THE HIGH COURT

[2023] IEHC 393

Record No. 2020/7827P

BETWEEN

TOM O'BRIEN, HILARY LARKIN AND PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

PLAINTIFFS

AND

PATRICK MCCMAHON (AS ADMINISTRATOR AD LITEM OF ANGELA MCMAHON, DECEASED)

DEFENDANTS

Judgment of Mr. Justice Brian O'Moore delivered the 10th day of July 2023

1. On the 6th March, 2023 I granted the plaintiffs judgment in default of defence against both defendants.

2. The proceedings were then listed in the List to Fix dates on the 31st March, 2023 for the purpose of finalising the reliefs to which the plaintiffs were entitled on foot of this default judgment. On that date, the solicitor for the defendants appeared in court and sought an opportunity to set aside the order which I had made on the 6th March. The defendants were given the chance to seek to do so, and directions were made in respect of this application. In accordance with these, the defendants issued a motion on the 21st April, 2023, returnable for the 15th May, 2023.

3. By that motion, the defendants sought the following orders:

> "(1) An order seeking to re-enter the Plenary action had herein.
>
> (2) An order allowing the defendant to file a defence and counterclaim.
>
> (3) Such further other order as this honourable court deems fit;
>
> (4) costs of the within application."

4. In truth, the application was one brought pursuant to O. 27, r. 15(2) of the Rules of the Superior Courts seeking to set aside the default judgment granted to the plaintiffs on the 6th March.

5. Order 27, rule 15(2) requires the court to be "satisfied that at the time of the default special circumstances (to be recited in order) existed to explain and justify the failure…" to deliver the requisite pleading.

6. The first question, therefore, to be determined is whether or not such special circumstances exist. It is further submitted to me by counsel for the plaintiffs that, even if such special circumstances exist, the defendants must show that they have a real ground of defence to the proceedings.

7. GN & Co., the solicitors for the defendant, responded to the order of the 6th March, 2023 with a letter of the 30th March. This letter seeks to explain the grant of the order for judgment in default by reference to the following factors: -

> (a) "We were instructed that our client had engaged a third party to negotiate a settlement with Pepper Finance Corporation DAC. In the circumstances we

believe that a settlement to our client would be the best result for all concerned and erroneously also thought that agreement was achievable and close."

This is no reason whatsoever not to have delivered a Defence, or not to have attempted to defend the motion for judgment in default of defence. The fact that negotiations were ongoing, a contention to which I will return, is no reason to ignore a motion brought on notice to the defendants seeking judgment against them.

(b) "We assumed, incorrectly, that your client would have made you aware of the ongoing negotiations. This was obviously not the case."

As I said, even if there were ongoing negotiations that does not preclude the bringing of a motion seeking judgment. That is particularly the case in these proceedings, where the statement of claim was delivered on the 9th May, 2022 and where the plaintiffs may well have wanted to bring on the case in the absence of any concluded settlement.

(c) "We accept that you did correspond with us, and we did not reply at the time in the hope that negotiations would bear fruit."

Again, this position is entirely untenable. This approach on the part of the solicitors, as set out in their own correspondence, suggest that a conscious decision was made not to respond to correspondence in respect of the outstanding defence as it was hoped that the proceedings would settle. In making this conscious decision not to engage in correspondence GN & Co. left their clients completely at the mercy of the negotiations. If the negotiations did not succeed, then the threatened motion for judgment in default of defence would issue and (if GN and Co. did not attend to resist the application for judgment) would proceed to the detriment of the defendants.

(d) "We were not in attendance on the 6th March due to the unfortunate circumstances of Covid in our office affecting staff at the time."

This explanation is to be so vague as to be effectively meaningless. It is not indicated who (or what sort of person in the office) contracted Covid. It is not explained how the contracting of Covid on the part of this individual prevented attendance at the hearing of the motion on the 6th March. It is not explained when the individual contracted Covid, or the extent to which they were absent from the office or capable of working from home as a result of having been infected with the virus. It is not explained why, if an outbreak of Covid had a direct effect on the person due to attend in court, a letter or email was not sent to the solicitors for the plaintiffs to notify them of that fact.

8. Peculiarly, the letter of the 30th March, 2023 states in addition:

> "We did have a defence drafted in relation to a discrete issue involving the receivers in the hope of avoiding protracted and costly litigation."

9. If, as this portion on the letter suggests, a defence was in fact drafted at the time the motion was threatened, (or, at the latest, the date the motion was heard) it is impossible to understand why a copy of that defence was not sent to the solicitors for the plaintiffs with a request the time be extended to allow the defence to be filed. It is also difficult to square this contention with the balance of the letter, which suggests that the solicitors for the defendant had hoped that the case would settle. If the solicitors were so confident the case was going to resolve that they did not even respond to correspondence, it is difficult to understand why they nonetheless went to the cost of drafting a defence. Having gone to that expense, it is even more difficult to understand why the defence was not made available to the solicitors for the plaintiffs prior to the hearing of the motion.

