Neutral Citation [2013] IEHC 264

THE HIGH COURT

[2008 No. 4753P]

BETWEEN

ACC BANK PLC

PLAINTIFF

AND

GERALD STEPHENS AND MARYANNE STEPHENS (OTHERWISE MARY ANNE M. STEPHENS)

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 5th day of June, 2013.

The proceedings and the application

1. These proceedings were initiated by a plenary summons which issued on 12th June, 2008 in which the primary reliefs sought by the plaintiff are:

> (a) a declaration that the plaintiff is entitled to a first legal charge in respect of the dwelling house and premises comprised in Folio 11109F of the Register of Freeholders, County Mayo (the Premises) as security for the banking facilities advanced by the plaintiff to the defendants on foot of an agreement made between the plaintiff and the defendants on or about the 6th day of February, 2004; and
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> (b) an order for specific performance of the said agreement whereby the defendants and each of them undertook to attend to completion of a first legal charge in favour of the plaintiff in respect of the Premises.

2. The application to which this judgment relates was initiated by a notice of motion dated 10th December, 2012, which was first returnable for 14th January, 2013, in which the plaintiff sought an order pursuant to Order 8, rule 1 of the Rules of the Superior Courts (the Rules) granting leave to renew the plenary summons dated 12th June, 2008 for a period of six months. Prior to the notice of motion being issued, the plaintiff had applied *ex parte* to the Court for an order pursuant to Order 8, rule 1 on 30th July, 2012. However, the Court (Peart J.) ordered that the application to renew the summons should be brought on notice to the defendants.

Summary proceedings

3. Prior to issuing these proceedings the plaintiff had issued summary proceedings in this Court entitled ACC Bank, plaintiff, and Gerald Stephens and Maryanne Stephens, defendants (Record No. 2007 No. 2253SP) (the Summary Proceedings) to recover monies payable by the defendants to the plaintiff for money lent by the plaintiff to the defendants.

4. The plaintiff brought a motion for summary judgment in the Summary Proceedings. Judgment was given by the Court (Ryan J.) on 31st July, 2012 (the date shown on the perfected order, 31st May, 2012, being a mistake). In that order it was ordered that the plaintiff recover from the defendants the sum of €775,234.57 together with continuing interest until payment together with the costs of the proceedings when taxed and ascertained. The order further provided that execution on foot thereof should be stayed for a period of six months from the date thereof and that the defendants be at liberty to apply for an extension of the stay.

5. Execution on the order of 31st July, 2012 was, by a further order of the Court (Ryan J.) made on 19th November, 2012, stayed for a further period of three months from the date of that order. The reason for the extension of the stay was that by the same order, that is to say, the order dated 19th November, 2012, it was ordered that the first named defendant be at liberty to issue and serve a third party notice on his former solicitor, Philip Clarke (Mr. Clarke). As I understand it, the extension of the stay was to enable the first named defendant to prosecute his third party claim against Mr. Clarke.

6. The current position is that, without any resistance from the plaintiff, the stay on execution has been further extended to September 2013.

7. The order dated 31st July, 2012 has been appealed to the Supreme Court (under Record No. 2012 No. 404).

Solicitor's plenary proceedings

8. On 2nd December, 2008, Mr. Clarke, described as practising under the style and title of Ledwidge, Solicitors, issued proceedings against the defendants (Record No. 2008 No. 10295P) (the Solicitor's Plenary Proceedings). As I understand the position, Mr. Clarke, in his capacity as solicitor for the defendants, gave the plaintiff an undertaking to procure the execution of a charge by the defendants over the Premises to secure the defendants' indebtedness to the plaintiff. In the Solicitor's Plenary Proceedings, Mr. Clarke sought an order for specific performance directing the defendants to execute a deed of charge in favour of the plaintiff in the form annexed to the plenary summons and, in the alternative, an order directing a court official to execute the deed of charge on behalf of the defendants. By order of the Court (Murphy J.) made on 15th February, 2010, Mr. Clarke was granted judgment in default of defence against the defendants and by further order of the Court (Murphy J.) made on 11th March, 2010, an application to vacate the earlier order was refused.

