THE HIGH COURT

[2013 No. 11670 P]

BETWEEN

SHANE MCCARTHY

PLAINTIFF

AND

DOMINIC GALLAGHER

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 15th day of December, 2017

Introduction
1. This judgment concerns the effect of a notice of discontinuance served by the plaintiff receiver ("*the Receiver*") in March 2015, following his undertaking to abide by any order for damages which the Court may direct the Receiver to pay arising from an interlocutory order directing the defendant to deliver up possession of an industrial unit ("*the Unit*") in November 2013.

How this comes before the Court?
2. The original questions for the Court were identified in a notice of motion issued in November 2016, seeking orders to strike out the defendant's counterclaim (delivered in November 2014) pursuant to O. 19(27) and O. 19(28) of the Rules of the Superior Courts ("*RSC*") "*and/or the inherent jurisdiction of"* the Court on the grounds that the counterclaim failed "*to disclose a reasonable or any cause of action*", was "*frivolous and/or vexatious"*, was "*unnecessary and/or scandalous and/or tend to embarrass",* "*constitutes an abuse of process*," and was "*bound to fail*".

3. Following receipt of that notice of motion, the defendant appointed a solicitor in December 2016, and delivered a replying affidavit which contended that:-

(i) the Receiver had been "*invalidly appointed*"; and

(ii) if validly appointed, the Receiver did not have the power to sell the Unit.

4. The Receiver's motion came before me earlier this year. Then I observed that the defence and counterclaim, which the defendant himself drafted and delivered in 2014, had not identified the specific grounds of his challenge to the appointment and powers of the Receiver. I gave directions before adjourning the Receiver's motion to the effect that the defendant as counterclaimant deliver "*points of claim*" which, *inter alia*, contended but may be summarised as follows:-

(i) the counterclaim should not be struck out;

(ii) the Court should assess damages for negligence and trespass by the Receiver in selling the Unit; and

(iii) the Receiver had no power of sale.

5. "*Points of defence*" were delivered on behalf of the Receiver, to the effect, that: -

(i) the Receiver had no obligation in respect of the defendant's costs in the claim which had been discontinued because the defendant had been a lay litigant up to the date of discontinuance;

(ii) the Receiver was obliged to seek injunctive reliefs due to the unlawful action of the defendant;

(iii) the defendant's counterclaim could proceed even where the Receiver's claim was discontinued;

(iv) the deed of appointment for the Receiver which was executed under seal constituted execution by ACC Bank plc ("*the Bank*") "*in writing under its hand*" which was the term used in the relevant deed of charge;

(v) any infirmity relating to the execution of the deed of appointment had been remedied by a ratifying type resolution of the Bank in August 2015 which had appointed the Receiver; and

(vi) the Receiver relied on the security documentation and the statutory power of sale "*pursuant to the Conveyancing and Law of Property Act 1881 and 1911*".

Preliminary Trial?
6. In short, the Receiver is now seeking a determination of facts and law when the defendant declines to agree facts and disputes the Receiver's defence of his appointment. No application for a trial of a point of law pursuant to O. 25 of the RSC or for a trial partly of fact and partly of law under O. 36(7) of the RSC was made by the Receiver.

Chronological Summary
7. It may assist in understanding some undisputed facts for the purpose of this motion by setting out a chronological summary for ease of reference:-

22.07.2005 The relevant charge in favour of the Bank over the Unit was registered.

25.11.2010 A demand from the Bank to the defendant was sent following default by the defendant.

07.09.2011 A copy of the deed of appointment by the Bank of the Receiver was served on the defendant.

14.11.2011 The defendant notified the Receiver in writing that the Receiver is a trespasser and did not act as the agent of the defendant.

12.04.2012 A forfeiture notice was served on a tenant in the Unit on the instructions of the Receiver.

15.10.2013 Meath Circuit Court granted an order for possession and a decree for €38,092.14 against the tenant in favour of the Receiver.

19.11.2013 White J., of this Court, directed the plaintiff to deliver up possession of the Unit to the Receiver and noted the Receiver's undertaking as to damages while allowing 21 days for the statement of claim to be delivered and directing the defendant to discharge the costs of that application.

06.01.2014 The statement of claim was delivered.

03.11.2014 The defence and counterclaim were delivered.

26.03.2015 Notice of discontinuance was served for the Receiver's claim without leave of the Court or any application concerning the Receiver's undertaking given on the 19th November, 2014.

