Neutral Citation: [2014] IEHC 271

THE HIGH COURT

[2012 No. 12756 P.]

BETWEEN

TIMOTHY JOSEPH DAIRE

PLAINTIFF

AND

THE WISE FINANCE COMPANY LIMITED, RONALD WEISZ AND ARTHUR GUNNING

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered the 20th day of March 2014

1. A so-called *Isaac Wunder* order was made in these proceedings by Laffoy J. on the 11th July, 2013, restraining the plaintiff from instituting any further proceedings against the first and second named defendants without leave of the court. That order arose in the context of long litigation had between the parties since 2004 relating to certain registered lands comprised in Folios 24157F, 35029, 35030 and 9409 Co. Roscommon and certain unregistered lands being part of the lands of Lisagallon or Cloverhill, comprising 16.598 hectares or thereabout situate in Co. Roscommon.

2. The plaintiff acting in person had issued a plenary summons on the 17th December, 2012, in which he sought declaratory relief in respect of a loan agreement and mortgage made on the 9th October, 1996, and the 10th April, 1997, respectively and where he *inter alia*, sought to set aside an order for possession made by Dunne J. on the 31st July, 2006, in respect of Folios 35030 and 9409 and the unregistered lands.

3. The motion which was served returnable before me on the 13th March, 2014, sought an order setting aside the order of Laffoy J. made on the 18th July, 2013, and a declaration that the execution order for possession made on the 15th April, 2013, was unlawful and void. Counsel for the first and second named defendants, the respondents to this motion, agreed that the motion could be amended and that the substance of the application before me was an application for an order following the making of the *Isaac Wunder* order by Laffoy J. aforesaid that this court would grant liberty to the plaintiff to commence fresh proceedings against these defendants.

The 2004 Proceedings

4. In proceedings bearing record No. 2004, No. 401 SP, between the first named defendant in these proceedings and the plaintiff, Dunne J. on the 31st July, 2006, made *inter alia*, an order for possession of the Folio Lands 35030 and 9409 and of the unregistered lands. A stay of one month was granted and the order was amended under the slip rule on the 5th February, 2007.

5. The plaintiff appealed the order of Dunne J. and the Supreme Court on the 21st May, 2012, the appeal having been withdrawn, affirmed the order of the High Court with minor amendments not relevant to the matters before me.

The 2012 Proceedings

6. The plaintiff commenced these proceedings by plenary summons dated the 1ih December, 2012, in which he sought certain reliefs, the relevant ones being for present purposes relief in the form of a declaration that the loan agreement and mortgage made between the plaintiff and the first named defendant was void and unenforceable, and an order vacating the order of the High Court granting possession of the registered and unregistered lands made on the 31st July, 2006.

7. The first and second named defendants brought two applications m those proceedings as follows:

> (a) By notice of motion dated the 28th May, 2013, these defendants sought an order dismissing the plaintiffs claim for want of prosecution, an order striking out the claim as frivolous and vexatious and/or an abuse of process and/or pursuant to the inherent jurisdiction of the court, and an Isaac Wunder order restraining the plaintiff from instituting any further proceedings against these two defendants without leave of the court.
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> (b) By notice of motion dated the 12th June, 2013, these defendants sought an order pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009, vacating the *lis pendens* registered in respect of the Folios 9409, 35030, 35029 and 24157F of the Register of Freeholders of County Roscommon and in respect of the unregistered lands.

8. Those two motions came on for hearing before Laffoy J. and in *Daire v. The Wise Finance Company Ltd. & Ors.* [2013] IEHC 337, delivered on the 11th July, 2013, she made an order striking out the claim of the plaintiff as against these two defendants pursuant to the inherent jurisdiction of the court and on the basis that it was an abuse of process, an order vacating the *lis pendens* and an order restraining the plaintiff from instituting any further proceedings against these defendants without leave of the court.

9. In her judgment Laffoy J. held that the orders of the High Court, and on appeal the Supreme Court, could not be re-litigated and that the question of the entitlement of the mortgagee to possession of the lands, the subject matter of the 2004 proceedings, was *res judicata*.

10. The court held that no new issue had been raised by the plaintiff which could possibly lead to the order of the 31st July, 2006, as affirmed by the order of the Supreme Court, being vacated or to the plaintiff being in a position to establish that that order should not be enforced. She said as follows at para. 34:-

> *In truth, what Mr. Daire is trying to do is to re-litigate issues which were fully litigated in the High Court and his appeal in respect of which was withdrawn in the Supreme Court.*

11. The court then went on to hold at para. 35 that, even if it had considered it appropriate to give the plaintiff time to deliver a

statement of claim in the proceedings, it was

> *inconceivable that Mr. Daire, on the basis of the matters addressed in his replying affidavit, would be able to produce a statement of claim, which could be supported by evidence, which would have the effect of saving the proceedings. In any event, the essential facts on which this case is based were identified between 2004 and 2006 in the 2004 Proceedings. No new relevant fact has been adduced by him on this application.*

12. The court accordingly struck out the application and made the *Isaac Wunder* order which has led to the plaintiff bringing this application before this court to permit the issue by the plaintiff of fresh proceedings.