9. The first named defendant appealed against the orders dated 15th February, 2010 and 11th March, 2010 to the Supreme Court. By order of the Supreme Court made on 14th May, 2010, it was noted that the plaintiff conceded the appeal against the first named defendant only and that there was an undertaking from the first named defendant on his own behalf not to alienate or charge the Premises pending the determination of the High Court proceedings. The Supreme Court then ordered that the order dated 15th February, 2010 be set aside as against the first named defendant and there followed directions the objective of which was to expedite the Solicitor's Plenary Proceedings on remittal to the High Court.

10. The Solicitor's Plenary Proceedings have not been prosecuted expeditiously, as was envisaged by the Supreme Court, and are still pending in the High Court.

The course of dealings between the parties in relation to the execution of the charge
11. In the grounding affidavit of Donnacha O'Donovan (Mr. O'Donovan), a solicitor in the firm of G. J. Moloney, the Solicitors for the plaintiff, sworn on 7th December, 2012, the factual basis of the agreement in respect of which the plaintiff seeks specific performance in these proceedings was explained as being a Letter of Sanction dated 3rd February, 2004, on which acceptance was endorsed by the defendants on 6th February, 2004, in which the plaintiff offered a bridging loan facility in the sum of €400,000 to the defendants on the terms therein specified including a requirement that the defendants give the plaintiff a first legal charge on the Premises.

12. After these proceedings were initiated, on 16th June, 2008, the plaintiff procured the registration of the proceedings as a *lis pendens* against the interest of the defendants in the Premises on Folio 11109F, County Mayo.

13. From around the time these proceedings were initiated, the plaintiff, and subsequently the plaintiff's solicitors, were in direct contact with the defendants seeking to procure the execution by the defendants of a charge over the Premises. By letter dated 15th July, 2008, which was in response to a letter of 14th July, 2008 from the plaintiff's solicitors, the first defendant confirmed that both he and the second defendant would execute a deed of charge in accordance with the plaintiff's direction. There was a complication in that, apparently, the second named defendant was then resident in the United States. However, by letter dated 28th July, 2008 to the plaintiff's solicitors, the first defendant furnished a power of attorney executed by the second defendant. The first defendant indicated that he would arrange to sign the deed of charge on his own behalf and on behalf of his wife, the second named defendant. When the correspondence from the plaintiff's solicitors to the first name defendant did not produce results, the plaintiff's solicitors commenced writing directly to the second named defendant in the United States of America in August 2008. The second named defendant advised the plaintiff's solicitors that she was prepared to execute the deed of charge and would be returning to Ireland in the middle of November 2008.

14. By letter dated 15th December, 2008, the plaintiff's solicitors furnished, *inter alia*, an original deed of charge to the second named defendant at the address of the Premises for execution. By letter of the same date the plaintiff's solicitors advised the first named defendant that the deed of charge had been sent to the second named defendant and noted the plaintiff's solicitors' understanding that both defendants were prepared to execute the deed of charge. In the letter to the first defendant, the plaintiff's solicitors reminded him that the loan account which was to be secured by the deed of charge was the subject of the Summary Proceedings. Reminders were sent to both defendants by the plaintiff's solicitors on 20th January, 2009.

15. The response of the first named defendant by letter dated 26th January, 2009 introduced a new element into the dealings between the parties, in that the first named defendant stated that he had placed the documents with his US attorney for review, given that the plaintiff's solicitors had advised in their letter of 15th December, 2008 that the defendants obtain legal advice in relation to the execution of the deed of charge. By letters dated 10th February, 2009 and 12th March, 2009 to each of the defendants, the plaintiff's solicitors pursued the return of the executed documentation. In each of the letters dated 12th March, 2009 it was stated that, if the completed documentation was not returned within seven days to the plaintiff's solicitors, the plaintiff would be left with no alternative but to serve proceedings seeking an order of the Court for specific performance of the agreement entered into between the plaintiff and the defendants whereby they agreed to provide the plaintiff with the first legal charge over the Premises

