THE HIGH COURT

[2024] IEHC 612
[2018 No. 890 S]

BETWEEN

PROMONTORIA (ARAN) LIMITED

PLAINTIFF

– AND –

ANDREW SHEEHY

DEFENDANT

– AND –

NOEL TYNAN AND BRIAN MOLONEY

THIRD PARTIES

JUDGMENT of Mr Justice Max Barrett delivered on 18th October 2024.

SUMMARY

In this judgment I explain why I will not strike out certain third party proceedings.

1. By notice of motion of 28th February 2024, Messrs Tynan and Moloney seek, among other reliefs, an order setting aside the third party proceedings herein. Both parties have provided helpful affidavits outlining the facts in some detail. Essentially, the key facts, as I understand them, are as follows.

2. In 2005 Messrs Sheehy, Tynan, and Moloney used lands in Portarlington as security for a €3m loan from Ulster Bank. Around the same time a company ('IDEEA') was established in Romania. IDEEA was used as a vehicle to purchase a commercial property (the 'Bucharest Property') in the Romanian capital.

3. By 2006, unhappy differences had arisen between the parties. After compromising an action that commenced in 2006, in 2009 Mr Moloney sued Mr Sheehy for recovery of some €255k. These are the '2009 proceedings'. In 2013, Mr Sheehy delivered a counterclaim in the 2009 proceedings. In that counterclaim, Mr Sheehy sought specific reliefs in relation to the 2005 Ulster Bank indebtedness and repayment of certain monies.

4. The 2009 proceedings appear to have been agitated with a certain languor. Thus, while there were, admittedly, a number of interlocutory applications (including the seeking of a prohibitory injunction preventing the sale of the Bucharest Property), it was not until June 2017 that Mr Sheehy procured a trial date for the 2009 proceedings. Then, on 2nd June 2017, the 2009 proceedings were settled between the parties. Critically, however, the issue of costs in those proceedings remains outstanding between the parties.

5. Of relevance to what happened thereafter, para.7 of the terms of settlement confirmed that Mr Sheehy would be paid US$441k (the then equivalent of €393k) by way of loan from IDEEA, and para.8 states that Mr Sheehy was required to settle 'the partnership debt...for the smallest amount possible'. Though the said monies were paid over, Mr Sheehy did not settle the debt. Thereafter, Promontoria (which had come to substitute Ulster Bank) entered into terms of settlement with Messrs Tynan and Molony and sued Mr Sheehy for the entirety of the debt that it perceived to be owing to it. This was by way of what were referred to at the hearing of this motion as 'the 2018 proceedings'.

6. The 2018 proceedings commenced by summary summons on 23rd July 2018. In them, Promontoria sought judgment in the sum of €4m+ against Mr Sheehy. The summons recited a mortgage of 22nd February 2005 in favour of Ulster Bank and a facility letter of 27th May 2009. The 2018 proceedings were admitted into the Commercial List. The listing judge was told that Messrs Tynan and Molony would have to be joined as third parties and that the 2009 proceedings should also be entered into the Commercial List at the same time, and this was done.

7. By way of recapitulation as to what happened thereafter:

- Mr Sheehy delivered his defence to the 2018 proceedings in February 2019; by reply of 1st March 2019 Promontoria sought, among other matters, to confirm its right to seek equitable relief against Mr Sheehy.
- Disputes over discovery somewhat stalled matters, with discovery of the amount paid by Promontoria for its loans (a matter that would doubtless have proved of separate public interest) being ordered by the High Court, that order being affirmed by the Court of Appeal in April 2020.
- Mr Sheehy then re-entered the 2018 proceedings, and both extant sets of proceedings (the 2009 and the 2018 proceedings) were listed for case management on 15th May 2023.
- This re-entry precipitated settlement negotiations and the 2018 proceedings were settled as between Promontoria and Mr Sheehy on the basis that the action between them would be struck out with no order as to costs.
- Messrs Tynan and Moloney offered that the third party proceedings would be discontinued, with each side bearing their own costs. This offer was refused by Mr Sheehy and the within application has ensued.

