Neutral Citation: [2012] IEHC 608

THE HIGH COURT

[2008 No. 4749 P]

NOEL J. LOONEY

PLAINTIFF

AND

PUNCH HOLDINGS & ORS

DEFENDANTS

JUDGMENT of Mr. Justice Moriarty delivered on the 17th day of December, 2012

1. Of the two motions in this matter listed last Monday, 17th December, 2012, vastly the more substantial was the defendant's application to have the plaintiff's claims struck out on the basis that pursuant to O. 19, r. 28 of the Rules of the Superior Courts, no reasonable cause of action was disclosed and the proceedings brought were frivolous and vexatious. Similar relief was in the alternative sought pursuant to the inherent jurisdiction of the High Court. A cross-motion had been brought by the plaintiff, seeking further and better discovery, although voluntary discovery had been furnished on behalf of the defendants close to the time of the bringing of the plaintiff's motion. This aspect was only lightly touched upon at last Monday's hearing when the focus of the argument was upon the defendant's dismissal application.

2. The proceedings in essence relate to alleged breaches of covenant on the part of the defendants and each of them, as supposed tenants to the plaintiff in respect of lands and premises at Glanmire, Co. Cork, on foot of which the plaintiff not merely seeks recovery of possession on the basis of forfeiture, but also claims punitive or aggravated damages. As the plaintiff has acted in person throughout the proceedings, and as relevant documents of title to the premises date from only marginally short of a quarter millennium ago, the hearing was not without its arcane moments. And it is accordingly necessary for purposes of this judgment to distil somewhat what was contended for on each side, while seeking not to distort the sequence of matters of principal importance.

3. Procedurally, the sequence of events was that the plaintiff instituted his plenary summons on 12th June, 2008, in unusually fulsome terms which he further expanded upon in his 22nd September, 2008, statement of claim. A defence on behalf of all five defendants was delivered on 28th January, 2009, substantially presaging the nature of the present application, which was brought by the defendants, following some additional applications and exchanges of more limited importance. That substantive matter was listed for hearing before Hedigan J. on 25th October last. It appears that the plaintiff indicated to the Court on that occasion that the firm of Messrs. David Kenny and Company Solicitors of Dillon's Cross, Cork, would thereafter be appearing for him, whereupon the Court adjourned the defendant's motion to 17th December last, and on being informed by the plaintiff of his cross-motion for further discovery, ordered that both matters should then proceed with the plaintiff's motion to be heard after the defendant's motion. When the solicitors to the defendants thereupon furnished Messrs. Kenny and Company with relevant pleadings and motion papers some days thereafter they were informed by letter of Mr. Donnacha Gould of Kenny and Company that, "We wish to make it clear that we are not coming on record for Mr. Looney in this matter. As a consequence, we return your correspondence." From what was stated to me by both the plaintiff and by Mr. Brady, senior counsel for the defendants at last Monday's hearing, it further appears that when the matter was first mentioned in the call over of the list before Kearns P., the plaintiff stated that one of his sons, a qualified solicitor, had belatedly indicated preparedness to act for him and sought a further deferral to enable him prepare the case adequately, a request rejected by the president, who indicated that the matter should proceed. It was in the light of these agreed facts that when the plaintiff again in his argument renewed his adjournment application to engage legal representation, I similarly declined.

