

THE HIGH COURT

[2016 No. 3563 P]

BETWEEN

VALERIE HAYES

PLAINTIFF

AND

THE MINISTER FOR THE ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL AND
PROMONTORIA (FINN) LTD

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 9th day of November, 2018

1. This is an application on behalf of the fourth defendant, by notice of motion issued on 22nd October, 2017, for an order, whether pursuant to O. 19, r. 28 of the Rules of the Superior Courts or the inherent jurisdiction of the court to dismiss the plaintiff's claim as against the fourth defendant on the grounds that it discloses no reasonable cause of action and is bound to fail.
2. There was no dispute as to the applicable principles of law as laid down by the decisions of the High Court in *Barry v. Buckley* [1981] I.R. 306 and the Supreme Court in *Keohane v. Hynes* [2014] IESC 66, to which the court was referred.
3. It was agreed at the bar that the jurisdiction invoked is to be exercised sparingly and with caution and only in the clearest cases. It was also agreed and it is well established that an application such as this, whether pursuant to O. 19, r. 28 or the inherent jurisdiction of the court will not succeed where the deficiency in the pleading can be rectified by an amendment, or the case might be saved by an appropriate amendment of the pleadings. See for example *Lawlor v Ross* [2001] IESC 110.
4. On the pleadings and in the affidavits filed on the motion there was some lack of clarity as to dates but there is no real contest on the substance of the facts.
5. In 2005 Mr. Keith Doyle and Mrs. Margaret Doyle bought a property at 29, The Turnpike, Santry Cross, Ballymun, Dublin 9. That purchase was funded in whole or in part by a loan from Ulster Bank Ltd, secured by a charge on the property, which in due course was registered as a burden on the folio.
6. The plaintiff's case is that she was a tenant of the property from the time it was acquired by Mr. and Mrs. Doyle. The amended statement of claim pleads on the one hand that the plaintiff entered into her tenancy on or about 28th January, 2006 and on the other that she was in actual possession at the time of the mortgage by Mr. And Mrs. Doyle to Ulster Bank, in or about October, 2005 to which she pleads she is a stranger.
7. Whether the plaintiff's tenancy shortly predated or shortly post-dated the Ulster Bank loan and charge it does not appear to be contested that the plaintiff was a tenant in the property continuously from at least January 2006.
8. The case pleaded is that Ulster Bank was on notice of the plaintiff's tenancy because it predated the charge and because the Bank was aware that the Doyles did not reside at the property but rather at another specified address. If the statement of claim could have been more clearly drafted, the substance of the plaintiff's case appears to me to be that Mr. and Mrs. Doyle, to the knowledge of Ulster Bank, bought the property as a buy to let and so consented to and acquiesced in the letting to the plaintiff.
9. Mr. and Mrs. Doyle got into difficulty with their loan and on 20th August, 2013 Ulster Bank issued a Civil Bill for possession in the Dublin Circuit Court. The Civil Bill named Mr. and Mrs. Doyle as defendants and it was addressed to them and to all persons in actual occupation of the property. The statement of claim acknowledges that the Civil Bill was served on the plaintiff but it is said that "*she was not a party to the proceedings and no order was sought as against her.*" It is now suggested that the copy Civil Bill served on the plaintiff was a "*courtesy copy*" and that "*no submission could have prevented Ulster Bank from being entitled to the relief sought in the Civil Bill in the possession proceedings as against the Doyles*". This, to my mind, betrays a less than full understanding of the claim of Ulster Bank and a misunderstanding of the reason why, in accordance with the Circuit Court Rules, the Civil Bill was served on the plaintiff as the person in actual possession of the property as well as on the named Defendants.
10. Whether rightly or wrongly the plaintiff did not avail of the opportunity made available to her by the service on her of the Civil Bill to make the case in the Circuit Court that she was in possession of the property as a tenant of Mr. and Mrs. Doyle, with the consent of Ulster Bank and that she should not be disturbed and on 26th March, 2015 the Circuit Court made an order. If, as is pleaded, there was nothing that the plaintiff could have said that would have affected Ulster Bank's claim against the Doyles, she was entitled to make the case that whatever order the Circuit Court might make should not affect her rights. I will return to the precise terms of the Circuit Court order.
11. According to the statement of claim, on 1st May, 2015 (which of course was after the order for possession had been made) the plaintiff's solicitors wrote to the solicitors for Ulster Bank "*requesting information and seeking to engage with Ulster Bank on the plaintiff's position*". Following some further engagement in the meantime, it is said, Ulster Bank wrote to the plaintiff's solicitor on 18th May, 2015 indicating that Ulster Bank did not engage with tenants once an order for possession had been obtained but that the plaintiff would get adequate notice before a repossession would be arranged.
12. On 16th June, 2015 Ulster Bank wrote a letter. According to the statement of claim this was a letter written to the plaintiff advising her that she was required to vacate the dwelling within 112 days. In fact the letter was addressed to "*The Tenant*" rather than to the plaintiff personally. The letter did, as is pleaded, state that the property was "*subject to a repossession order/has been voluntarily surrendered by the owner(s) of the property*" and asserted that this meant that the property would come into possession of the Bank and be sold. The letter went on to ask the addressee to contact his or her "*landlord/owner of the property/estate agent*" to confirm receipt of the letter.
13. The case pleaded is that the plaintiff "*treated this correspondence as a putative termination of her tenancy*" and sought to make the case to the Private Residential Tenancies Board, on a complaint naming Ulster Bank as the respondent, that it was an invalid notice of termination. The Private Residential Tenancies Board, of its own motion, raised an issue as to whether it had jurisdiction to