8. Arising from the foregoing, what one has in place at this time are two sets of related proceedings that remain in being, the 2009 proceedings and the 2018 proceedings. Because they are related proceedings, the third parties (in my respectful view, wrongly) state that no prejudice is suffered by Mr Sheehy if the 2009 proceedings are struck out. By contrast, Mr Sheehy (in my view, rightly) states that there is no prejudice if these overlapping cases continue, allowing for a full determination of all outstanding issues between the parties. Mr Sheehy, as I understand matters, is also concerned that if the proceedings are struck out, as sought, that he will be restricted in the case he may make at trial. Both sides consider that matters can be case managed to hearing and it seemed to me that the suggestion of counsel for Mr Sheehy that a list of issues could be agreed between the parties would be a sensible approach to take if this matter is to be adjudicated upon in a timely manner.

9. Before proceeding, I should emphasise that it is not the case that the 2009 proceedings are fully settled and it may yet be that further discovery will be required in those proceedings. Additionally, I note that to the extent that it is contended (if it is contended) that once Promontoria settled the 2018 proceedings with Mr Sheehy (the 'Promontoria-Sheehy

settlement'), the third parties are entitled to a strike-out with costs, there is no authority for such a proposition which to me would seem in any event to be wrong if (as is the case) there are issues in the 2018 proceedings that remain to be resolved at hearing.

10. Order 16, r.9 (1) RSC (Order 16 is concerned with third-party procedure) provides as follows:

> 'Where the action is tried, the Court which tries the action may, at or after the trial, give such judgment as the nature of the case may require for or against the defendant giving the notice against or for the third-party, and may grant to the defendant or to the third-party any relief or remedy which might properly have been granted if the third-party had been made a defendant to an action duly instituted against him by the defendant: provided that execution shall not be issued against the third-party without leave of the Court until after satisfaction by the defendant of any judgment against him.'

11. Bringing that provision to bear in the context of the present proceedings it means that Mr Sheehy in the third-party proceedings may seek any relief or remedy which he could have sought in separate proceedings. That being so, I do not see how the appropriate course of action would be other than for both sets of proceedings (the 2009 and the 2018 proceedings) to continue in being.

12. Messrs Tynan and Moloney maintain that the 2018 proceedings should now be struck out with an order for costs. But how could that be? Mr Sheehy contends, among other matters, that Messrs Tynan and Moloney have a joint and several liability for the amount for which he was sued and that he is entitled to his costs from them. As to the notion that the 2018 proceedings were settled as between Promontoria and Mr Sheehy on the basis that the action between them would be struck out with no order as to costs, so nil costs arise to be claimed, that is, with respect, patently wrong. In this regard, I can do no better than to adopt the following written submissions of counsel for Mr Sheehy as being entirely correct:

> '29. Substantial legal costs have been incurred by the defendant which the defendant submits are uniquely recoverable in the third party proceedings by the defendant from the applicants under the rule of law established for the

Irish Court of Appeal in *Re Swan's Estate* (1869) 4 IR Eq. 209[1]... [There,] at 216-217, [it is stated] that a defendant to a debt claim is entitled to recover from a co-indemnitor not only what he had been required 'to pay to the plaintiff...but what he had been decreed to pay the plaintiff, together with his own costs of the suit and the costs he was to pay to the plaintiff...'

...

31. Further, the damages due from the Applicants in an indemnity case include the legal costs of defending the Promontoria claim, recoverable as damages from an indemnitor....[I]n *Badeley v. Consolidated Bank* (1887) LR 34 Ch.D 536[2] [Stirling J. stated,] at 556:

> "That right no doubt exists but it is simply part of a general right to indemnity which exists on the part of the principal debtor towards his sureties. But I think it is clear from further consideration that they have other rights. First of all, they have a right of indemnity and I take it that a surety could prove that by reason of a non-payment of the debt he had suffered other damage beyond the principal and interest which he had been compelled to pay, he would be entitled to recover that damage from the principal debtor. This shews, therefore that more can be recovered by the surety under the contract of indemnity than could be recovered by the creditor."

