

THE HIGH COURT**[2016\753P]****BETWEEN****FARRELL & KELLY****APPELLANT****AND****PETROSYAN & ORS****RESPONDENT****BETWEEN****CARMEL MCLOUGHLIN & ANOR****APPELLANT****AND****ACC LOAN MANAGEMENT LIMITED****RESPONDENT****EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 2nd day of March, 2016****Background**

1. This is a judgment arising from the issue of two sets of proceedings. Mrs. Carmel McLoughlin, as will be explained later, is the only participating claimant in the claim against ACC Loan Management ("ACC"), and the only effective respondent/defendant in the proceedings issued by Messrs. Farrell and Kelly, the Receivers.

2. Mrs. McLoughlin was accompanied by her son and daughter for the hearing of these applications. The law is well established that in the absence of legal representation by either solicitor and/or counsel, only a lay litigant may make submissions on the lay litigant's behalf. In exceptional circumstances the Court may ask or allow a "McKenzie Friend" to assist in communications between the Court and the lay litigant.

3. The Court expects legal representatives who are on the other side of contested applications involving lay litigants to summarise the applications and to open all relevant pleadings, affidavits and exhibits while helping the Court to focus on the issues between the parties. Suffice it to say that following the initial outline of the issues yesterday morning by Senior Counsel for the Receivers, I asked Mrs. McLoughlin whether she wanted herself or her son to reply to discrete questions from me about the actual questions to be decided.

The issues

4. The parties agreed that the following issues outlined by counsel for the Receivers were the subject of the claims in both sets of proceedings:

- a. Whether the Receivers could act in the proceedings in view of their Deeds of Appointment from ACC Loan Management Limited (ACC);
- b. Whether the name change of ACC Bank plc to ACC Loan Management Limited provided in some way, or effected in some way the operation of the charges pursuant to which the Receivers were appointed;
- c. Whether the sense of grievance felt by Mrs. McLoughlin over the outcome of talks with a Mr. Archbold of ACC in 1997, and given the ventilation of that sense of grievance in proceedings started in 2001, and which were compromised in 2010, had an invalidating effect on the entitlement of ACC to the properties which are the subject of the two sets of proceedings before the Court. For clarity purposes, the relevant properties are 56 Mary Street and 32-36 Wolfe Tone Street in Dublin.
- d. Whether there is some frailty or misconduct which requires the Court to set aside the terms of settlement signed by Mr. Jamie McLoughlin for Mrs. McLoughlin with Messrs. O'Sullivan and Murphy to give up vacant possession of 56 Mary Street that led to an order for the Sheriff issued by this Court on 2nd November, 2015.

5. Following the opening of affidavits and exhibits and a summary of the relevant law by counsel for the Receivers, I asked Mr. Jamie McLoughlin whether he had any interest in the relevant properties. The Court repeats its appreciation of Mr. McLoughlin's candour when he acknowledged that he did not have any legal interest in the relevant properties. In those circumstances I asked Mrs. McLoughlin to make whatever submissions which occurred to her then.

Mrs. McLoughlin

6. The following is a summary of Mrs. McLoughlin's points which I will eventually address:

1. ACC reneged on its representations to convert all the loans to herself and her late husband into a 20-year loan that would still be in existence, and which ought to deny ACC the effect of its charges and the appointment of the Receivers.
2. She was ignorant of the terms of settlement dated 6th May, 2010, signed by her then solicitor, who was also her solicitor for her role in respect of the interests of the estate of her late husband.
3. Her perceived breach of duty on the part of ACC in connection with offering and reneging on the loan terms and encouraging her to do business with the MOS partnership for the development of the relevant properties.
4. The effects of the economic collapse exacerbated the consequences of the perceived breaches of duty which,

according to Mrs. McLoughlin, included her separation from her late husband and the early death of her husband in 2007. Furthermore, Mrs. McLoughlin referred to her inability to exercise a buy-back option to purchase in the absence of the loan facilities,.

Determination

7. The following is the Court's determination. The alleged breaches of duty and failure to honour commitments on the part of ACC were ventilated in proceedings commenced by Mrs. McLoughlin and her late husband in 2001 under record number 2001/1243P. Those proceedings were compromised in terms of settlement dated 6th May 2010. In that regard Mrs. McLoughlin is now not able to relitigate those issues and there is a long line of common law authority to support the legal proposition which requires the Court to make this determination.