20.04.2015 The reply and defence to the counterclaim were delivered on behalf of the Receiver.

31.07.2015 Cregan J. delivered his judgment in *McCleary v. McPhillips* [2015] IEHC 591 (unreported, High Court, 31st July, 2015), ("*the McCleary judgment*") where appointments of Receivers along with a discharge of a receiver by the Bank were found to be invalid.

19.08.2015 The defendant wrote to the Receiver's solicitors and alluded to the McCleary judgment before requesting a "*without prejudice meeting … to see if an amicable solution can be found".*

04.09.2015 The Bank itself replied to the defendant that "*the decision of Judge Cregan is incorrect and is therefore being appealed. Without prejudice to that position, we confirm tha*t [the Bank] *has ratified the authority of all receivers. Taking these factors into account and in accordance with the doctrine of estoppel, we are satisfied that the sale of your property which closed months ago is unaffected by the recent court decision".*

10.11.2016 The Receiver issued a notice of motion to strike out the counterclaim which motion is the subject of this judgment.

02.12.2016 A solicitor was appointed for the defendant and the defendant swore his replying affidavit for this motion.

10.03.2017 This Court gave directions for the exchange of the points of claim and reply in the context of the Receiver's motion.

09.06.2017 The appeal from the McCleary judgment was struck out by the Court of Appeal with the consent of the parties involved in that appeal.

09.07.2017 Notice of trial for the defendant's points of claim was served on behalf of the defendant.

Submissions

8. The outline written submissions of both parties focussed correctly on whether the defendant was entitled to pursue an enquiry or a claim for damages. It was properly conceded for the Receiver that a successful counterclaim would lead to an enquiry about damages. However, the submissions for the Receiver, unlike those of the defendant, then moved onto:-

(i) applying the findings of Gilligan J. in an interlocutory injunction application determination on 20th April, 2016, for proceedings entitled *Fennell v. Gilroy & Ors* having record number 2016 No. 948 P to the facts which the Receiver now asserts about the execution of a deed in 2011 and the ratification nearly four years after the appointment of the Receiver by the Bank in 2015;

(ii) referencing my judgment in another interlocutory injunction application entitled *Farrell v. Petroysan* [2016] IEHC 522 (unreported, High Court, 2nd March, 2016) in a manner similar to the citing of *Fennell v. Gilroy & Ors*; and

(iii) findings of fact by Birmingham J. in *Tom Kavanagh v. Bank of Scotland Plc and Others* [2013] IEHC 453 (unreported, High Court, 30th September, 2013), that a bank in that case actually knew that an individual was acting as its agent.

9. The defendant did not engage with those strands. It is the defendant's entitlement to have a trial to establish the facts with which he takes issue and to make detailed submissions on the law about whether ratification, estoppel or such other principles apply, including the effect of the McCleary judgment. It is worth noting again that the Receiver has applied only to dismiss or strike out the counterclaim. The Receiver in this regard has rushed his fences, so to speak, by serving a notice of discontinuance of his claim without seeking to discharge the interlocutory injunction orders and his undertaking. He then sought the dismissal or striking out of the defendant's counterclaim in a rather peremptory manner for "*abuse of process*" and a "*bound to fail*" argument, *inter alia*.

Effect of Order 26(1) of the RSC

10. The comprehensive judgment of Laffoy J. in *Shell E&P Ireland Ltd v. McGrath (No.3)* [2007] 4 I.R. 277; [2007] IEHC 144, at para. 19, noted that it is usually "*impracticable to assess the eventual prospects of success in the action"* following a notice of discontinuance.

11. The learned judge, at para. 32, considered "*what the authorities say about the effect of discontinuance on an undertaking as to damages … on a previous interlocutory application*". The Receiver in these proceedings rightly conceded that discontinuance "*cannot deprive the defendant of his right to damages on foot of* [the Receiver's] *undertaking*".

12. The entitlement of the defendant to an enquiry or damages depends largely indeed on the outcome of the counterclaim. This is

another reason to allow the counterclaim to proceed.

13. No application has been made to date to discharge the undertaking as to damages. Undertakings given to the court remain until they are allowed to be withdrawn with the leave of the court whether with the consent of all relevant parties or otherwise.

Onus of Proof
14. In *Shell E&P Ireland Limited v. McGrath (No. 3),* Laffoy J. at para. 39(3) saw "*no legal basis for ordering that the plaintiff retain the onus of proof on the issues of the validity of the consent under the [Gas] Act of 1976 and the validity of the compulsory acquisition orders"*. Counsel for the plaintiff in those proceedings had clarified that the plaintiff would rely on the maxim *omnia praesumuntur rite esse acta*.

