

BETWEEN:**DECLAN GEARY and MARIE GEARY****Plaintiffs****-and-****PROPERTY REGISTRATION AUTHORITY, ENNIS PROPERTY FINANCE DAC, BANK OF SCOTLAND PLC, TOM KAVANAGH, MAPLES AND CALDERS SOLICITORS****Defendants****Judgement of Ms. Justice Ní Raifeartaigh delivered on the 19th day of November, 2018****Nature of the Case**

1. This is a case in which a receiver (Mr. Kavanagh), appointed by Ennis Properties, had brought proceedings against Mr. and Mrs. Geary in order to enable the receiver to carry out his duties in respect of certain commercial property in Limerick. Various court orders were made in those proceedings and a timetable set for the exchange of pleadings. However, before the Gearys filed a defence to those proceedings, and despite the court-ordered deadline for them to do so having expired, they commenced a second set of proceedings, not only against the receiver, Mr. Kavanagh, and Ennis Properties, but also against a number of other parties; namely, the Property Registration Authority (hereinafter "the PRA"), Bank of Scotland, who gave them the original loans, (hereinafter "BOS"), and Maples and Calder Solicitors (agents for Ennis Property and the Receiver). A number of motions have issued from various parties in the context of both sets of proceedings. What came before me by way of motion was; (1) a motion (in the second set of proceedings) on behalf of Mr. Kavanagh, Ennis Property and Maples and Calder solicitors to have the proceedings struck out as against them; (2) a motion (in the second set of proceedings) on behalf of Bank of Scotland to have the proceedings struck out as against them; and (3) a motion (in the second set of proceedings) on behalf of the Gearys seeking reliefs against the Property Registration Authority and the Receiver.

2. A feature of the proceedings was that neither Mr. nor Mrs. Geary, nor anyone on their behalf, appeared before the Court on the dates on which hearings took place before me. The Gearys are litigants in person, and Mr. Geary, who had been dealing with the proceedings, became unfit to appear in court from May 2018 as a result of acute stress-related reactions. I set out further detail in this regard below.

Relevant Chronology

3. I will refer to the first set of proceedings as "The Receiver Proceedings". These have the Record No. 2017/6534P and are entitled *Tom Kavanagh v Declan Geary and Marie Geary and Habanville Ltd.* These proceedings were issued in July 2017, seeking possession of property and related reliefs. As originally constituted, they were against the Gearys only. In December 2017, Habanville Ltd. were added as defendant by court order as the Gearys informed the court that Habanville Ltd. were now the tenants of the property

4. I will refer to the second set of proceedings as the "Geary Proceedings". These bear the Record No. 2018/3000P and are entitled *Geary v. Property Registration Authority, Ennis Property Finance DAC, Bank of Scotland plc, Tom Kavanagh and Maples and Calder Solicitors.* These proceedings were issued in April 2018 by the Gearys, some 9 months after the Receiver proceedings had been commenced, and at a point in time when they themselves had failed to comply with a (second) court-ordered deadline for the delivery of a defence to the first set of proceedings.

5. The property the subject of the receivership is registered land in County Limerick from which the Gearys conducted a business. Charges had been registered in the Land Registry Folios in respect of the land; first, by Bank of Scotland on the 9th April, 2015, and subsequently by Ennis Properties on the 24th April, 2015. Bank of Scotland had never taken any enforcement action against the Gearys. In December 2014, Bank of Scotland sold a portfolio of loan facilities, including those of the Gearys, to Ennis Property. By two letters dated the 7th November, 2016, Ennis demanded €1,337,013.03 from the defendants by the 10th November, 2016.

6. On the 14th November, 2016, Ennis Properties appointed Mr. Kavanagh as Receiver by Deed of Appointment. This was followed by correspondence from the Gearys, from which it became clear that they were disputing the validity of the appointment of the receiver, although it may be noted that there was no suggestion by them that the sums in question were not due.

7. The first set of proceedings was then issued on behalf of the Receiver in July 2016. By order dated the 6th December, 2017, the High Court (Gilligan J.) granted liberty to join Habanville Ltd. as co-defendant. He also ordered that the defendants co-operate with the plaintiff receiver to enable him to access the properties on reasonable notice and that the matter be remitted to plenary hearing. Gilligan J. set out a timetable for the exchange of pleadings and particulars and discovery.