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[1] There, Thomas Swan, Thomasine Swan, and Joseph Swan, entered into a joint and several recognizance, in the sum of £750. Thomasine was later obliged to pay the whole amount of the recognizance. Thereafter, she filed a claim against the bankrupt estate of Joseph Swan, claiming the sum of £375 as Joseph Swan's contribution towards the sum of £750, *plus interest*. Thomas Armstrong (the creditor's assignee) objected, contending that the claim for interest should be disallowed. An initial order was made that Thomasine's claim was good as to the principal but not as to the interest. On appeal the Court of Appeal, reversing the court below, held that where one of two sureties has paid the full amount of a receiver's recognizance she is entitled to rely on that recognizance to recover from the estate of a co-surety both one-half of the sum so paid *and* the interest paid thereon.

[2] In *Badeley*, it had been agreed that a lender should advance money to a railway contractor. The contractor, by way of security, assigned the benefit of his contract and the materials employed by him and covenanted to repay all advances within six months. In return the lender was to receive interest and one tenth of the net profits made by the contractor. It was held by the High Court that the deed was a device, that the lender was a partner with the contractor, and that he fell to indemnify a person who had a claim against the contractor arising out of a guarantee given in connection with the contract.

[*Court Note*: In other words, the rights of a surety against a principal are not the same as those of the creditor. Thus, while, *e.g.,* a creditor who has recovered judgment against one partner cannot then sue another partner, that does not mean that a surety *qua* surety would lose their rights as against another partner. There are advantages to being a surety that do not pertain to the position of creditor.]

...

33. For completeness, it is important to mention the persuasive case of *McColl's Wholesale Pty Ltd v. State Bank* (NSW) [1984] NSWLR 365, an Australian authority which treats the legal costs of defending a counterparty claim as recoverable damages under an indemnity claim.

34. Powell J. in *McColl's*...at 376 [states as follows]:

"Although both Rowlatt...and Snell [leading academic commentaries]..would assert that the right of indemnity extends not only to any sums properly paid to the creditor but also to interest on such sums even – though the principal debt did not carry interest – and to any costs reasonably incurred by the surety in resisting the creditor's claims, it seems to me that, if it is the intention of each of the learned authors to suggest that, among the terms of the implied contract to indemnify are terms imposing upon the principal debtor obligations to pay interest and costs, the suggestion is in error. Far from supporting such a view, the authorities would seem to suggest that where, in proceedings to enforce the right of indemnity, interest has, or costs have, been allowed, the court has justified its actions upon the basis that the sum or sums allowed is or are in the nature of damages for the principal debtor's failure to honour his contract to indemnify the surety."'

13. I respectfully accept the foregoing to reflect the applicable law in Ireland. I respectfully do not see that the costs Mr Sheehy claims as damages in the third-party proceedings which Messrs Tynan and Moloney seek to have struck out would be reclaimable in any other set of proceedings.

14. As to the notion that the rule in *Henderson v. Henderson*, as latterly (helpfully) discussed by Hogan J. in *Culkin v. Sligo Co. Co.* [2017] IECA 104,[3] is somehow applicable to these proceedings, it is not. *Henderson* prevents the same cause of action being agitated in later proceedings; it does not prevent the same relief(s) being pursued in related proceedings. There is no complete overlap between the proceedings (such as is contemplated by the Court of Appeal in *Carney v. Bank of Scotland* [2017] IECA 295)[4] which could or does justify the strike-out here sought.

15. Reliance was sought also to be placed by Messrs Tynan and Moloney on *IBRC v. Purcell* [2014] IEHC 525.[5] There, the applicable test for identifying the validity of claim for indemnity and/or contribution was the following:

> '...This is that in a more usual application to strike out a claim, the plaintiff maintains that it has suffered a wrong by virtue of the actions of the defendant. By contrast, in a third party claim for indemnity and/or contribution the defendant is

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[3] There, the key issue presenting for the Court of Appeal was stated by Hogan J. in the following terms:

