

THE HIGH COURT

[2014 No. 5046 P]

BETWEEN:

PHILIP O'BRIEN

Plaintiff

AND

IAN WOHLMAN, ALAN TAPNACK, MICHAEL CULLEN, INVESTEC BANK PLC., SIMON COYLE, VINCENT DOWNES, MAZARS, MARIA CLIFFORD, REGINA MANGAN, BOOK A ROOM THE ACCOMODATION COMPANY LIMITED, DIARMUID O'FLYNN, STEPHEN COLEMAN, BRIAN PHELAN, AYODEJI TUNDE DUROJAIYE AND CRYSTAL CONTRACT SERVICES LIMITED

Defendants

[2015 No. 2719 P]

BETWEEN:

SIMON COYLE

Plaintiff

AND

PHILIP O'BRIEN

Defendant

[2015 No. 2828 P]

BETWEEN:

PHILIP O'BRIEN

Plaintiff

AND

NOEL CUNNINGHAM, FRANK GREENE, GERRY VAHEY, SIMON COYLE, VINCENT DOWNES, MAZARS, MARIA CLIFFORD, REGINA MANGAN AND BOOK A ROOM THE ACCOMMODATION COMPANY LIMITED

Defendants

[2015 No. 2829 P]

BETWEEN:

PHILIP O'BRIEN

Plaintiff

AND

IAN ROBERT WOHLMAN, ALAN TAPNACK, KEVIN MCKENNA, DAVID MILLAR, PEREGRINE KENNETH OUGHTON CROSSWAITE, DAVID FRIELAND, HARUKO FUKUDA OBE, BERNARD KANTOR, STEPHEN KOSEFF, FANI TITI, DAVID MICHAEL VAN DER WALT, ALLEN ZIMBLER, INVESTEC BANK PLC, MICHAEL CULLEN, DOLORES GEANEY, INVESTEC BANK PLC., NOEL CUNNINGHAM, FRANK GREENE, GERRY VAHEY, SIMON COYLE, VINCENT DOWNES AND MAZARS

Defendants

Judgment of Ms. Justice Murphy delivered on 4th March, 2016.

1. On 18th and 19th February, 2016, the Court heard an application on behalf of Mr. Simon Coyle, a receiver appointed by Investec Bank plc., for various interlocutory reliefs relating to possession of mortgaged properties at Poleberry, Co. Waterford and Duncormick,

Co. Wexford as well as applications on behalf of numerous defendants broadly connected to Investec Bank plc. and Mazars, to have three sets of proceedings issued by the mortgagor, Mr. O'Brien, struck out either pursuant to Order 19 rule 28 of the Rules of the Superior Courts or on the basis of the Court's inherent jurisdiction on the grounds that such proceedings are frivolous and vexatious; disclose no reasonable cause of action; are an abuse of process and/or are bound to fail. The background of those applications was outlined to the Court over two days of hearing along with the legal principles which the parties submit should be applied.

2. At the root of all of the applications before the Court and of all of the proceedings to which they relate were two mortgages granted by Philip O'Brien to Investec Bank. The first mortgage, dated 13th January, 2006 granted the Bank a charge over property contained in Folio 24304F of the Register of Freeholders of the County of Waterford. This mortgage was executed by Mr. O'Brien and his wife Breda and may conveniently be described as the Poleberry mortgage. The mortgage was of a mixed commercial and residential property at 84 Poleberry in Waterford.

3. The second mortgage was executed by Mr. O'Brien on 13th July, 2007 and granted Investec Bank a charge over part of the lands comprised in Folio 9116F of the Register of Freeholders County Wexford which combined properties were to be known as sites No. 2 and 5, Duncormick, County Wexford. Site 2, on the map annexed, is entirely landlocked and Site 5 has only potential access from the public roadway. This second mortgage has an additional clause at 3.1(a) which provides:

"The Mortgagor as legal and beneficial owner as continuing security for the payment performance and discharge of all monies and liabilities hereby covenanted to be paid and/or discharged by the Mortgagor hereby:

(a) grants, conveys, transfers and demises to the Bank ALL THAT AND THOSE the freehold and leasehold property of the Mortgagor both present and future (including specifically, but not limited to, the lands, hereditaments and premises specified in part A of the Schedule) and all buildings and fixtures (including trade fixtures) from time to time on every such property..."