8. The Gearys subsequently took the view that they could not comply with the timetable until they obtained "clarification" of the above court order, and sought the DAR of the relevant court date. By order dated the 29th January 2018, the High Court (Barniville J.) directed the Gearys to deliver a defence by the 8th March, 2018. To date, they have not complied with this deadline. Instead, they issued a motion dated 12th March, 2018 seeking to strike out the proceedings on the basis they were frivolous, vexatious and bound to fail. Also, they commenced the second set of proceedings on the 5th April 2018 by plenary summons, and on the same date, issued a motion seeking reliefs against the PRA and the Receiver.

9. On the 23rd April, 2018, the second, fourth and fifth defendants issued a motion seeking to have the plenary summons in the second set of proceedings struck out as against them.

10. On the 30th April, 2018, the third defendant (Bank of Scotland) issued a motion seeking to have the second set of proceedings struck out as against them.

11. On the 17th May, 2018, the High Court (O'Connor J.) refused to grant the relief sought by the Gearys in their motion to strike out the first set of proceedings, apparently on the basis that they had failed to file a defence in compliance with the previous High Court order. Mr. Geary complains that he was subjected to humiliating treatment in court and that this caused a rapid deterioration in his mental health situation. He has not appeared in court since that date.

12. On the 31st May 2018, Mr. Geary swore an affidavit in which he referred to the stress caused by the last hearing before the High Court, and exhibited, among other things, a letter from his general practitioner dated the 25th May, 2018. This referred to Mr. Geary being on medication for depression and stress in recent years due to mental pressure from his business, and stated that he had experienced an acute deterioration in his mental state after a recent court appearance resulting in him considering suicidal thoughts. The doctor had referred him to a consultant psychiatrist for further management and stated that he was "not fit to be in any acutely stressful situation".

13. On the 7th June 2018, the High Court (Costello J.) fixed a new hearing date of the 24th July, 2018 for the motions but put the matter in for mention on the 3rd July to see if it could proceed.

14. On the 2nd July 2018, Mr. Geary swore an affidavit seeking further time and exhibited a letter dated the 2nd July, 2018 from a psychiatrist who had met him on the 30th June which stated that he was suffering from "a depressive disorder of moderate severity secondary to severe stress" and also that he was suffering from hypertension. The psychiatrist stated that adjustments had been made to his medication which would take time to take effect and it was stated that he was "not fit to present himself in court over the coming month".

15. On the 3rd July, 2018 the High Court (Stewart J.) adjourned the proceedings to the 4th October, 2018 for hearing on a peremptory basis.

16. On the 1st October, 2018 a supplemental affidavit was sworn by Mr. Geary. He averred that he was unable to present his case before the Court due to the current state of his mental health, exhibiting a letter from his GP dated the 19th September, 2018 which was to the effect that he was suffering from acute chronic anxiety and depression, and that he was awaiting a further appointment with a consultant psychiatrist at the end of October, 2018. Dr. O'Callaghan also averred that Mr. Geary was not fit for attendance at court.

17. By email dated the 4th October 2018, Mrs. Geary said that her husband had sworn an affidavit and that she herself was not equipped to stand before the courts, and that she also had medical issues which were undergoing treatment. She said that they were asking a representative to go before the President of the High Court to speak on their behalf. The High Court put the matter back to the next day for the hearing of the motions, and directed that the defendants be written to, informing them of this.

18. The matter was put back to the 5th October, 2018 at which point it came to me. I indicated that, given the history, I would take the papers and read them over the week and resume the hearing on the 12th October, 2018. I also directed that this be communicated to the Gearys in writing.

19. On the 12th October, 2018, there was no appearance by or on behalf of the Gearys. I was shown an email sent by Mrs. Geary on the 11th October 2018 enclosing an affidavit of Mr. Geary sworn on the 8th October, 2018. This affidavit contained 22 paragraphs and dealt in some detail with legal matters. It also said that his psychiatrist is of the view that Mr. Geary would not be able to withstand the stress of a court hearing.

20. Having read the papers in the intervening week, and having regard to all the circumstances therein, I decided that the matter should proceed, notwithstanding the absence of the Gearys and the medical condition of Mr. Geary. I set out my reasons for that decision orally on that date, and they are recorded in the transcript of that hearing.