10. These bundle of reasons, taken individually or together, do not constitute "special circumstances" such as would justify the setting aside of the order of the 6th March.

11. The affidavit of Geoffrey Nwadike, grounding the current motion, does not carry the matter significantly further. Mr. Nwadike apologises "for what occurred", and indeed these apologies were repeated on a number of occasions by counsel for the defendants at the hearing of the motion. While these apologies are welcome, they do not in themselves go towards establishing the "special circumstances" which the rule requires.

12. Mr. Nwadike gives evidence about the ongoing negotiations in respect of the resolution of the dispute between the parties. In doing so, he puts forward a bundle of exhibits which, he says, show the engagement between a Colm Canning (described as a "Banking Mediator") who is acting for the defendants in their dealings with Pepper, the third plaintiff. These documents are, in the main, marked "without prejudice offer". On that basis they should simply have not been exhibited to Mr. Nwadike's affidavit. However, given that they were appended to the affidavit, counsel for the plaintiffs was understated in her objection to their admission. Instead, and as the plaintiffs pointed out during the course of the current motion, the emails show sporadic correspondence between Mr. Canning on the one hand and Pepper on the other hand between March 2022 and November of that year. The fact that these "negotiations" were neither constant nor current is illustrated by an email sent on the 16th May, 2023 by Mr. Canning summarising what he had been doing on behalf of the defendant. This email, heavily relied upon by counsel for the defendants, reads: -

> "In reference to above case, I confirm that dialogue and engagement with Pepper has been live since initial letter of authority sent to Pepper Asset Servicing on 1

> June, 2022. This has been extremely active on my part, however this is not the same with Pepper. I have sent multiple (circa 18 emails) to Mr. Seamus Dowling senior management of Pepper, to no avail. The single person in Pepper who does respond or acknowledge is Ms. Kathleen Keane. Ms. Keane simply passes enquiries on but does not follow up on same. I have circa 50 cases with Pepper and continue to be actually engaged from my side."

13. There could not be a more poignant description of a process whereby somebody engaged on behalf of the defendants is trying to attract the attention of Pepper for the purpose of conducting negotiations, but this has proved absolutely fruitless. The statement that this "dialogue and engagement" has been "extremely active *on my part*…" speaks volumes. Certainly, on the papers before me, it cannot accurately be said that, as of the issuing of the motion for judgment on the 8th February, 2023 (or, indeed, the hearing of the motion on the 6th March, 2023) there was anything resembling a meaningful negotiation going on between the relevant parties.

14. It is against this background that one must consider the averments of Mr. Nwadike to the effect that: -

(a) "I say on notice that talks were ongoing to settle the matters I thought it best to allow both parties an opportunity to reach an amicable agreement …" (para. 6 of the affidavit)

(b) "I ought to have ignored the attempts to bring resolution and continued with the court process…" (para. 7 of the affidavit)

15. As already said in the context of the letter of the 30th March, even if there had been negotiations of a more meaningful nature taking place between the parties, that was no

reason for GN & Co. to fail to deliver a Defence, to ignore correspondence and not to attend at the hearing of the motion. The position with regard to the hearing of the motion was taken somewhat further by Mr. Nwadike at para. 8 of his affidavit, which reads as follows: -

> "I say on the days leading up to the 6th March, 2023 staff in my office had Covid. I say an administrative error resulted in my non-attendance … I accept that had I had been in attendance I would have been in a position to inform the court of the settlement talks. Regretfully I was not in court for reasons deposed."

16. As with the correspondence emanating from GN & Co., the reference to "staff in my office" having Covid "on the days leading up to" the hearing of the motion is not fleshed out or given either detail or context. The "administrative error", which is not referred to in the correspondence of the 30th March or elsewhere in Mr. Nwadike's affidavit is not explained in any real way.