The purpose of the loan on which the second mortgage was granted was to provide financing for the construction of houses on the lands at Duncormick.

4. On 23rd January, 2009, Investec Bank Limited re-registered as a public company and changed its name to Investec Bank plc. Arising from this change of name Mr. O'Brien has sought to challenge the validity of the mortgages.

5. Mr. O'Brien fell into arrears on both the Poleberry and Duncormick loans, letters of demand were issued and thereafter on 16th February, 2011, Simon Coyle of Mazars was appointed as receiver over both the Poleberry and the Duncormick properties. The Deeds of Appointment were witnessed under seal by two directors of Investec. Mr. O'Brien was initially compliant with the receivership. The evidence suggests that keys to the virtually completed houses which had been constructed on sites 2 and 5 in Duncormick were handed over to the receiver. Furthermore, possession of 84 Poleberry was given to the receiver who installed persons to manage the property and receive the rents on his behalf. The receiver remained in possession of the property and in receipt of the rents until April 2014.

6. As matters evolved, Mr. O'Brien became less compliant. In 2012 he asserted that the receiver had no right of access to sites 2 and 5 of the Duncormick lands pursuant to the legal charge executed in favour of Investec Bank and he further asserted that the onus was on the receiver to prove his entitlement to a right of way.

7. Following considerable correspondence with the Property Registration Authority, who had also expressed doubt as to the receiver's rights to grant easements over the borrower's property, Investec Bank issued a further letter of demand in respect of the Duncormick loan on 2nd January, 2014 and executed a further Deed of Appointment of Mr. Coyle as receiver of the property on 4th February, 2014. In executing this Deed of Appointment, Investec Bank relied on the wider charge contained in clause 3.1(a) of the mortgage deed set out above. The Deputy Registrar of the Property Registration Authority expressed the view that this was sufficient to enable the receiver grant easements over the balance of the lands in the Folio upon the transfers of Sites 2 and 5.

8. Meanwhile, Mr. O'Brien, more than three years after he had ceded possession of the Poleberry property to the receiver, began to assert ownership of the property by demanding that the tenants pay rent to him rather than to the receiver. The evidence indicates that by reason of his interference with the tenants, one group of tenants had to be moved out of the property. Security was arranged and locks were changed. On 26th April, 2014, on his own admission, Mr. O'Brien broke down the door of a residential unit to gain entry at a time when he knew there was a person in occupation. Mr. O'Brien alleges that he was assaulted in the course of that incident. He was subsequently arrested and charged before the District Court. It appears that the charges were dismissed on the grounds that the District Court Judge was not satisfied as to the ownership of the Poleberry property. The receiver has averred that he was not asked to give evidence in those proceedings but did give the Gardaí copies of his Deeds of Appointment.

9. On 4th June, 2014, Mr. O'Brien issued High Court plenary proceedings (2014 No. 5046P) against a total of fifteen defendants including the receiver, members of his staff, staff members of the Bank, and tenants of the properties. In those proceedings, Mr. O'Brien seeks a declaration that the charges held by Investec Bank *inter alia* on the Poleberry and Duncormick properties are null and void; an order setting aside the appointment of the receiver and damages of €10 million for trespass.

10. On 11th November, 2014, the receiver's solicitors wrote to Mr. O'Brien again outlining their position that the receiver had been validly appointed, enclosing deeds of appointment dated 16th February, 2011 and requiring a written undertaking within seven days that Mr. O'Brien would immediately deliver up peaceable vacant possession of the properties and that neither he nor his servants or agents would interfere or otherwise obstruct the receivership.