21. It is regrettable that the Gearys were not in a position to find anyone to represent them or to appear personally at the hearing of the motions the subject of this judgment. However, there were no indications that Mr. Geary would be sufficiently recovered to attend and make representations in court any time in the near future; and he continued to put his case forward in detail by way of affidavit, including an affidavit sworn on the 8th October, 2018. Further, I had regard to the overall circumstances of the case, including the timing of the Geary proceedings and the content of the motions before me. It is noteworthy that the Gearys, despite putting many documents before the Court since March 2018, have never complied with the March 8th deadline for filing a defence in the first set of proceedings. While they may genuinely feel entitled to disregard this court-imposed deadline in the Receiver proceedings and to issue a wholly fresh set of proceedings of their own, and may well feel aggrieved that the Court is proceeding to deal with these motions in their absence, the Court has to find a balance of justice as between the various litigants and its own duty to progress cases with reasonable expedition, having regard to the nature of the case and the content of the motions before it at this time. A considerable amount of leeway is afforded to litigants in person, but they are not entitled simply to disregard court-imposed deadlines nor to hold up proceedings which are legitimately brought by instituting their own set of proceedings which may be misconceived in law, no matter how genuinely they believe them to be valid or have been advised by others behind the scenes that this is so. I refer to advice behind the scenes because the affidavits and motions and proceedings sworn and issued by the Gearys are replete with legal terminology and jargon, although (as will become clear below) what is unfortunately lacking is clear, cogent legal reasoning.

22. A hearing then took place on the 12th October, 2018 at which counsel for each of the remaining parties set out their position. There were some written submissions also. At the conclusion of the hearing, I adjourned judgment until the 30th October, 2018. On that date, I indicated the decision on each of the motions but indicated that detailed reasons would be given on the 17th November, 2018. The present judgment sets out those reasons.

23. I should perhaps note that a stenographer has been present and taking notes on all occasions when I have dealt with the case.

The Motion of Ennis Property Finance, Mr. Kavanagh (the receiver), and Maples and Calder Solicitors seeking to have the Geary proceedings struck out as against them.

24. Counsel on behalf of the second, fourth and fifth defendants (Ennis, Kavanagh, Maples and Calder) made written and oral submissions. The core of their submission was that there was duplication of issues as between the first set of proceedings (the Receiver proceedings) and the second set of proceedings (the Geary proceedings).

25. It is well established that when a first set of proceedings has been finalised, no further proceedings may be brought to litigate the same issues or to raise issues which could have been raised in the earlier set of proceedings; *Henderson v Henderson* (1843) Hare 100; *AA v. Medical Council* [2003] 4 IR 3021; *Re Vantive Holdings* [2010] 2 IR 118, in particular at para 21; *Vico Ltd. v. Bank of Ireland* [2016] IECA 273; and *Fox v. McDonald* [2017] IECA 189. The purpose of the principle set out in *Henderson v Henderson*, as described in the above Irish authorities, is to ensure that there is finality to proceedings brought in respect of a particular dispute, and to avoid repetitious and unnecessary litigation. The same logic must apply even where the first set of proceedings has not yet been concluded but a second set of proceedings, which unnecessarily duplicates the issues in the first proceedings, is brought. In the present case, the Receiver proceedings were issued in order to clarify the position regarding the validity of the receiver's appointment. The Gearys

were under an obligation, by court order, to file a defence in those proceedings. They failed to do so and instead issued proceedings raising their objections to the receivership. There is no reason the issues they raise in their own proceedings could not have been raised in the context of the existing proceedings and there is therefore, in my view, an unnecessary duplication of issues as between the proceedings, which amounts to an abuse of the court process, and I will direct that the proceedings be struck out as against Ennis Property and Mr. Kavanagh for this reason.

26. As regards the claim of the Gearys against Maples and Calder, the solicitors who are acting for Ennis Property and Mr. Kavanagh the receiver, I have no hesitation in granting the relief sought, namely a strike out of the proceedings as against them. I do so on the basis of what was set out in *Kearney v Allsop Ireland and others* [2016] IEHC 166, namely that the matters of which the Gearys complain as against them were the actions of an agent acting on instructions and that the claim against them is therefore not based on any claim known to the law.

27. I should perhaps clarify that I propose to exercise my discretion to strike out the proceedings instituted by the Gearys in respect of the second, fourth and fifth defendants on the basis of the inherent jurisdiction of the Court.

