

BETWEEN

MICHEAL CORBETT AND KEVIN CORBETT

PLAINTIFFS

AND

COFFEY CONSTRUCTION IRELAND LIMITED

DEFENDANT

**RULING of Mr. Justice Richard Humphreys delivered on the 7th day of February, 2017**

1. The issue between the parties relates to priority as between two creditors over a particular piece of registered land, Nos. 9 and 10 Copley Street in Cork City. The first creditor, Ulster Bank provided facilities to the plaintiffs in October, 2010 and June, 2011, the benefit of which was subsequently transferred to a company called LSREF III Achill Investments Ltd. The other creditor, Coffey Construction Ireland Ltd., obtained a judgment against the plaintiffs in October, 2010 and registered a judgment mortgage in May, 2011.

2. The plaintiffs have brought two motions. The first motion dated 16th January, 2017 seeks a declaration that the charge dated 18th August, 2016, executed by the plaintiffs in favour of LSREF III Achill Investments Ltd. in respect of Nos. 9 and 10 Copley Street, Cork and lodged for registration subsequent to the registration of a judgment mortgage by the defendant, affecting the interests of the plaintiffs in the said property may be registered in priority to the judgment mortgage. The second motion, dated 2nd February, 2017, seeks an order granting the plaintiffs leave to amend their endorsement of claim by the addition of a relief in similar terms.

3. There are three preliminary issues I am dealing with at this stage. First of all, whether the amendment should be permitted either in principle or at all. Secondly, whether the relief in the motion of 16th January, 2017 is proper to be sought by way of a motion. And thirdly, if the matter is properly to be determined by the court, whether LSREF should be a party.

4. In relation to the first issue, the difficulty with the amendment as currently framed is that it simply adds one relief to the reliefs sought in the statement of claim with no supporting plea as to fact or as to the legal consequences of those facts. That seems to be an insufficient basis for allowing such a plea to be made (as discussed in *Quinn v. IBRC* [2016] IECA 21 *per* Irvine J. at paras. 101 to 108). Having said that, that is not an irremediable difficulty and I will discuss with Mr. Louis McEntagart S.C. for the plaintiffs as to whether he wishes to adjust further his application for an amendment. In the meantime in terms of the application as it currently stands I would uphold the submission by Mr. David Holland S.C. on behalf of the defendant that the amendment as currently formulated is not such as would be suitable to be incorporated into the statement of claim without at the very least further supporting details.

5. The second issue is whether the relief sought in the motion, namely a declaration as to the relevant priority as between the two creditors, is appropriate for a motion. It seems to me that there are only limited circumstances where substantive relief is suitable to be sought by a motion procedure. The general principle is that the substantive relief is to be granted at the ultimate hearing of the action at least in plenary proceedings. The way it is put in *Delaney and McGrath Civil Procedure in the Superior Courts* 3rd ed. (Roundhall, 2012) at p. 526 is that "*the traditional model of litigation is one of a unitary trial whereby all issues whether a fact or a law proceed to a determination at the same time as this is generally considered to be the most convenient and just course*". There are obviously a number of exceptions to that general rule. One is in relation to interlocutory relief. This is not interlocutory relief; this is final relief as against the defendant. A second exception is where trial of a preliminary issue has been ordered under O.25. This is not such a case, nor would I have been minded at the present time to have directed that this be tried as a preliminary issue. Insofar as there was no application in that regard, I do not think that O.124 in relation to non-compliance with the rules really gets the plaintiffs anywhere in this regard, as submitted. A further exception obviously is where the rules make explicit provision for seeking substantive relief by originating notice of motion; and that is done, for example, in O.96 r.2 in relation to registered land. But that cannot be applied by analogy beyond the cases to which it applies. If the rules do not otherwise provide then substantive relief in a plenary action should generally be sought at the hearing. A fourth possible exception is consent of the parties or a direction of the court; for example, where a motion for an injunction is treated as the trial of the action and a permanent injunction then granted on foot of it. But as none of those exceptions apply here it seems to me that this is substantive relief which is proper to the trial of the action. So I would dismiss the motion seeking a declaration on that basis.

6. The final issue is whether a contest as between two creditors should be decided in the absence of one of them. Mr. McEntagart relies on the judgment of Laffoy J. in *Harrahill v. Dixon* [2012] IEHC 524 where the learned judge ultimately brought the other creditor into the application. Mr. McEntagart says this procedure is not in fact necessary here because the parties have the benefit of Barrett J.'s judgment in *LSREF III Achill Investments Ltd. v. Corbett* [2015] IEHC 652 (Unreported, High Court, 22nd October, 2015), which he says determines the position as regards LSREF. The difficulty with that argument it seems to me that if LSREF were not party to any determination of the issue at hand they could essentially seek a second bite of the cherry in some further or subsequent proceedings on the grounds that since they were not party to these proceedings they were not bound by the result. That I think shows the unrealistic nature of attempting to determine a contest between two creditors in the absence of one of them, and specifically the unrealistic nature of attempting to determine an issue such as the one in this case in the context of any proceedings not involving LSREF. The relevance of that given that I am dismissing the first motion is that if the plaintiffs want to proceed with their second motion for an amendment they will also have to add LSREF to the proceedings in some shape or form.