16. In late May 2009, an attorney at law practising in the United States of America, Steven G. Legum (Mr. Legum), commenced correspondence with the plaintiff's solicitors on behalf of the defendants. Mr. Legum proposed, on behalf of the defendants, that, in lieu of prolonged and time-consuming litigation, the defendants' outstanding obligation be converted "into conventional mortgage financing". The plaintiff's solicitors, by letter dated 12th June, 2009 to Mr. Legum, sought confirmation that the defendants intended to discharge the arrears which had accrued on the mortgage loan and also requested, as a matter of utmost urgency, confirmation that the defendants were prepared to execute the mortgage documentation. Mr. Legum's response by letter dated 15th June, 2009 was the suggestion that all litigation be stayed "pending a settlement". There was no mention of the defendants executing a deed of charge. By further letter dated 18th June, 2009 to Mr. Legum, the plaintiff's solicitors issued a warning that if the executed documentation was not returned within seven days, the plaintiff would have no alternative but to continue with its legal proceedings. The correspondence between the solicitors continued through June and into July, but no executed deed of charge was forthcoming.

17. As has been recorded earlier, the Solicitor's Plenary Proceedings commenced by plenary summons which issued on 2nd December, 2008, and an order for judgment in default was made on 15th February, 2010 and affirmed on 11th March, 2010. In the grounding affidavit there was exhibited a deed of charge, which bore the date of 18th February, 2004 and was expressed to be made between the defendants of the one part and the plaintiff of the other part charging the Premises, which was executed by an officer of the Court pursuant to the order dated 15th February, 2010. However, as recorded earlier, the order dated 15th February, 2010 was set aside as against the first defendant by the order of the Supreme Court dated 14th May, 2010, so that the execution on behalf of the first defendant has been nullified. The position of the plaintiff's solicitors is that they have written to Ledwidge, Solicitors, on numerous occasions seeking an update in respect of the Solicitor's Plenary Proceedings but have not received any response.

18. One of the reasons advanced on behalf of the plaintiff in the grounding affidavit for the fact that the plenary summons in these proceedings was not served on the defendants is that the plaintiff was aware of the existence of the Solicitor's Plenary Proceedings and had made a decision not to progress these proceedings while the Solicitor's Plenary Proceedings were active, hoping that the Solicitor's Plenary Proceedings would be sufficient to bring the matter to a resolution. The other reason advanced on behalf of the plaintiff is that they did not wish to incur unnecessary legal expenses if the defendants were willing to co-operate and execute the deed of charge, which they had indicated they were willing to do, but which they did not do.

Participation of the defendants in these proceedings and on this application
19. Each of the defendants has entered an appearance in person to the proceedings. They have jointly sworn affidavits in response to the plaintiff's application –

(a) on 9th January, 2013;

(b) on 16th January, 2013; and

(c) on 5th March, 2013.

They appeared in person on the hearing of the plaintiff's application. The first named defendant made submissions on that occasion and the second named defendant, when invited to make submissions, adopted the first named defendant's submissions.

20. The purpose of the second affidavit sworn by the defendants on 16th January, 2013 was to ground an application for leave to cross-examine Mr. O'Donovan on his affidavit. That application was heard by the Court (Laffoy J.) on 22nd March, 2013. The