13. The solicitor for the plaintiff made the argument before me that a new point now arises for consideration by the court, namely that the execution order for possession issued on the 15th April, 2013, is not legally sound in that it was not made within six years of the making of the order as is required by O. 42, r. 23 of the Rules of the Superior Courts. That Rule provides as follows:-

> *As between the original parties to a judgement or order, execution may issue at any time within six years from the recovery of the judgement, or the date of the order.*

14. The solicitor for the plaintiff makes the argument that as execution is now sought to be effected outside the six year time limit provided in O. 42, r. 23 that the execution order is legally flawed. What in essence the solicitor for the plaintiff now seeks is an order permitting his client to commence new proceedings to challenge the validity of the execution order, although the application was at first framed as an application to set aside the primary order for possession.

15. He points out that the judgment of Dunne J., delivered on the 3rd December, 2013, in *Carlisle Mortgages Limited v. Canty* [2013] IEHC 552, which concerned an application for the renewal of a writ of execution, made it clear that further application could be made for a second or subsequent renewal of an execution order for possession after the expiration of the original order but, that as no extension of the writ of execution had been sought or obtained, the execution order for possession in this case is flawed.

Leave to Institute Proceedings: The Test

16. In *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463, Ó Caoimh J., in considering whether to grant leave to institute proceedings, applied a test of whether the intended proceedings could succeed and whether a reasonable person could reasonably expect to obtain the relief sought. The learned judge concluded that the cause of action had no prospect of success, that no reasonable person could reasonably expect to obtain relief and took the view that the proposed action was vexatious and had an improper purpose, namely the harassment and oppression of the parties referred to in the proceedings already determined by the Supreme Court, rather than the assertion of a legitimate right. He refused the intended plaintiff leave to institute proceedings.

17. In *Kenny v. Trinity College* [2008] IEHC 320, Clarke J. followed *Riordan v. Ireland (No. 5)* and explained the test as being whether on the basis of the information available at the early stage of an application for leave, it can be said that the proceedings contemplated were frivolous and vexatious.

18. Clarke J. identified the purpose of the jurisdiction of the court to make an *Isaac Wunder* order as one to protect persons from being the subject of frivolous or vexatious litigation. As he states, any litigant may in the normal course commence proceedings which might be vexatious and frivolous, but once an *Isaac Wunder* order has been made, that litigant will not be permitted to institute proceedings unless the court is satisfied that these contemplated proceedings were not frivolous and vexatious. The court may in hearing an application for leave to bring proceedings in those circumstances explore at least to some extent the basis on which the party would seek to advance their claim with a view to assessing whether any such claim might be regarded as being frivolous or vexatious. It seems that the bar set by the jurisprudence is low.

The Basis of the Proceedings Sought to be Commenced

19. The claim sought to be brought by the applicant is to set aside the execution order for possession as having been made outside the six year time limited provided by the Rules of the Superior Courts. The solicitor for the plaintiff asserts for that purpose the court should treat the operative date of the primary order for possession as being the date of the High Court order made by Dunne J. on the 31st July, 2006. He asks this court in that context to accept that the date of the Supreme Court order is not the date on which the time began to run for the purposes of O. 42, r. 23. He applies in the circumstances for liberty to commence proceedings for a declaration that the execution order for possession is unlawful and was made without jurisdiction and outside time.

20. Counsel for the defendants, and intended defendants in those proceedings, argues that what the plaintiff is attempting to do is to impugn the order for possession itself and that he is not competent to do so having regard to the fact that final and unassailable orders have already been made by the High Court and on appeal by the Supreme Court. Counsel is correct as a matter of first principle that the plaintiff may not seek to reopen that order, but what the solicitor for the plaintiff urges upon the court is a somewhat different proposition, namely that the writ of execution was made outside jurisdiction, and outside the time limit provided by the Rules. He argues that as an order for the extension of time was not sought, that the writ for possession is invalid. This is not a point that has previously been litigated between these parties.

21. In the circumstances, I turn now to examine the basis of this claim and whether it could be said to be vexatious and frivolous, or is likely to fail and it seems to me that the test I must apply in this case is as follows:

> (a) Are the contemplated proceedings frivolous and vexatious?
>
> (b) Do the contemplated proceedings seek to reopen and challenge a final decision of the court other than by way of appeal?
>
> (c) Should the court exercise its jurisdiction to refuse leave on the basis that the plaintiff has no stateable case and that the contemplated proceedings are likely to fail?

22. In essence what the court must ask is whether the contemplated proceedings are sustainable, or to use the words of Laffoy J. at para. 35 of her judgment in *Daire v. The Wise Finance Company Ltd. & Ors.*, can the plaintiff "produce a statement of claim, which could be supported by evidence, which would have the effect of saving the proceedings."