Bank of Scotland's Motion to strike out the Geary proceedings as against them

28. In Mr. Geary's most recent affidavit of 8th October, 2018, he raised a prematurity argument, namely that it was premature for the Court to strike out proceedings before a statement of claim had been delivered. Counsel for Bank of Scotland pointed out that Mr. Geary was in serious default with regard to filing his Statement of Claim which should have been done within the 21-day time limit pursuant to O. 20, r. 1 of the Rules of the Superior Courts. He also submitted that the Plenary Summons was relatively detailed and that the case being made had been set out by Mr. Geary over a number of detailed affidavits. Counsel pointed out that O. 19 r. 28 provides that the court may order "any pleading to be struck out...", which therefore includes an originating summons (O. 125, r. 1). Counsel referred to *Connor v. Cotter* [2017] IECA 25 which also confirms that it is appropriate in some cases to strike out prior to the delivery of the statement of claim.

29. Having regard to the decision in *Connor v. Cotter*, together with the history of the proceedings and the contents of the Plenary Summons and affidavits sworn by Mr. Geary, it seems to me that this is one of those cases in which it is appropriate to consider the relief sought notwithstanding that the statement of claim has not been delivered. I therefore reject the argument that the application is premature.

30. As regards the exercise of the "strike out" jurisdiction, it is clear from the authorities, including *Aer Rianta* [2004] 1 IR 506, and *Sun Fat Chan* [1992] 1 IR 425, that the jurisdiction to strike out proceedings must be exercised sparingly and with considerable caution, whether dismissal is sought pursuant to the rules of court or pursuant to the inherent jurisdiction of the court. The difference in the exercise of the two separate "strike out" jurisdictions is that under O.19 r. 28, the court must confine itself to pleadings, whereas it may consider the evidence on affidavit when exercising its inherent jurisdiction; *Barry v. Buckley* [1981] 1 IR 306, *Salthill Properties* [2009] IEHC 207, *Manning* [2011] IEHC 98. The onus of proof is on the defendant to prove that the claim is bound to fail. The Supreme Court decision of *Ewing v Ireland* [2013] IESC 44 interpreted the terms "frivolous and vexatious" by adopting the summary of the High Court in *Riordan v Ireland (No. 5)* [2001] 4 IR 463, where that court itself adopted the summary of the Ontario High Court in *Re Lang Michener and Fabian* (1987) 37 D.L.R. (4th) 685 to include the following scenarios:-

- "(a) the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
- (c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;
- (f) where the respondent persistently takes unsuccessful appeals from judicial decisions."

31. In the present case, it was submitted on behalf of Bank of Scotland that the Bank was not a proper party to the dispute as it had conclusively assigned and transferred its rights, title and interest in the various loan facilities, together with its security interest in the property, to Ennis Property in 2015, and had never at any stage taken any enforcement action against the Gearys pursuant to the loan facilities or in respect of the charged property. It was submitted that the timing suggested that the real motivation of proceedings by the Gearys was to frustrate the appointment of the receiver, and not because of any legitimate grievance between them and Bank of Scotland. More particularly, counsel identified three separate arguments made by the Gearys with regard to Bank of Scotland, which appeared from the plenary summons and the affidavits sworn by Mr. Geary in the various motions.

i. That the cross-border merger was not effective to vest interest in Bank of Scotland

32. Several issues relating to the validity of the cross-border merger of Bank of Scotland (Ireland) and Bank of Scotland have been dealt with in detail by the Supreme Court in *Kavanagh v. McLaughlin* [2015] 3 IR 555 and in *Freeman v Bank of Scotland* [2016] IESC 14, as well as in the High Court in the decision of *McDermott v. Ennis Property Finance* [2017] IEHC 478. I agree with the submission that this issue has been disposed of previously by the superior courts and that the Gearys' case in this regard is bound to fail. I am not satisfied that any significantly new dimension to this argument has been raised in any of Mr. Geary's affidavits. Insofar as the Gearys seek to rely on *Tanager v. Kane* [2017] IEHC 697, where the High court (Noonan J.) stated a case for the Court of Appeal, the present case is distinguishable on its facts from the Kane case insofar as the Bank of Scotland was registered as owner of the charges after the cross-border merger and before the transfer of the charges to Ennis Properties. In any event, the Court of Appeal decision in the Kane case has since been handed down and is not of any assistance to the plaintiff (31st October, 2018, [2018] IECA 352).

ii. That Bank of Scotland did not have an entitlement to dispose of their interest as mortgagee:

33. I am satisfied that the issue is also bound to fail, on the basis not only of the relevant clause in the original mortgage, but also on the basis of the statutory entitlements contained in s.28 (6) of the Judicature Act 1877, and s. 64 of 1964 Act.

iii. Sale to unregulated entity.