11. On 26th January, 2015, Mr. O'Brien delivered a Statement of Claim in respect of his High Court proceedings (2014 No. 5046P) issued on 4th June, 2014. The Statement of Claim alleges that as the charges were null and void, the appointment of the receiver was invalid and that the defendants to the proceedings were guilty of trespass over Mr. O'Brien's private property. It seeks a variety of reliefs including *"damages to the value of €10,000,000 which includes out of pocket expenses, medical and legal costs, travel costs, loss of earnings and foreseeable profits to be accounted and irreversible mental stress and damage to dignity"*.

12. On 29th March, 2015, the receiver's agents reported to his staff that furniture appeared to have been moved into No. 2 Duncormick and that activity was noticed outside No. 5 in relation to a potential occupancy of the property, to which the receiver is a stranger.

13. On 8th April, 2015, the receiver instituted proceedings by way of plenary summons seeking possession of the properties (2015 No. 2719P). His solicitors also issued a notice of motion seeking interlocutory relief in respect of the properties in question.

14. On 13th April, 2015, Mr. O'Brien issued two further sets of proceedings against a number of defendants. In the first set of those proceedings (2015 No. 2828P), Mr. O'Brien seeks an order "*for rental monies which were unlawfully taken or withheld, damages and loss in the amount of €180,000... plus interest, all in relation to the property at 84 Poleberry, Waterford*". In the second set (2015 No. 2829P), Mr. O'Brien claims damages for assault against twenty two defendants including senior executives of the Bank and each of the partners of Mazars. Mr. O'Brien seeks, in those proceedings, "*an order in the amount of €6,500,000...for assault and damages resulting from injuries, mental stress and post-traumatic stress disorder as a consequence of assault and battery by the Defendants and all of them singularly, collectively and vicariously on the plaintiff by the Defendants at 84 Poleberry, Waterford in the county of Waterford*".

15. On 14th May, 2015, PB Cunningham & Co. served a notice of appointment of solicitor in respect of Mr. O'Brien, who until that point, in the context of the receiver's proceedings (2015 No. 2719P), had been acting as a litigant in person.

16. On 21st May, 2015, Kennedy J. directed that the receiver's application for interlocutory relief against Mr. O'Brien (2015 No. 2719P) be listed for hearing in November 2015 together with various applications to strike out the three proceedings which had been instituted by Mr. O'Brien. These are:

- (i) O'Brien v. Wohlman & Ors (2014 No. 5046P)
- (ii) O'Brien v. Cunningham & Ors (2015 No. 2828P)
- (iii) O'Brien v. Wohlman & Ors (2015 No. 2829P).

Kennedy J. also directed that legal submissions be exchanged between the parties in respect of the various issues arising.

17. On 4th July, 2015, Mr. O'Brien swore an affidavit both in response to the receiver's application for injunctive relief and in response to the various applications to strike out the three sets of proceedings brought by him (2014 No. 5046P; 2015 No. 2828P; 2014 No. 2829P) in which he alleged, for the first time, that the Deeds of Appointment of 16th February, 2011 were invalid on the basis that no common seal was affixed to them despite specific references on such deeds to the affixing of such a seal. He further asserted that the charges themselves were invalid since the mortgagee, being described as Investec Bank (UK) Limited (Irish Branch) was not an entity or business registered with the Companies Registration Office at the date of the creation of such charges. Counsel on behalf of Mr. O'Brien abandoned that position in the course of the hearing, accepting that an identical argument had been rejected by Kennedy J. in *Wallace v. Roche* [2015] IEHC 521. In addition, at the outset of the hearing, all the proceedings issued by Mr. O'Brien against Maria Clifford, Regina Mangan and Book a Room the Accommodation Company Limited, who had managed the Poleberry property on behalf of the receiver ("the Book a Room defendants"), were struck out on consent on the grounds that they were frivolous and vexatious.