> '2....[C]an a plaintiff present a complaint of discrimination in the workplace before the Equality Tribunal on the grounds of harassment, victimisation and exclusion from the body of workplace and then, in the event that this complaint should prove unsuccessful, ultimately sue the employer for personal injuries arising out of the same alleged set of facts? In the High Court, Kearns P. considered that this multiplicity of litigation was per se abusive and violated the rule in *Henderson v. Henderson*. He accordingly struck out the personal injuries proceedings as an abuse of process: see *Culkin v. Sligo County Council* [2015] IEHC 45. The plaintiff, Mr. Culkin, now appeals to this Court against that decision. '

The Court of Appeal went on to hold that it would allow the appeal insofar as Kearns P. held that the personal injuries claim must automatically fail *in limine* as an abuse of process by reason of the plaintiff's failure to prevail before the Equality Tribunal. But it also held that it would also be open to the court of trial to determine that the personal injuries claim – or, at least, parts of the claim – should fail on the ground that it amounted in substance to a collateral attack on the decision of the Equality Tribunal.

[4] There, an appeal was brought by Mr. Carney against an order made in the High Court dismissing Mr Carney's claim against the second named defendant, Mr. Costelloe. (Mr. Costelloe was a receiver appointed by Bank of Scotland entity over property which was owned by a company, Philisview Properties Limited, pursuant to a deed of mortgage and charge). The basis of the application to the High Court to dismiss the claim was on the grounds that the plaintiff's cause of action in the proceedings against Mr Costelloe was *res judicata* by virtue of what had happened in certain Circuit Court proceedings. The Court of Appeal dismissed the greater part of the appeal but allowed so much of the appeal as dismissed the entire of the proceedings against Mr Costelloe, replacing it with a more nuanced order that allowed an identified claim to certain proprietorial items to proceed.

[5] This was an unsuccessful application brought by the Central Bank, as a third party in the proceedings, seeking the dismissal and/or striking out of Mr Purcell's third party statement of claim against the Central Bank. The grounds upon which the application was brought were that Mr Purcell's third party statement of claim disclosed no reasonable cause of action against the Central Bank and/or that the claims were frivolous and/or vexatious and/or an abuse of process and/or were bound to fail.

not claiming that he has suffered a wrong but rather that the third party owes a duty to the plaintiff and that the defendant and third party are concurrent wrongdoers in respect of the plaintiff...'.

16. That is clearly a test/distinction which can only operate to the benefit of Mr Sheehy in the circumstances here presenting. There is a stateable (arguable) case – the standard for third party joinder applied in *IBRC v. Purcell* – that Mr Sheehy and Messrs Tynan and Moloney are concurrent wrongdoers in respect of Promontoria. The settlement between Promontoria and Mr Sheehy does not resolve all the questions presenting in those proceedings. The test identified in *IBRC v. Purcell* for indemnity in a third party statement of claim is met and continues to be met despite the Promontoria-Sheehy settlement.

17. It will be clear from the foregoing that, respectfully, I see no basis for ordering the strike-out sought or any other of the reliefs sought in the notice of motion. Order 16 seeks to ensure that related claims are heard by the same court and the potential for contradictory findings reduced or obviated: that is consistent with what Mr Sheehy seeks here. The parties are contended by Mr Sheehy in the third-party proceedings to have been joint tortfeasors; that remains his position despite the Promontoria-Sheehy settlement. The issue as to costs in the 2009 proceedings requires to be heard. I do not see that there is any prejudice to the third parties in having the matters heard together. There was some suggestion at the hearing that ideally Messrs Tynan and Moloney would prefer to be the subjects of a single set of proceedings. Maybe they would but that does not mean that they are prejudiced if they are not so confronted. In truth, having things heard in full at a single hearing seems to bring them closer to their preferred ideal, and it is certainly the fairest way of proceeding in terms of allowing a full hearing and a comprehensive determination of the entirety of the dispute/s presenting between the parties. Proceeding so also ensures that Mr Sheehy does not suffer the prejudice that would undoubtedly be visited upon him if the strike-out sought was now granted (including the fact that related claims would not be heard by the same court and the full resolution of the complete dispute between the parties would become unnecessarily and undesirably protracted).

18. For the reasons aforesaid, all of the reliefs sought in the notice of motion are respectfully refused. I will hear the parties as to costs.