deal with the complaint, specifically by reference to whether Ulster Bank was the plaintiff's landlord. The case made by the plaintiff, by reference to the definition of "*landlord*" in section 5 of the Residential Tenancies Act, 2004 was that Ulster Bank was the "*person for the time being entitled to receive the rent paid in respect of a dwelling by the tenant thereof*" and so was her landlord. Ulster Bank made the case that it had no privity with the plaintiff and had never received any rent in respect of the dwelling. On 27th October, 2015 the Private Residential Tenancies Board decided that it did not have jurisdiction and following an appeal by the plaintiff, that decision was affirmed by the Circuit Court on 25th January, 2016.

14. In the meantime, by deed dated 29th September 2015 Ulster Bank had assigned its charge over the property to the fourth defendant. The case pleaded is that Ulster Bank refused to provide the plaintiff with the name of the new charge holder and on 13th February 2017 this court made an order for non-party discovery by Capita Asset Services (Ireland) Ltd, to whom the plaintiff's solicitors had been told by Ulster Bank to address all future correspondence. I cannot forbear to observe that I do not understand the reticence on the part of Ulster Bank to identify the fourth defendant as the transferee of the charge or, for that matter, the need for the order for non-party discovery, because the transfer of the charge from Ulster Bank to the fourth defendant was registered in the Land Registry on 15th October 2015 so that the identity of the fourth defendant was a matter of public record.

15. The case made by the plaintiff in the action is at best ambiguous. On the one hand she claims to occupy the dwelling on foot of a valid Part IV tenancy which can only be terminated in accordance with the provisions of the 2004 Act and has not been determined, and on the other that she is left in a limbo situation. The plaintiff claims to have statutory rights which were not altered by the Circuit Court order for possession and yet claims that she enjoys no security of tenure and "*finds herself vulnerable to enforcement action... on foot of the order for possession*" and to "*live in fear that her home will be repossessed without notice to her and/or without recourse to anybody with power to adjudicate on the lawfulness of the termination of her tenancy and/or ensure that her rights as tenant are vindicated.*"

16. The plaintiff's case is that she went into occupation of the dwelling on foot of a tenancy agreement with Mr. and Mrs. Doyle which was renewed from time to time. To the extent, if any, to which there may be any issue about that, this application must be dealt with on the basis that the plaintiff will establish that fact.

17. The plaintiff's case is that she occupies the dwelling on foot of a valid Part IV tenancy which can only be terminated in accordance with the provisions of the 2004 Act. To the extent, if any, to which there may be any issue about that, this application must be dealt with on the basis that the plaintiff will establish that that is so.

18. The plaintiff's case is that the Circuit Court was not empowered to terminate her statutory tenancy. I do not understand the fourth defendant to contend otherwise.

19. The plaintiff relies on the Ulster Bank letter of 16th June, 2015 requiring her to vacate the dwelling within 112 days as a "*putative termination of her tenancy*". The defendant pleads that it is a stranger to that letter but the letter does not purport to terminate any tenancy it is absolutely clear that Ulster Bank never relied on that or any other letter as terminating the plaintiff's tenancy. Ulster Bank was steadfast in its position that it was not the plaintiff's landlord.

20. The plaintiff's case is that she has a valid and subsistent tenancy with Mr. and Mrs. Doyle which has not been terminated. The statement of claim is in large part a synopsis of the position taken by the plaintiff and Ulster Bank in correspondence rather than an assertion of what the correct legal position is. The plaintiff moves from the proposition that she has a valid and subsistent tenancy with Mr. and Mrs. Doyle to the proposition that by reason of the finding of the Private Residential Tenancies Board and the Circuit Court that Ulster Bank was not her landlord, she cannot seek to enforce her statutory rights. It seems to me that this simply does not follow.