18. The foregoing is the context in which the Court must consider the receiver's application for interlocutory relief and the applications of various defendants to dismiss Mr. O'Brien's claims as being unsustainable, frivolous and vexatious and/or as disclosing no reasonable cause of action, as being an abuse of process of the Court and/or as bound to fail. The Court considers it appropriate to deal first with the application of Mr. Coyle.

Application for Injunctive Relief

Poleberry Property

19. It is accepted by the parties that in order to be afforded injunctive relief of a mandatory nature such as is sought here an applicant must establish that he has a strong case which is likely to succeed; that damages are not an adequate remedy; and that the balance of convenience favours granting the injunction. The Court is satisfied that the plaintiff's claim in respect of the Poleberry property constitutes a strong case in that it was accepted by counsel for Mr. O'Brien in the course of hearing that the property was charged to Investec Bank UK Limited (Irish Branch) now Investec Bank plc. The Court is satisfied that the Deed of Appointment of Receiver dated 16th February, 2011 is *prima facie* valid and that the defendant, at the date of the receiver's appointment accepted the validity thereof and handed over the premises. The receiver was in control of the premises from then until April 2014 when the defendant, Mr. O'Brien unilaterally sought to recover possession of the premises culminating on 26th April, 2014 with his breaking into part of the premises by kicking in the front door of a rental property. On the facts set out herein the Court is satisfied that the plaintiff has established a strong case in respect of the Poleberry property which is likely to succeed at trial.

Adequacy of Damages

20. Given the impecuniousness of the defendant, Mr. O'Brien, the Court is satisfied that damages would not be an adequate remedy in this case.

Balance of Convenience

21. It is clear that Mr. O'Brien owes substantial monies to Investec Bank which has led to the appointment of the receiver over the Poleberry property. That property appears to generate significant rental income which can be applied to diminish Mr. O'Brien's indebtedness. The sale of the property would similarly result in a diminution if not an extinguishment of his indebtedness. A failure to grant the order sought will merely prolong the receivership, thereby increasing the costs and the interest on his debt. For these reasons the Court is satisfied that the balance of convenience also favours the granting of the interlocutory relief.

22. Insofar as the Poleberry property is concerned the Court therefore makes the following orders:

- (i) An order directing the defendant, his servants or agents, or any other person having notice of the said order, to deliver up to the plaintiff forthwith, the keys, alarm codes, locks and all other security and access devices and equipment in respect of 84 Poleberry, Waterford;
- (ii) An interlocutory injunction restraining the defendant, his servants or agents, and any person having notice of the making of such order, from preventing, impeding and/or obstructing the plaintiff, his servants or agents, from taking possession of, getting in, securing, marketing and selling the properties along with an injunction restraining the defendant, his servants or agents and any person having notice of the order, from trespassing upon, entering upon or otherwise attending at the properties.

Duncormick Properties

23. The position in relation to the Duncormick properties is far more complex. It is undoubtedly the case that the defendant charged Nos. 2 and 5 as security for his loan. The Deed of Charge is silent as to how access to those properties is to be gained. No. 2 is completely landlocked and access to No. 5 is potentially hindered in the absence of a right of way. The plaintiff, having initially sought to rely on the specific Charge of Nos. 2 and 5, obtained a second Deed of Appointment on 4th February, 2014, wherein he sought to rely on a general term in the Mortgage Deed at clause 3.1(a) as granting inter alia a power to create an easement. This is a complex issue about which there has been significant correspondence with the Property Registration Authority and it is not an issue amenable to resolution on an interlocutory application. Since at least 2012, the defendant, Mr. O'Brien, has maintained that the receiver has no entitlement to a right of way and has asserted that the onus of establishing such a right rests with the receiver.