17. In her oral submissions, counsel for the defendants stressed the very difficult personal circumstances of the first defendant. She said that there was a crisis in his health at the end of March, as a result of which he was referred to a "Heart Consultant"; para. 7 of Mr. Nwadike's affidavit. Counsel also stressed the fact that the first defendant had lost close members of his family and was suffering a significant amount of pressure. Of course, Mr. McMahon is entitled to a high level of sympathy for the losses which he has suffered, and his personal health difficulties. However, these do not explain why it is that there was no attempt made deliver a defence or to defend the motion seeking judgment in default of defence. The only consequence which Mr. Nwadike describes arising from the health crisis to which the first defendant was subject is the fact that Mr. McMahon was not in a position to attend the offices of GN & Co. to swear an affidavit in support of the

current motion. However, that difficulty was surmounted by Mr. Nwadike swearing the grounding affidavit. The timing of the medical episode suffered by Mr. McMahon, in itself, makes it plain that it was not the reason for the failure to deal with the motion for judgment. Equally, Mr. McMahon's medical difficulties (which arose after the default judgment was ordered) cannot have been the reason why a defence was not filed.

18. Mr. McMahon himself swore an affidavit in support of the motion on the 17th May, 2023. On the question of negotiations, Mr. McMahon exhibited the email from Mr. Canning which I have already set out in detail. He goes on to say that he intends to make a revised offer to Pepper "as I now have the funding to do so"; the previous offer was to discharge 65% of the debt, which was rejected. Mr. McMahon says that his circumstances "both mental and physical" had deteriorated over the previous 18 months, that he is on ongoing medication, and that there has been a sharp increase in his blood pressure. Mr. McMahon exhibits an undated medical certificate from a doctor in Castleknock Village Medical, which stated that Mr. McMahon "right now needs plenty of rest and recuperation and is not in a fit condition to manage difficult situations." The clinician involved does not explain, nor does either Mr. Nwadike or Mr. McMahon, how it is that his medical condition (even after his health crisis of the end of March 2023) in any way prevented him from giving instructions to prepare and deliver the defence and counterclaim which it is now sought to plead in these proceedings. The real issue appears therefore not to be Mr. McMahon's health difficulties, but rather the fact that attention was not paid to the need to engage with the correspondence from the plaintiffs' solicitors prior to the issuing of the motion, or to deal with the motion for judgment after it was issued.

19. Having considered carefully all of the evidence and argument put before me, I have decided that the defendants have not made out any special circumstances which explain or justify the failure to deliver a defence within the requirements of the rules or to meet the motion which resulted in the order of the 6th March, 2023. For that reason alone, the current application cannot succeed.

20. There is, however, another reason why the current motion should fail. The proposed defence is one which is simply unstateable, and therefore permitting the defendant to plead it would be pointless.

21. The letter of the 30th March from GN & Co. states that the defence drafted involved "a discrete issue involving the receivers …". That is a remarkably loose way to describe a specific and focused issue, but the matter is put somewhat further in Mr. Nwadike's grounding affidavit. At para. 18 of that affidavit, Mr. Nwadike swears: -

> "I say that when seeking consent from the plaintiffs to file the defence it was outlined that the defence would be grounded upon one net point which was on the position of a deed of appointment of the Receivers. I say and I believe the deed of appointment is null and void and contractually untenable … I say that the proposed Defence is most uncomplicated and will require nominal court time to determine mainly through legal submissions. I say it places no prejudice on the Plaintiffs. …"

22. Of course, the plaintiffs would be prejudiced by losing the judgment in default that they already have and would be further prejudiced by being put to the cost and effort of meeting a defence which is (as described to the court) bound to fail.

23. In the course of these proceedings the plaintiffs sought and obtained from Stack J. interlocutory orders in respect of properties on which the defendant's debt to the third plaintiff was secured. In her conclusion, Stack J. stated (at para. 37, judgment delivered on the 8th April, 2022): -

> "In my view, the plaintiffs have established a strong case that they are likely to succeed at trial in establishing their entitlement to enter into possession of the properties, receive the rents paid by any tenant in occupation of them, and ultimately to sell them."

24. One of the arguments deployed by the defendants in resisting the application for interlocutory relief was the validity of the appointment of the receivers. These arguments are considered at paragraphs 20 – 27 inclusive of the judgment of Stack J. The argument is summarised by Stack J. at para. 20 as follows: -

> "… The defendant said that the Joint Receivers were not properly appointed because the Deed of Appointment refer to their appointment as 'receivers' only, and not as 'receivers and managers."

25. This argument, which gained some traction as a result of an *obiter* comment by McDonald J. in *McCarthy v Moroney* [2018] IEHC 379 was dismissed in the course of a comprehensive judgment by Murray J. in *Fennell v Corrigan* [2021] IECA 248. The view of Stack J. (at para. 22 of her judgment) was that *Fennell v Corrigan* dealt "definitively with this issue". I agree entirely. In my own judgment in *Kearney v Bank of Scotland [2022] IEHC 344* I came to exactly the same view. GN & Co. represented Mr. Kearney in that case, and would therefore have been particularly aware of the lack of merit in the

'receiver and manager' argument, as well as the need to distinguish the current proposed Defence from the decision of Murray J.