The Legal Test

23. There is some overlap in the tests as to whether a claim is unsustainable or bound to fail and as to whether it may be regarded as frivolous and vexatious. Were the plaintiff to attempt to bring proceedings to set aside the order for possession already made in the

High Court and on appeal the Supreme Court, the bringing of that action would in my view be frivolous and vexatious and would be an attempt to impugn what has to be regarded as a final judgment or order of the Irish Courts. However, what the plaintiff seeks to do is to challenge the execution order for possession which he states was made out of time. In those circumstances, it seems to me that a new argument is now proposed to be made by the plaintiff, and this argument has not been tested in the previous litigation. As such, the intended proceedings are not vexatious or frivolous and do not amount to a collateral attack on the final order of possession. In those circumstances I conclude that the test I must apply is whether the contemplated action is bound to fail. Delany and McGrath in *Civil Procedure in the Superior Courts* (Roundhall, 3rd ed., 2012), at para. 16.22, suggests that this test is that the proceedings are "wholly unsustainable in law and in fact" and that:-

> *[T]his is a difficult test to satisfY as it will be necessary for the defendant to establish that the plaintiff's claim is entirely devoid of merit and has not just little but no reasonable prospect of success.*

24. The jurisprudence is well established that a court will not exercise its jurisdiction to strike out proceedings unless it is "clear beyond doubt" that the plaintiff will not succeed. See *Doe v. Armour Pharmaceutical Inc.* [1997] IEHC 139 and the comment by Fennelly J. in *Delahunty v. Player & Wills (Ireland) Ltd. & Ors.* [2006] IESC 21, where he stated that the jurisdiction to dismiss a claim is suitable for use in cases where there is no room for doubt about the evidence.

25. There is not likely to be any dispute between the parties as to the factual nexus that gives rise to the intended proceeding: the order for possession was made by the High Court on 31st July, 2006, affirmed on appeal by the Supreme Court on the 21st May, 2012, and the order of execution for possession issued out of the High Court directed to the Sheriff for the County of Roscommon on 15th April, 2013. To succeed in the intended action the plaintiff must persuade the court that it is the date of the High Court and not of the Supreme Court order that is the relevant date from which the six year time limit began to run.

26. It is also established as a matter of law that this Court must "treat the plaintiffs claim at its high watermark" as stated, at para. 6.4, by Clarke J. in *McCourt v. Tiernan* [2005] IEHC 268. Accordingly this Court must consider whether there is a stateable proposition of law that time began to run for the calculation of the six year time limit for the issue of a writ of execution at the date of the High Court order and not at the date of the Supreme Court order.

27. The order of the High Court made on 31st July, 2006, was a final order in that court. A stay of execution was granted for one month and on the expiration of the stay the order became enforceable and final between the parties subject to the right of either party to appeal. The plaintiff did in fact appeal and there was nothing in the form of the order made by Dunne J. that limited the scope of that appeal. The Supreme Court had full jurisdiction and could have affirmed, set aside or varied the order of the High Court. In the events, the plaintiff withdrew his appeal and the Supreme Court, on the 21st May, 2012, affirmed the order of the High Court.

28. As between the parties, the order of the Supreme Court was final and conclusive and stands as "one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction," the test explained by Lord Diplock in *D.S.V. Silo-und Verwaltungs-gesellschaft m.b.H v. Owners of the Sennar and Thirteen Other Ships: The Sennar (No.2)* [1985] 1 WLR 490 at p. 494. A judgment of an appeal court is regarded as operative for the purpose of any argument that a matter *inter partes* is *res judicata* as explained in Spencer Bower and Turner, *The Doctrine of Res Judicata* (Butterworths, 2nd ed., 1969) at para. 62 as follows:-

> *When a judicial tribunal of competent original jurisdiction has granted, or refused, the relief claimed in an action or other proceeding, and an appellate tribunal reverses the judgment or order of the court of first instance, and either refuses the relief granted below, or grants the relief refused below, as the case may be, the former decision, till then conclusive as such, disappears altogether, and is replaced by the appellate decision, which thenceforth holds the field to the exclusion of any other, as res judicata between the parties.*

29. An appeal was lodged by the plaintiff to the decision of Dunne J. granting an order for possession. The appellate court made an order affirming that order and the date of the appellate's court decision is, in my view, the operative date from which time began to run for the purposes of the making of a writ of execution. To use the words of Spencer Bower and Turner, the High Court order "disappears altogether" or merged in the affirmation of that order by the Supreme Court on the 2151 May, 2012. In the circumstances, it seems to me that there is no coherent or rational argument that can be made by the plaintiff that the writ of possession was made out of time. Having regard to that view, and even taking the plaintiffs case at its height, the action which the plaintiff now seeks liberty to commence is, in my view, bound to fail.

30. In the circumstances, and having regard to the limited and specific claim sought to be litigated, my view is that the intended action in respect of which leave is sought is one that is bound to fail and accordingly, I refuse the relief sought.