24. In respect of the Duncormick property the Court is therefore not satisfied that the plaintiff has demonstrated a strong case likely to succeed at a full hearing such as to persuade the Court to grant him all of the interlocutory relief which he seeks on this application. Even if the Court were persuaded that the plaintiff had a strong case, the balance of convenience suggests that the uncertainty over the issue of access makes the properties virtually unsaleable until such time as that issue has been resolved. While the plaintiff's entitlement to possession of Nos. 2 and 5 is clear his right to grant easements to allow access to those properties has yet to be determined. In the circumstances, the Court therefore proposes to grant limited interlocutory orders in respect of these properties. The Court is satisfied that the plaintiff has made a strong case that the defendant has no right to be in possession of Nos. 2 and 5 Duncormick and the Court therefore is satisfied to grant an interlocutory injunction restraining the defendant, his servants or agents and any person having notice of the order, from trespassing upon, entering upon or otherwise attending at Nos. 2 and 5, The Greens, Duncormick and; an order directing the defendant to allow the plaintiff, his servant or agents, access to Nos. 2 and 5, The Greens, Duncormick for the purpose of securing same pending the hearing of this action. The Court will also grant the plaintiff liberty to apply in that regard.

Application to Strike Out and/or Dismiss

25. Order 19, rule 28 of the Rules of the Superior Courts provides:

"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just".

26. The Court also possesses an inherent jurisdiction to strike out proceedings as confirmed by Costello J. in the decision of *Barry v. Buckley* [1981] IR 306 where the continued existence of such proceedings "cannot be justified and is manifestly causing irrevocable damage to the defendant". It is well accepted, as noted in *Sun Fat Chan v. Osseous Ltd.* [1992] 1 IR 425, that the jurisdiction to strike out proceedings whether pursuant to Order 19, rule 28 or pursuant to the court's inherent jurisdiction, is a power which must be exercised sparingly. While the Court is free to consider evidence on affidavit relating to the issues in the case and is not limited to an examination of the pleadings (*Price and Lynch v. Keenaghan Developments Ltd* [2007] IEHC 190), the Court must take the plaintiff's claim at its "high water mark" as outlined by Clarke J. in *McCourt v. Tiernan* [2005] IEHC 268 and the burden of proof falls on the defendant to establish that the plaintiff's claim is bound to fail.

27. The Court also notes that Mr. O'Brien was a litigant in person at the time he initiated the relevant proceedings. However the applicants point to the decision of *Burke v. Judge Mary O'Halloran & Ors* [2009] IEHC 343 in this regard, in which Clarke J. stated as follows:

"...it does have to be noted that a party who chooses to represent him or herself is no less bound by the laws of evidence and procedure and any other relevant laws, and by the rulings of the court in that regard, than any other party. Where a party chooses to represent himself or herself and where that party fails to abide by directions of the court concerning the manner in which the case should be conducted in accordance with procedural, evidential and any other relevant law, then the court must take whatever action is appropriate to deal with any such failure".

The applicants also note that Mr. O'Brien now has solicitors and counsel acting on his behalf.

Decision of the Court

28. Mr. O'Brien is a plaintiff in three sets of proceedings being 2014 No. 5046P; 2015 No. 2828P; and 2015 No. 2829P, all of which relate in one way or another to the mortgages executed by him in favour of the Bank over the properties at Duncormick, Co. Wexford and Poleberry, Co. Waterford. The first set of proceedings is a claim for trespass to the properties; the second set of proceedings is for rental monies allegedly due and owing to Mr. O'Brien from the Poleberry property and the third set of proceedings is a claim for damages for assault against a number of directors of Investec Bank and the partners of Mazars. The Court has a duty to ensure that the Court's resources are efficiently utilised and the issuing of multiple proceedings relating to the same transactions does not constitute an efficient use of the Court's resources. The Court proposes to apply the relevant law to the individual proceedings issued by Mr. O'Brien.