4. As to setting forth in abridged form what was conveyed in the pleadings and on affidavit by both sides, I will take firstly the plaintiff. In his plenary summons, he sought recovery of possession of the dwelling house, known as The Fountains, and adjacent mills, lands, outhouses and gardens, known as Glanmire Mills, Co. Cork. His complaint in this regard and also for damages for fraud and misrepresentation was precipitated by a fire that destroyed the mill on 30th July, 1964, following which the first-named defendant was paid a sum of in or about £60,000 by Norwich Union Insurance Company on foot of the policy effected by that defendant. It was complained that the first-named defendant never told the insurers that such payment was by lease only to be used to reinstate the burned mills. It was further complained that this amount was, in fact, invested to build a new factory, known as Glanmire Business Park, in circumstances amounting not merely to breach of covenant, but to criminal fraud and embezzlement. This thus was an enormously large and successful business, built up by the defendants in the contention of the plaintiff, resulting in a partial sale for what was alleged to have been over €135,000,000 in comparatively recent times. The plaintiff had computed the current value of the £60,000, when issuing his plenary summons as approximately £1.017 million, equivalent in Euros to €1.2923 million. To this, he had added interest at 4.76% per annum, aggregating to a total amount of approximately €6.2 million of which he claimed a share, which he did not quantify, contending that all of this had arisen by reason of the initial £60,000 seed capital, having been used in the manner he complained of. He stated that he was the fee simple holder of the demised premises and that the defendants held as tenants to him under a sub-lease of 7th February, 1922, between the Law estate and various Punch entities. In late 1967, he had told the defendants of his interest through his then solicitor, but he contended that he had been precluded from advancing his claim due to lack of documents and facts, and that the defendants had denied any indebtedness to him at the time. Other complaints were also made by him, including allegedly allowing certain cottages on the demised premises become derelict. But primarily he contended that the defendants, as tenants to him had fundamentally failed in their obligation to keep the premises in good and tenantable repair, and otherwise thereby entitling him to repossession on the basis of forfeiture and to significant damages.

5. On the defendant's side, considerable research had been undertaken on the position as to title. It was contended that the defendants held the Glanmire premises under the 1922 sub-sublease for a term of 447 years from 29th September, 1864, save for the last day thereof, at a yearly rent of €252, being the equivalent of the former £200 stipulated. By an assignment of 31st December, 1931, portion of the Glanmire take was assigned to the first-named defendant, following which on 1st June, 1996, that portion was assigned to the second named defendant on 1st June, 1996, who continued to reside in the dwelling house on the lands. The third defendant is a director and shareholder of the first named defendant but has no interest in the demised lands and is therefore even more remote from the plaintiff's claims, as is the fourth-named defendant who is not even a director of the first named defendant.

6. The defendants acknowledge that the plaintiff is entitled to certain estates and interests in the lands superior to the 1922 lease. This was indeed a fee simple interest which was subject to a lease of 4th September, 1764 between Samuel Pike and Samuel Neill for 500 years from 1st May, 1764. This was the root of title I earlier referred to as dating back almost 250 years. That lease in turn was subject to a sublease of 2nd February, 1822, between George Newenham and Archibal Christie Shaw for 450 years, from 29th September, 1821, subject to a yearly rent of £230. There was provision for rent abatement of £100 if a sum of £1000 was paid, which seemingly was done but, in fact, the parties entered into a new sublease for 447 years from 29th September, 1824. As already

indicated the plaintiff acquired the lessees' interest under the 1764 lease, and by a conveyance in 1969 acquired the fee simple and merged his leasehold interest into the fee simple. However, between the plaintiff and the first and second named defendants was another estate or interest to which the plaintiff had not shown title. The first defendant had for many years paid and continues to pay the annual €254 rent to Mr. John P. McCarthy, an estate agent who it appears has died recently. Letters from him in 2003 and 2008 exhibited in the affidavit of the defendant's solicitor, Mr. Patrick Dorgan, attest that Mr. McCarthy's clients were the Law estate who held from the Ruth estate and in turn from another unknown entity. Accordingly, it was contended that there was no privity of contract or estate between the plaintiff and the interest of the first and second defendants under the 1922 sub-sublease. It was under an assignment of 8th May, 1961, between Mr. John O'Donoghue and the plaintiff that the plaintiff had initially acquired the lessor's interest in the 1822 sublease and the 1825 sublease on the premises, and this was accordingly some years prior to the 1964 fire.