34. This issue has been discussed extensively in a number of authorities, most recently in *McCarthy v Moroney*; *Moroney v. PRA Record No.* [2017] 8108 P, where McDonald J. discussed those authorities (including *Launcetown Property Finance v. Burke* [2017] 2 IR 789 (Supreme court), *Hogan v. Deloitte* [2017] IEHC 673) and concluded that the law was now clear and that there was no legal basis on which to make a case that the borrower is in some way wronged by the transfer of the loan and related security by Bank of Scotland to Ennis Property, because the effect of the 2015 Act is that the borrower has the same protections in practice as he would if he was dealing with a regulated financial service provider. Again, I am not satisfied that any significantly new dimension to this argument has been raised in any of Mr. Geary's affidavits and I consider that this issue is also bound to fail.

35. Accordingly, I am satisfied that although the threshold is high for exercising the "strike out" jurisdiction, as referred to earlier, this threshold has been reached in the present case and that the Gearys are essentially seeking to re-litigate matters that have already been decided in previous decisions of the High Court and Supreme Court. I therefore propose to exercise my discretion pursuant to the inherent jurisdiction of the Court to strike out the proceedings as against Bank of Scotland.

The Gearys' motion in relation to the Property Registration Authority

36. By way of motion dated the 17th April, 2018 the plaintiffs sought the following alternative reliefs: "(1) An Order compelling the First Named Defendant to remove the legal charge of the 2nd Named Defendant from the Property of the Plaintiffs bearing Folio Nos. of the Register of Co. Limerick; or (2) In the alternative, an Order restraining the 4th Named Defendant and any of their Servants or Agents from further interference or progression of a receivership as against the Plaintiffs over Folio No. 35115F of the Register of County of Limerick and part of the Land comprised in folio 10222 of the Register of County of Limerick pending the outcome of the Plenary trial.

37. The relief sought in this motion is expressed as relief in final terms rather than interlocutory reliefs. Needless to say, final reliefs cannot be sought by way of motion and that alone is a reason for refusing this particular set of reliefs.

38. However, even if I were to take the view that what Mr. Geary was actually seeking was interlocutory relief, I would not grant it for the following reasons. First, there is no statement at all from the Gearys dealing with the damage they might suffer if the charges were not removed from the folio; nor any undertaking as to damages given by them. Secondly, the balance of convenience favours refusal of interlocutory relief, because if the charge were removed, even on interlocutory basis, other creditors would gain priority, the effect of which could not be reversed down the line. Thirdly, I take into account the delay on the part of the Gearys in seeking to set aside the charge, it having been registered in April 2015. Fourthly, it seems to me that the substance of the case made (essentially that he is entitled to a hearing before the PRA registers a charge) is very weak in circumstances where the PRA itself is under a mandatory obligation to register a charge, and falls far short of the test for a mandatory injunction as set out in the *Maha Lingam v HSE* [2005] IESC 85, namely 'a strong case that he is likely to succeed at the hearing of the action'. Further, I have considered the judgment of the High Court (McDonald J.) in *Moroney* [2018] IEHC 379, which is a detailed and rigorously reasoned judgment weighing heavily against the Gearys' claim. Indeed, it seems to me that not only should the interlocutory relief be refused but the proceedings against the PRA struck out, as was done in the *Moroney* case itself.

39. Finally, I note that this motion also seeks relief against the receiver "from further interference or progression of a receivership as against the plaintiffs" over the Folios in question. Again, it seems to me that this involves duplication of issues as between these proceedings and the Receiver proceedings, and I propose to refuse that relief for the same reasons as those set out above in connection with the first motion discussed.

Orders & Costs

40. Orders will be made in respect of each of the motions as follows: (1) granting the reliefs sought by the second, fourth and fifth defendants and striking out the proceedings as against them; (2) granting the reliefs sought by the third defendant and striking out the proceedings against it (Bank of Scotland); (3) refusing the relief sought by the Gearys in their motion in respect of the PRA and the Receiver, and striking out the proceedings as against the PRA.

41. In my view, costs should follow the event in respect of each of these motions, but I will place a stay on execution pending the determination of the first set of proceedings (the Receiver proceedings). Any remaining aspects of either set of proceedings (the Receiver and the Geary proceedings) are to be adjourned to the appropriate Chancery list so that the remaining aspects of the proceedings can be progressed as appropriate.