21. Having repeatedly asserted her tenancy and statutory rights, the plaintiff does not claim against the fourth defendant any declaration of those rights but rather claims a declaration that the fourth defendant, as the party entitled to the benefit for the order for possession, is "*the landlord of the premises*".

22. The plaintiff goes on to claim, in the alternative, a variety of declarations as to the compatibility of various sections of the Residential Tenancies Act, 2004 with the State's obligations under various provisions of the Constitution and the European Convention on Human Rights Act, 2003.

23. It seems to me that the plaintiff's challenge to the compatibility and effectiveness of the 2004 Act is not an alternative to her claim that the fourth defendant is her landlord. In my view it simply does not follow from the fact (if it be the fact) that the fourth defendant is not her landlord (or "*the landlord of the premises*") that the 2004 Act does not apply to her tenancy. Neither, in my view, is it necessary for the plaintiff to establish that the fourth defendant is her landlord to make the case that the fourth defendant's rights under the charge are subject to her tenancy.

24. From the time I first read the papers in this case it seemed to me that what it was all about was the effect of the order for possession made by the Circuit Court on 23rd March, 2015. That was an order made on a Civil Bill claiming an order for delivery of possession of the property but which ordered "*...that the plaintiff do recover from the defendants possession...*" of the property. [Emphasis added.]

25. While it is by no means clear from the pleadings, part of the case made on behalf of the plaintiff in argument on this application was that the effect of the Circuit Court order of 23rd March, 2015 was that Ulster Bank's right to possession was subject to the plaintiff's tenancy in the property: that is, her tenancy with Mr. and Mrs. Doyle. If that is so, the plaintiff's fears that she will be put out of her house on foot of the Circuit Court order are groundless.

26. I am unconvinced that these proceedings were necessary, or that the High Court is the proper forum in which, to make the case that the mortgagee is bound by the plaintiff's tenancy and/or that the plaintiff's right to possession of the property is unaffected by Circuit Court order but neither am I satisfied that that claim is bound to fail.

27. If that claim were made out, it seems to me that the attack on the compatibility and adequacy of the Residential Properties Act would fall away.

28. The primary relief claimed by the plaintiff in the prayer in the statement of claim is a declaration that the fourth defendant as the person now entitled to the benefit of the order made by the Circuit Court on 23rd March, 2015 is "*the landlord of the premises*" and that the provisions of the 2004 Act apply in respect of the plaintiff's tenancy.

29. Counsel for the fourth defendant submits that this claim seeks to raise the same issue as was decided by the Private Residential Tenancies Board and the Circuit Court and is *res judicata*. I accept that submission. Judicial tribunals include, besides the courts, statutory tribunals. The Private Residential Tenancies Board is such a tribunal. By section 84 of the 2004 Act the Board has express jurisdiction to determine whether a dispute referred to it comes within its jurisdiction, subject to the right of any party to the dispute to appeal to the Circuit Court. The issue identified by the Board in this case was whether Ulster Bank, against whom the complaint had been made, was the plaintiff's landlord. The Board and the Circuit Court on appeal from the Board decided that it was not.

30. I reject the argument made on behalf of the plaintiff that the decision of the Board and the Circuit Court was simply that it did not have jurisdiction and not that Ulster Bank was not the plaintiff's landlord. The finding of lack of jurisdiction was a direct consequence of a decision that Ulster Bank was not the plaintiff's landlord.

31. The case made against the fourth defendant is that, as the assignee of Ulster Bank, it took the charge subject to all of the rights and obligations of Ulster Bank. The plaintiff's application to the Private Residential Tenancies Board appears to have been made on 14th July 2015. The plaintiff was not then aware of the transfer and the fourth defendant was not party to that process but even on the plaintiff's case, the fourth defendant is the privy of Ulster Bank. If the fourth defendant would have been bound by a finding by the Board or by the Circuit Court on appeal that Ulster bank was the landlord, it follows that it is bound by, or entitled to the benefit of, the finding that it was not.

32. In response to the short affidavit of Ronan Hopkins sworn on behalf of the fourth defendant in support of this application, the plaintiff's solicitor, Mr. Gary Lee, swore quite a long affidavit summarising and exhibiting the correspondence with and from Ulster Bank and the fourth defendant since the making of the order for possession and dealing with the plaintiff's complaint against Ulster Bank, the Private Residential Tenancies Board's decision, and the appeal therefrom to the Circuit Court.

