. However, prior to making a final order, I will hear counsel on this proposed course of action, as this potential outcome was not fully addressed at the hearing of the motion.