15. In *Clark v. Early* [1980] I.R. 223 at 226 O'Higgins C.J. stated his view "*that two conditions be observed"* before applying the maxim:-

> *"In the first place an intention to do some formal act must be established. In the second place there must be an absence of credible evidence that due formality was not observed."*

16. In the motion before the Court now, the defendant has some credible basis to challenge the effect of the alleged execution of the deed of appointment in 2011 in view of the McCleary judgement which also involved the Bank. The effect of the resolution by the Board of the Bank which ratified the appointment four years later has not been accepted by the defendant and it is not clear at this stage which facts are agreed or are in dispute in relation to this resolution. The Receiver contends that any infirmity in his appointment was corrected by the Board resolution of 19th August, 2015, but in the context of the maxim, it is worth noting that the Receiver's appointment was not made pursuant to a statutory provision.

17. The maxim "*… to give effect to everything to which appears to have been established for a considerable course of time, and to presume that what has been done was done of right and not in wrong*" (quote from Pollock C.B. in *Gibson v. Doeg* (1857) 2H. & N. 615 at 623 and cited with approval in *McMullen v. Clancy* [2002] 3 I.R. 493; [2002] IESC 61) cannot be relied upon by the Receiver in this motion to strike out or dismiss because it is well established that the Court takes the position of the defendant at the height of his case. Following *Ennis v. Butterly* [1996] 1 I.R. 426 where that was properly conceded by counsel for the defendant, O'Sullivan J in *O'Keeffe v. Kilcullen & Ors* [1998] IEHC 101 (unreported, High Court, 24th June, 1998), found that assertions which are disputed in affidavits or pleadings should be accepted in favour of the party who is resisting the motion to strike out.

18. It is apposite to mention also that Hardiman J in *Liam Grant v. Roche Products (Ireland) Ltd & Ors* [2008] 4 I.R. 679; [2008] IESC 35, at 696 pointed out that the onus of establishing an abuse of process is on the applicant and the onus is "*a heavy one*". That was a case where it was alleged that there was no tangible benefit to the plaintiff in pursuing his claim.

19. In view of the rather tortuous prosecution of the claims in these proceedings to date, while having regard to the engagement of counsel for both sides, I shall hear counsel now about the following proposed orders and directions for the sake of clarity and effectiveness:-

> (i) The Receiver (the Plaintiff) shall pay the expenses (when taxed or agreed) of the defendant arising from these proceedings (other than the costs for the interlocutory application before White J. on 19th November, 2013, when the costs of that application were determined on that day) from 24th October, 2013, (the date of the issue of the plenary summons) to 26th March, 2015, (the date of discontinuance by the Receiver).
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> (ii) The Receiver's motion pursuant to notice dated 10th November, 2015, seeking to strike out or dismiss the counterclaim is refused.
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> (iii) The Receiver shall deliver, by 26th January, 2018, to the defendant's solicitors, a notice to admit facts and documents relevant to the claim that his appointment as receiver was valid (including the names of those who signed, sealed or executed any document to be relied upon, the dates and location of such execution, together with such other facts as the Receiver will rely upon at the plenary hearing).
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> (iv) The defendant/counterclaimant shall reply to that notice to admit facts within 21 days of receipt and specifically identify such fact or facts which require proof by the defendant at the trial of these proceedings.
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> (v) The parties, if oral evidence is required by them, shall exchange lists of witnesses as to fact intended to be called at the plenary hearing on or before 16th February, 2018. This list of witnesses need not include anyone who is required only for the assessment of any damages which may be considered at a later date depending on the determination of the dispute about the validity and effect of the relevant deeds and resolution.
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> (vi) The defendant shall, by 23rd February, 2018, file and serve outline legal submissions concerning the principles of law whether relating to execution of deeds of appointment, ratification, or otherwise to be advanced.
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> (vii) The plaintiff shall file and serve a reply to those submissions within 21 days of receipt and include a composite list of authorities so that the defendant in prosecuting the counterclaim can produce one composite indexed, leafed and paginated book of authorities for the trial.
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> (viii) The proceedings shall be listed for mention before this Court on 20th March, 2018, with a view to listing the plenary hearing of the counterclaim (save as to the assessment of any damages).

20. Finally, I invite counsel to address the Court also on the issue of the costs relating to the Receiver's unsuccessful motion to dismiss or strike out the counterclaim.

Postscript following delivery of judgment
21. On 26th June, 2019, counsel for both parties informed the Court of a settlement and the Court by consent struck out the claim and counterclaim with no further order.