8. In regard to the serious allegation made by Mr. Jamie McLoughlin in his affidavit sworn as late as 23rd January, 2016, about the lack of authority of a solicitor to sign the terms of settlement dated 6th May, 2010, the Court observes the following:

- a. Mr. Jamie McLoughlin belatedly makes this assertion;
- b. It is nearly six years since the terms of settlement were executed and the professional reputation and integrity of the solicitor involved has been challenged in a most unorthodox and extremely delayed manner;
- c. No action was brought to set aside those terms which formed part of an order made by this Court arising from those terms.
- d. The judgment of Kelly J. in *Harrahill v. Kane* [2009] IEHC 322 succinctly sets out the position on pages 20 to 22 concerning the ostensible authority of solicitors and counsel which can be relied upon by opposing solicitors and counsel. It is noteworthy that the late thought to use former solicitors as a scapegoat arose in that case also.

9. In short, it is not open to Mrs. McLoughlin to rely on her son's apparent self-serving assertion and submission in his affidavit. Mrs. McLoughlin has failed to establish a serious issue to be tried in this regard and even if there is some prospect of such an issue arising, damages would be an adequate remedy. The Court emphasises that it strongly deprecates suggestions of professional misconduct which have never been put to professionals themselves. This Court has a constitutional obligation to vindicate the good names of all citizens and the right to fair procedures.

10. These rights should be known to Mr. Jamie McLoughlin and perhaps his mother given their clear ability to prepare affidavits and deal with the requirements of the legal process.

11. The Court fails to understand any issue which can be made in these proceedings about the settlement signed by Mr. Jamie McLoughlin with the MOS Partnership, who are not involved in these proceedings.

12. Mrs. McLoughlin, in her quest to wrestle back the relevant properties, has seized upon the findings of Cregan J. in *McCleary v. McPhillips* [2015] IEHC 591 delivered on 31st July, 2015, that deeds of appointment by ACC of receivers in that case were invalid by reason of the failure to have authorised signatories on the Deeds of Appointment. That judgment is under appeal. However, if this Court accepted that there is some omission on the part of ACC in these proceedings to have authorised the signatories to the deeds which appointed the Receivers here, that has been remedied by the resolution of the Board of ACC on 19th August, 2015. That resolution ratified the appointment of receivers which may have been invalidated by reason of any interpretation of the judgment delivered by Cregan J. in the *McCleary* case.

13. Clarke J. in *Kavanagh v. Bank of Scotland* delivered on 19th, March 2015, at paragraph 8.2, endorsed the view of Birmingham J. which stressed that the Bank there knew that an individual was acting as its agent and within its scope of authority. Applying that reasoning to the point sought to be advanced by Mrs. McLoughlin, I can see no issue arising for determination at a later stage in these proceedings about the validity of the appointment of the Receivers now.

14. The point about the change of name of ACC has no merit. A chargor or a chargee can change its name. Mrs. McLoughlin could have changed her name by deed poll and that would not have deprived her of the rights to seek representation in the estate of her husband.

15. The Companies Acts permit companies to change their names and their liability status and that is what has happened here. Mrs. McLoughlin does not even have a *prima facie* case to make if she wishes to pursue these proceedings on this particular point.

16. In view of all the above, the Court finds that there is no serious issue to be tried in relation to the claim made by Mrs. McLoughlin or in the defence to the claim for possession by the Receivers. If Mrs. McLoughlin, following further consideration of this judgment and other matters, thinks that there is some issue which may require to be tried, her remedy lies in damages which is effectively a bar to an interlocutory injunction, which is being sought here against the Receivers now.

17. Moreover, the only non-monetary prejudice which is advanced as purportedly persuasive in the interlocutory injunction application by Mrs. McLoughlin is the alleged effect of the actions of the Receivers on third parties who have not participated in these proceedings.

18. Mr. Anton Petrosyan has been served with these proceedings with copy documents and correspondence which have alerted him to the application before the Court by the Receivers. He has made no attempt to corroborate or support Mrs. McLoughlin's stance about the effects on occupiers of parts of the relevant premises.

19. Lastly, this Court is prompted to urge Mr. Jamie McLoughlin, in particular, and the Receivers to recognise the fire safety concerns for those accessing what appears to be a residential part of the relevant premises on the first floor. The Court is further persuaded to grant the injunction sought by the Receivers in order to secure compliance with the recommendations of the Fire Officer, which may emerge from the letter from the Receivers' solicitors to him dated 27th January, 2016.

20. It remains open to Mrs. McLoughlin to prosecute her claim for damages but the Court urges caution in that regard because of its finding earlier in this judgment about the absence of any clear serious issue to be tried.

21. In short, the Court refuses the relief sought in the Notice of Motion issued by Mrs. McLoughlin and her son filed in the Central Office on 25th January, 2016, and will grant the injunctions in the terms of paragraph 1 to 3 of the Notice of Motion issued on behalf of the Receivers on 28th January, 2016, with the Court noting the undertaking as to damages given by the Receivers in the affidavits filed.