33. In that affidavit Mr. Lee expressed extreme concern that Mr. Hopkins, in his affidavit grounding this application, sworn on 20th December, 2017, had failed to deal with the fact that on 1st June, 2017, after it had been joined as a defendant, the fourth defendant "*sought to appoint*" Mr. Paul McCleary of Grant Thornton as receiver over the property on foot of the mortgage entered into by the original landlords. Mr. Lee suggested that the "*appointment*" of the receiver and correspondence exchanged was relevant to this application but not, clearly, why. It is not clear to me whether there is a challenge to the validity of the appointment of the receiver or, if there is, what the basis of any such challenge might be.

34. I am unconvinced that the appointment (or purported appointment) of the receiver had any effect on the plaintiff's claim as pleaded, or the fourth defendant's application to have that claim dismissed but it does, at least potentially, go to the necessity for continuing this complicated action. For the avoidance of doubt, I do not express any concluded view but merely identify it as a potential practical opportunity to resolve the issues between the plaintiff and the fourth defendant in a way that might avoid the necessity for continuing the the action against any of the defendants.

35. On 2nd June, 2017 Mr. McCleary wrote to "*the occupant*" of the property giving notice of his appointment as receiver and enclosing a copy of a Deed of Appointment of 1st June, 2017 over certain assets of Mr. and Mrs. Doyle, specifically, the property at Santry Cross. Mr. McCleary enclosed a questionnaire entitled "*Tenant Questionnaire*" and asked that all rental payments be made to him in his capacity as receiver.

36. The plaintiff's solicitor in response asked a number of questions and expressed his client's fear that steps might be taken adverse to her and threatened proceedings against the receiver but he did not engage with him. Specifically he did not give particulars of the plaintiff's tenancy in the property or offer to pay the rent.

37. On 20th June, 2017 O'Dwyer Real Estate Management who (as Mr. Cleary had said in his letter to the plaintiff of 2nd June, 2017) had been appointed as property managers wrote to "*the occupier*" of the property asking for access to the property "*so that [they might] effectively manage any issues which [might] arise during the course of your tenancy*" and seeking "*to collect all rental income from this property in accordance with your lease*". Enclosed with that letter was a "*tenancy contract form for completion by you*".

38. While Mr. Lee does not explicitly say so there must have been some contact between the plaintiff and O'Dwyer Real Estate Management because on 14th July, 2017 O'Dwyer Real Estate Management wrote to the plaintiff by name inviting her to provide a copy of her lease agreement or other proof of valid occupancy and to pay the rent into a designated bank account.

39. On 13th September, 2017 Capita Asset Services (Ireland) Ltd, on behalf of the fourth defendant, wrote to the plaintiff's solicitor asking for clarification of the basis on which the plaintiff claimed a right to reside in the property. Subject to such clarification, it was said, Capita would seek an instruction from the fourth defendant with regard to "*any possible regularisation of the purported tenancy*".

40. The plaintiff's solicitor appears not to have replied to Capita but instead, on 26th September, 2017, sent copies of all the correspondence to the fourth defendant's solicitors asking that they should take instructions with respect to the various letters.

41. The last letter to which I will refer is a letter of 21st November, 2017 from O'Dwyer Real Estate Management to the plaintiff directly suggesting that by her alleged failure to allow access to the property for the purpose of an inspection she was "*in breach of [her] tenancy obligations*". The letter continued: "*By this notice the Landlord gives you a period of 14 days to remedy the breach of your tenancy obligations. Should you fail to remedy the breach, I am entitled to terminate your tenancy pursuant to Part 5 of the Residential Tenancies Acts 2004 to 2015.*"

42. I have not seen the deed of charge given by Mr. and Mrs. Doyle to Ulster Bank which was assigned to the fourth defendant and on foot of which the fourth defendant appointed (or purported to appoint) the receiver. It may very well have provided that the receiver was to be the agent of the chargor but the reality is that the receiver is acting on behalf of the fourth defendant in seeking to realise the security. It seems to me that the receiver has offered to look at the plaintiff's claim to be entitled to a tenancy and that the receiver's agent has gone further, asserting that the plaintiff is the tenant and that her tenancy is subject to the Residential Tenancies Acts.

43. I am bound to say that the position adopted by the receiver in his correspondence sits uneasily with that adopted by the fourth defendant in the proceedings but if the plaintiff were to engage with the receiver she might very well establish her tenancy.

44. As far as this application is concerned, I accept the argument made on behalf of the fourth defendant that the plaintiff's case that the fourth defendant is her landlord is bound to fail but I am not satisfied that she has no case. I find that there is an issue to

be determined as to whether the Circuit Court order of 23rd March, 2015 requires the plaintiff to deliver actual possession of the property or whether the fourth defendant's entitlement to enforce its security is subject to the plaintiff's tenancy, not with the fourth defendant, but with Mr. and Mrs. Doyle.

45. If the plaintiff wishes I will afford an opportunity to reformulate her claim accordingly.