29. Proceedings 2014 No. 5046P which issued on 4th June, 2014 against fifteen defendants, are based on an assertion that the charges in favour of Investec Bank over the Poleberry and Duncormick properties were invalid because the mortgagee, Investec Bank (UK) Limited (Irish Branch) was not an entity or business registered with the Companies Registration Office at the date of the creation of such charges. Mr. O'Brien further asserted that as a consequence, the Deeds of Appointment of the receiver are invalid, making the receiver a trespasser on the properties. Counsel on behalf of Mr. O'Brien, however, abandoned such a position in the course of the hearing, accepting that an identical argument had been rejected by Kennedy J. in *Wallace v. Roche* [2015] IEHC 521. Counsel for Mr. O'Brien then attempted to move the basis of the claim to an assertion that the various Deeds of Appointment of the receiver were not validly executed. However, she has adduced no evidence in support of that assertion, an expert report commissioned by Mr. O'Brien being at best neutral in this respect.

30. While the Court notes, as per the decision of McCarthy J. in *Sun Fat Chan v. Osseous Ltd* that if the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed, in this case, the challenge to the validity of the receiver's appointment, on whatever basis, can be maintained by Mr. O'Brien in a defence to the receiver's claim simply by putting the receiver on proof of the validity of his appointment. In these circumstances the Court does not consider it appropriate to allow an amendment of the proceedings to include a challenge to the validity of the receiver's appointment. In order to avoid a multiplicity of actions and in order to maximise the efficient utilisation of the Court's resources, the Court proposes to dismiss proceedings 2014 No. 5046P on the grounds that as currently constituted, they are bound to fail. In doing so, the Court notes that a number of parties were joined to those proceedings in their personal capacity against whom no claim could have been sustained. The Court further notes that at the outset of the hearing, all of the proceedings, including proceedings 2014 No. 5046P, issued by Mr. O'Brien against Maria Clifford, Regina Mangan and Book a Room the Accommodation Company Limited, who were retained by the receiver to manage

the property ("the Book a Room defendants"), were struck out on consent on the grounds that they were frivolous and vexatious.

31. The second set of proceedings, proceedings 2015 No. 2828P, is, in essence, a claim for monies had and received to the use of the plaintiff by the receiver and his agents pursuant to his appointment over the Poleberry property. Such a claim is necessarily dependent on the outcome of the receiver's application for possession. The Court has already observed that Mr. O'Brien, in his defence to the receiver's proceedings can put the receiver on full proof of his appointment and can counterclaim for any monies owed in the event that such a defence is successful. It appears that any such counterclaim should be limited to the receiver whom it is alleged has received the monies. On that basis, the Court is satisfied that proceedings 2015 No. 2828P are unnecessary and an inefficient use of the Court's time and once again, in order to avoid a multiplicity of actions and to maximise the efficient utilisation of the Court's resources, the Court proposes to dismiss proceedings 2015 No. 2828P.

32. In proceedings 2015 No. 2829P Mr. O'Brien claims damages for an alleged assault arising from the incident at the Poleberry property on 26th April, 2014. These proceedings have been maintained against twenty two defendants all of whom appear to be connected to either Investec Bank or Mazars (the firm in which Mr. Coyle, the receiver is a partner) and none of whom is the alleged perpetrator of that assault. This is the one claim brought by Mr. O'Brien that is not entirely dependent on the outcome of the receiver's claim for possession of the property because he maintains that even if he is found to have been a trespasser, his claim subsists because of the alleged use of 'excessive force' against him during that incident. None of the proposed defendants to the proceedings was involved in any alleged assault on Mr. O'Brien and accordingly, in order to succeed against them, not only must he establish the use of excessive force, he must also establish that they are vicariously liable for the actions of the alleged perpetrator. It appears on the evidence that the alleged perpetrator was an employee of a security company who had been placed in the property, with the knowledge and consent of the receiver, as a result of Mr. O'Brien's alleged interferences with tenants and the property. His presence on the property was for the specific purpose of preventing trespass. The Court wishes to hear further submissions as to whether vicarious liability could attach, in the circumstances, to the defendants or any of them. The Court is therefore not prepared to strike out these proceedings at this juncture but will stay those pending further submissions on this issue.