7. The latter portion of Mr. Dorgan's affidavit referred to some earlier inter partes correspondence in which the plaintiff's claim to compensation arising from the 1964 fire had been broached. This culminated in a letter of Mr. Dorgan of 19th March, 2008 to Messrs. David Kenny and Company, the solicitors then acting for the plaintiff, in which Mr. Dorgan described such a claim, arising from the fire some 40 years previously, as ludicrous. Also exhibited was correspondence with the solicitor acting for the plaintiff in 1967, Mr. James P. McD Concannon, in which any entitlement on the part of the plaintiff was vigorously rebutted, and in which Mr. Concannon himself appeared to convey clear misgivings on the plaintiff's prospects of seeking redress.

8. Accordingly, Mr. Brady's submission on behalf of the defendants was fourfold. Firstly, the plaintiff had not shown any privity of contract or estate with the first or second defendants, and indeed the contrary had been demonstrated in his solicitor's affidavits and appended documents of title. He cited Professor Wylie's text in his work on Landlord and Tenant Law, in which it was stated in relation to the position of parties after a subletting at Chapter 22, para. 06, as follows:

> "The position of the various interested parties after a subletting by the tenant is reasonably clear; the tenant remains the tenant of the head landlord, subject to all the terms of the head tenancy. In essence, the relation of landlord and tenant between the original landlord and tenant is undisturbed and unaffected by the sub-tenancy. Of course, the head tenant assumes now a dual capacity; that is, while remaining tenant of the head landlord under the head tenancy, he becomes landlord (sub-landlord) of the sub-tenant; that is, a new relation of landlord and tenant is created between the head tenant (or sub-landlord), and the sub-tenant, with all the usual incidents of a tenancy. There exists therefore privity of contract between the head landlord and head tenant, or sub-landlord, and between the head tenant and sub-tenant, but none between the head landlord and sub-tenant. Even more important, there is no privity of estate between the head landlord and sub-tenant, because the sub-tenant is not an assignee of the head-tenant; he does not succeed to any part of the head tenant's interest under the head tenancy."

And I there quote that extract from Professor Wylie's book.

9. Furthermore it was argued by Mr. Brady that the plaintiff had signally failed to comply with the clear statutory precondition imposed by s. 14 of the 1881 Conveyancing Act by serving a forfeiture notice on the defendants, or any of them, prior to his action for repossession. And a belated purported notice in this behalf which had been attached to the premises only on the Saturday immediately preceding last Monday's hearing in no sense filled this void. In any event, the relevant instrument of 1922 contained no forfeiture clause, save as regards non-payment of rent, which was not in issue. But also in any event it was above all contended that any possible entitlement on the part of the plaintiff was clearly statute barred under the 1957 statute of limitations and succeeding legislation. Even if the longer limitation period of 12 years applicable to an instrument under seal was allowed for, it availed the plaintiff nothing in respect of material events that occurred more than 40 years past.

10. The plaintiff, in contrast to his lengthy averments and contentions in his papers, relied on his pleadings and affidavits and otherwise had not a great deal to say. He believed that the defendants had held directly from him, felt that he was somewhat out of his depth in technical landlord and tenant arguments, and acknowledged that the position was very serious. He had, he said, always been keen for some kind of mediation or negotiations in the matter.

11. I have considered the position with care since last Monday's hearing. As regards seeking repossession, it is clear the statutory pre-condition of a forfeiture notice was not complied with prior to action, and the belated expedient resorted to by the plaintiff less than a week ago in no sense retrospectively fills this void, particularly in the absence of any forfeiture clause in the lease other than as regards non-payment of rent. Likewise, the detailed documentation adduced appears to substantiate the averments on behalf of the first and second named defendants, that they have never had privity of estate or contract with the plaintiff, so that the position set forth by Professor Wylie appears applicable, and the remaining defendants have, a fortiori, no such connection. But, above all, the import of the statute of limitations in the context of events in the 1960s, of which the plaintiff was clearly aware and in receipt of legal advice at the time, seems unassailable, and the plaintiff has not sought to advance any or any stateable argument as to why he sat on such rights as he felt he had. There seems no possible basis on which in any event any matters by way of acknowledgement, part-payment, disability, fraud, estoppel or indeed any potential relieving factor could be inferred.