application was refused for the following reasons. The Court noted that the first named defendant had grounded his application on his own affidavit and that counsel for the plaintiff had gone through each of the paragraphs in Mr. O'Donovan's affidavit which the first named defendant had contended fell short of the truth, that is to say, paragraphs 2, 3, 5, 6, 8, 10, 11, 12 and 13. The Court was of the view that counsel for the plaintiff was absolutely correct in saying that no issue of fact in dispute on the plaintiff's application was highlighted in those paragraphs. They were all matters of fact which were not, and could not be, in dispute because they were all matters of public record or, alternatively, they were issues of law or issues of construction. Therefore, there was no basis for making an order that Mr. Donovan be cross-examined. In particular, noting that the first named defendant in his reply had relied on paragraph 29 of Mr. Donovan's affidavit, in which it was averred that the Solicitor's Plenary Proceedings had not been progressed in the two years since the Supreme Court Appeal, the Court observed that that was a matter of public record and, addressing the rhetorical question raised by the first named defendant, as to how Mr. O'Donovan knew that the proceedings had not been progressed, the Court stated that the fact is that they have not been progressed. The Court stated that the only reasonable inference is that the first named defendant has taken no action to deal with what he alleges is non-compliance by Mr. Clarke with the order of the Supreme Court.

The plaintiff's submissions

21. Counsel for the plaintiff emphasised the wording of the relevant portion of rule 1 of Order 8 of the Rules. Rule 1 provides that no original summons shall be in force for more than twelve months. After the expiration of a twelve month period, an application to extend time for leave to renew the summons must be made to the court. In the case of an application to the court, the rule provides as follows:

> "The court . . . if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original . . . summons be renewed for six months from the date of such renewal . . .."
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> Counsel for the plaintiff made it clear that the plaintiff is not contending that it made reasonable efforts to serve the summons on the defendants. On the contrary, the position of the plaintiff is that the summons should be renewed for "other good reason".

22. As to what constitutes "other good reason", counsel for the plaintiff referred the Court to the judgment of the High Court (Peart J.) in *Moynihan v. Dairygold Co-Operative Society Limited* [2006] IEHC 318. Having emphasised that the rule refers to "other good reason", not simply "any reason", Peart J. stated:

> "The Court is required in my view to reach the conclusion not only as to what is the true reason why the summons was not served within the proper time, but also to conclude that the reason justifies the failure to serve. It is in that sense that the word 'good' must be read. Even if the Court is satisfied that the reason is a good reason, it must then proceed, where prejudice is alleged, to consider matters such as the length of the delay, the conduct of the proceedings generally to date, whether this defendant was alerted in a timely manner or at all by the plaintiff that the claim might be made, and whether in all the circumstances the prejudice to the defendant in having to defend the proceedings after the length of time involved is such as to outweigh the undoubted prejudice to the plaintiff in being in effect debarred from proceeding with the claim at all, or whether, on the other hand, the prejudice to the plaintiff is in all the circumstances such as to justify depriving the defendant to his/her right to avail of the Statute of Limitations. In a general sense the Court is engaged in determining where the interests of justice between the parties lies."

Having stated that the defendant in the case before him had done nothing wrong and was not culpable in respect of the time which had passed, Peart J. later stated:

> "There are very often cases, for example, where a defendant, maybe through an insurer, has engaged in correspondence as to liability or other matters, and may even have engaged in negotiations during the period after a summons was issued, and where the plaintiff's solicitor has decided that it would be wise to hold off serving the summons in order to see if those negotiations yield fruit. In such circumstances the defendant can be seen as having participated in the creation of the delay, and while being in no way morally culpable, nevertheless must take some share in the blame. There can be circumstances such as that where the reason for not serving the proceedings might be regarded as a 'good reason' for renewing the summons, where no settlement had been reached. Each case must be considered on its own facts."

23. As to the application of those principles, counsel for the plaintiff submitted that there were good reasons justifying the plaintiff's failure to serve the summons because –

> (a) for more than a year after the plenary summons was served there were repeated promises from both of the defendants and, subsequently, their attorney to execute the charge;
>
> (b) following the breakdown of communications with Mr. Legum, the plaintiff became aware of the Solicitor's Plenary Proceedings, which had the same objective as the plaintiff's proceedings, that is to say, to procure the execution of the charge by the defendants and it was reasonable for the plaintiff to hold back in serving these proceedings so as to avoid two sets of costs; and
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> (c) it was only when, following inquiries, the plaintiff became aware that the Solicitor's Plenary Proceedings had not been proceeded with that it sought to serve these proceedings on the defendants.