26. The proposed narrow point of defence, therefore, as set out in the argument before Stack J. and as summarised by counsel in the hearing before me, is on which simply cannot succeed. It might be that an argument could have been mounted to the effect that the relevant deed of mortgage and charge in these proceedings differs materially from the deed of mortgage and charge in, say, *Fennell v Corrigan* or that considered in this court by Allen J. in *McCarthy v Langan* [2019] IEHC 651. No attempt whatsoever was made to distinguish the current security instruments from those which were considered in either *McCarthy,* in *Fennell,* or in *Kearney.*

27. While counsel for the defendants was initially non-committal about the precise scope of the defence upon which the defendants wished to rely (should they be allowed to deliver a defence and counter claim) she ultimately accepted quite correctly that the "receiver and manager" point was the argument which the defendants wished to plead. Counsel also referred to the fact that any appointment of the receiver (or joint receivers) be one that had to be made in writing. That again is something considered by Stack J. at the hearing before her where (at para. 27 of her judgment) the judge expressly refers to the need for the appointment of a receiver or receivers to be "in writing". She then makes the following finding: -

"In each case, a Deed has been executed, and signed for and on behalf of Tanager by Mr. Karl Smith, who describes himself on the face of the Deed as 'attorney and authorised officer'. Mr. Smith has sworn an affidavit in this application in his capacity as director of Tanager. He does not explicitly refer to the execution of these Deeds. However, nothing

has in fact been put in issue and this argument was made very much at the level of theoretical possibility rather than seeking to point to any facts which would suggest formalities had not been complied with. There is a presumption of due execution and nothing has been done to dislodge it in this case. I am accordingly satisfied that the Joint Receivers are validly appointed."

28. In fact, the argument at the level of "theoretical possibility" was not made on behalf of the defendants either on the papers before me or the oral submissions made to me. It appears from the judgment of Ms. Justice Stack that the evidence before her included a written instrument appointing receivers, and that no infirmity (however technical) was found to exist in respect of these deeds of appointment. Again, it would have been quite open for counsel for the defendants to make submissions as to why (in this case) there was a technical or substantive flaw in the instruments appointing the joint receivers. This was not done in Mr. Nwadike's affidavit, in Mr. McMahon's affidavit, in the oral submissions of counsel or, indeed, in the proposed draft defence and counter claim itself. The only level of precision and detail in the proposed pleading is to be found in the relief sought in the counter claim of the defendant, which reads: -

(1) "The defendants seek a Declaration that the first and second named plaintiffs were invalidly appointed over the property of the said defendant."

29. In a situation where only one discrete point (essentially of law) is sought to be raised on behalf of the defendants, it is incumbent on the defendants to explain to the court exactly what that point of defence is. Until the concessions made by counsel in her oral submissions, the particular point which the defendants wanted to raise has been left vague.

30. In addition, and contrary to the affidavit of Mr. Nwadike – already quoted at para. 21 of this judgment – further relief is sought by the defendant in the proposed pleading in the following form: -

> "The defendant seeks a declaration that the first named plaintiff whose position has been ascertained as a result of the cross-border merger and the Irish regulations is unable to provide the same entitlement as offered by the original lending institutions and therefore the retrospective legislation relied upon by the first named plaintiff by the Irish regulations grounding its position as charge holder has placed prejudice upon the said defendants and are therefore unconstitutional when applied retrospectively."

31. The basis for this relief is set out nowhere in the proposed draft defence and counter claim. The "first named plaintiff", which it is pleaded is relying upon retrospective legislation while "grounding its position as charge holder" cannot be Mr. O'Brien (the actual first named plaintiff) as he does not have any position as charge holder. It is more likely that reference is to the third plaintiff, Pepper. It is nowhere explained on behalf of the defendant how this further declaration is one to which they are entitled, at least in the motion before me. It is deeply unfortunate that this relief has been parachuted into the proposed pleadings in defiance of the evidence of Mr. Nwadike (and his assurance to the court) that the defendants wish to argue "one net point". In any event, no real efforts have been made to explain how this aspect of the composed defence arises, to ground it in any legislation or in any legal argument, or even to plead it out in a coherent form. In addition, I take it from the submission of the defendants' counsel that there is only one live point of defence, which she has identified as the "receiver and manager" issue. On the basis of that concession, there is no need to consider any other possible argument.

32. I therefore refuse the motion seeking to set aside the order of the 6th March, 2023. I do so on the basis that no special circumstances, within the meaning of O. 27, r. 15(2) have been established on behalf of the defendants. I also refuse the application on the basis that the one ground of defence which it is proposed to plead is one which, on the authorities, cannot succeed.