12. The jurisdiction that arises under O. 19, r. 28 of the Rules of the Superior Courts is a blunt and radical one, and I have had regard to the considerable body of case law on it, as helpfully set out in Chapter 14 of *Civil Procedure in the Superior Courts* by Delaney and McGrath. It is apparent that it should be exercised sparingly, only on clear cases, and should not be resorted to where, for example, a simple pleadings amendment could rectify matters, or where matters at plenary hearing might foreseeably cast the party moved against in a better light that was apparent on interlocutory papers. I cannot realistically see this as such a case. While I am fully mindful of the caution here required, I have come to the conclusion that, on the grounds argued, but above all on the limitations point, Mr. Looney's application against all the defendants is inextricably doomed to failure. I have considered the possible argument that the defendants might have moved sooner in this regard rather than have matters proceed thus far down the road, but I am mindful of the judgment of Hanna J. in *Mitchell v. Ireland*, of March 2005, that such an application as this should be brought at the earliest stage reasonably possible, but that once an abuse of process is identified, it was incumbent on a court to adjudicate, and delay should not debar an applicant from relief.

13. In all these circumstances, I accede to the plaintiff's application under O. 19, r. 28. I think costs have to follow the event. In ease of Mr. Looney, I'll just do two things that may in a very minor way alleviate his position. It was not his fault that matters had to go to a second day this week, so as regards the actual motion, it is one day which may be deemed to have ended matters, and I think since nothing of any note took place on the cross-motion for discovery, so I am disposed to simply strike it out with no order. (So, I am sorry, Mr. Looney, there is no better news for you having come all the way up from Cork, but I have considered the matters as fully as I can and that's the best I can do in your case, and perhaps when I rise the registrar may advise you on any entitlements you may have in relation to taking matters further if you choose to.)

("REGISTRAR: Just one thing, Judge; Mr. Looney wants a copy of the transcript --

JUDGE: Yes.

REGISTRAR: -- have you any difficulty with that?

JUDGE: No, indeed; I'll see that one is sent to you.

REGISTRAR: Mr. Looney will have to pay for it, that's the only difficulty.

JUDGE: Well, yes.

MR. LOONEY: And I will thank you for your diligence and the depth you've gone in to it.

JUDGE: Yes, well, that's very gracious of you, Mr. Looney, so I'll try to see that a transcript is made available.

REGISTRAR: And that we have a copy of your orders ... your judgment.

JUDGE: Yes, well, that's -- once the transcript is made available to me and I've made any minor corrections in it. Yes.

REGISTRAR: ... more Mr. Looney's portion ...

JUDGE: Well, I was going to come to that. Mr. Brady?

MR. BRADY: Two things, Judge. Firstly, in paragraph 10 of your judgment ... at one stage you say, "The defendants"; it's clear that, in fact, you meant to refer to Mr. Looney.

JUDGE: Yes.

MR. BRADY: Paragraph 10, towards the end of it.

JUDGE: Yes, yes. I'll check that, Mr. Brady; it's inevitably ...

MR. BRADY: And secondly I'm asking for costs, my lord.

…

MR. BRADY: Yes, Judge.

JUDGE: But otherwise you're entitled to costs in accordance with the event.

MR. BRADY: Yes.

REGISTRAR: So costs for the motion and the proceedings.

MR. BRADY: Yes.

JUDGE: Yes, yes, very good. So, I'll try to see that this, once I've corrected the transcript that's made available to you, it's sent you as soon as possible, and then you'll have an opportunity to consider your position. Thank you.

MR. BRADY: I'm obliged, Judge.

JUDGE: Thanks very much.")