Counsel for the plaintiff also submitted that no allegation of prejudice has been advanced by the defendants arising from the failure to serve the proceedings before now, and, even if there had been an assertion of prejudice, it would not stand up. Like the position addressed by the High Court (Dunne J.) in *O'Leary v. Walsh* [2008] IEHC 253, the core complaint against the defendant in this case is "straightforward" – that the defendants have not executed the deed of charge as they should have done. Therefore, there is no risk of the defendants' recollection fading. Finally, counsel for the plaintiff submitted that there was no risk of injustice to the defendants because, from an early stage, the correspondence from the plaintiff's solicitors to the defendants made it clear that these proceedings would be prosecuted.

The defendants' submissions

24. The first name defendant made his primary submission by reference to paragraph 4 of the defendants' affidavit sworn on 16th January, 2013, in which it was stated:

> "The plaintiff is precluded under the doctrine of *Res Judicata* from proceeding with [these proceedings]. (a) If judgment is rendered in favor of the plaintiff in a particular suit, the plaintiff is precluded from raising claims (in any future litigation)

> which were raised in (or could have been raised) in that law suit: (b) [The Summary Proceedings and these proceedings] share a common nucleus of operative fact: (c) The parties in the above titled cases are identical: (d) There is a final judgment on the merits in the original litigation [i.e. the Summary Proceedings]. We say that the plaintiff is precluded from further litigation in this matter in any forum."

25. On the issue of *res judicata*, the first named defendant referred the Court to the decision of the Supreme Court in *Bula Limited v. Crowley* [2009] IESC 35 and, in particular, to paragraph 56 of the judgment of Denham J. in which the following passage from the decision in *Henderson v. Henderson* (1843) 3 Hare 100 is quoted:

> "I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward only as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and to pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence might have brought forward at the time."

The first named defendant submitted that there is no special case here.

26. The first named defendant also relied on the decision of the Supreme Court in *AA v. Medical Council* [2003] 4 I.R. 302 and, in particular, the outline of the law on *res judicata* contained in the judgment of Hardiman J. It was submitted by the first named defendant that the plaintiff has judgment, which I understand to mean the judgment in the Summary Proceedings, and, accordingly, should not be allowed to bring further proceedings, which would be oppressive to the defendants.

27. In response to the defendants' reliance on the principle of *res judicata*, while submitting that the Court should not engage with that argument and that it would ultimately be a matter for the trial Judge, counsel for the plaintiff made the point that the plaintiff is not pursuing two actions for debt, which is undoubtedly correct. In the Summary Proceedings the plaintiff sought and obtained a money judgment against the defendants, albeit that it is under appeal. In these proceedings the plaintiff is seeking to enforce an agreement to furnish security to it over the Premises against the defendants, which is a separate and distinct claim. Counsel for the plaintiff also made the point that while the plaintiff has given the parties to the Solicitor's Plenary Proceedings every opportunity to prosecute those proceedings, that has not happened. That is also true and no decision on the substantive claim in those proceedings has been made in any court.

Conclusion

28. I am satisfied, on the basis of the submissions made by counsel for the plaintiff as to the application of the law to the facts here, which have been summarised at para. 23 above, that the plaintiff has established that there is a good reason which justifies renewing the plenary summons in this case. While not expressing any definitive view as to whether the reliance by the defendants on the principle of *res judicata* at this juncture is misconceived, I am satisfied, having regard to the current procedural status of the Summary Proceedings and the Solicitor's Plenary Proceedings, that the existence of those proceedings is not a factor which precludes the plaintiff from seeking to renew the plenary summons in these proceedings. Taking an overview of the matter, I am satisfied that the balance of justice as between the plaintiff and the defendants favours making an order to renew the summons. The issue of *res judicata* can, in due course, be raised by the defendants as a defence.

Order

29. Accordingly, there will be an order pursuant to Order 8, rule 1 renewing the summons for six months.