THE HIGH COURT

[2023] IEHC 653

2013/12852P

BETWEEN

SAMANTHA SCRIVEN

PLAINTIFF

AND

GERARD SCRIVEN

(AND BY ORDER)

FENITON PROPERTY FINANCE DAC,

LUKE CHARLETON

AND

MICHAEL COTTER

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 23rd day of November 2023

1. This is my judgment on an application made by the second, third and fourth defendants for the following orders: -

> "1. An order pursuant to O. 17, r. 4 of the Rules of the Superior Courts (as amended) that these proceedings be carried on between the existing parties as continuing parties and Pepper Finance Corporation (Ireland) DAC as an additional defendant and counterclaimant;
>
> 2. In the alternative an order pursuant to O. 15, r. 13 of the Rules of the Superior Courts (as amended) with the name of Pepper Finance Corporation (Ireland) DAC be added as an additional defendant and counterclaimant to these proceedings …"

Further adjectival orders are also sought.

2. At the hearing of the application, counsel for the moving parties emphasised the fact that the proposed additional defendant ("Pepper") had been registered with the appropriate statutory agency (then known as the Property Registration Authority - "the PRA") as the owner of charges over the properties which constitute the subject matter of the current litigation. Counsel argued that, whatever the differences were between the parties about the level of evidence produced to show that Pepper had acquired the relevant loans or securities, Pepper should nonetheless be added as a party to these proceedings given that its interest as owner of the relevant charges would be challenged by the claim made by Ms. Scriven against the existing defendants.

3. I will arrange this judgment under the following headings: -

(a) These proceedings;

(b) The position taken by the parties;

(c) Decision.

<u>These proceedings</u>

4. These proceedings were issued on the 22nd November, 2013. Initially, the only defendant was Gerard Scriven. By order of the 16th November, 2016, the existing second, third and fourth defendants were joined as defendants to the claim. In an amended statement

of claim dated the 26th July, 2019, and delivered on behalf of the plaintiff, it is pleaded that the plaintiff is "the lawful spouse…" of the first defendant, Mr. Scriven. It was also pleaded that the plaintiff's "marriage is in difficulty and some of this difficulty can be ascribed to these instant proceedings."

5. The amended statement of claim goes on to plead that there are debts due by Mr. Scriven to Ms. Scriven, and that these arise "from agreements reached between the plaintiff and the first named defendant, from monies advanced by the plaintiff to the first named defendant and also arising from work carried out by the plaintiff for the first named defendant while she was in his employment."

6. Importantly for the current application, the amended statement of claim goes on to assert that: -

> "It was at all times agreed between the plaintiff and the first named defendant that in return for the said credit i.e. monies advanced by the plaintiff to the first named defendant, and unremunerated work, that the plaintiff would be entitled to the first named defendant's entire beneficial interest in the properties specified in the First and Second Schedule of the plenary summons herein (the Properties)."

7. The statement of claim further asserts (at para. 19): -

> "By reason of the matters aforesaid, the plaintiff asserts that the second named defendant has no legal title and the mortgages/charges executed by the first named defendant in favour of BOSI and as such, the second named defendant has no claim or entitlement to the properties and is wrongfully in possession thereof."

8. It is then pleaded that the appointment of the third and fourth defendant as receivers over the properties is invalid and unlawful.

9. It is clear that the amended statement of claim delivered on behalf of the plaintiff makes claims which fundamentally affect the position of the second, third and fourth named

defendants with regard to the properties covered by these proceedings. That is put beyond doubt when one considers the actual reliefs claimed by the plaintiff. The relevant reliefs, for the purpose of the current application, are as follows: -

> "3. An order declaring that [the plaintiff] is the rightful and lawful owner of the properties the schedules attached to the Indorsement of Claim.
>
> 4. An order declaring the agreements (if any), between the first defendant and the second defendant cancelled and have no legal effect …
>
> 15. An order directed to the chief registrar of the Property Registration Authority to register the plaintiff as sole owner of such of the properties as are registered in the Property Registration Authority free from encumbrances."

10. In their defence and counterclaim, the second, third and fourth defendants assert that Mr. Scriven (the first defendant) was at the time of the pleading indebted to the second defendant on foot of loans taken out in April, July and August 2007 in the sum of €2,500,000, €3,000,000 and €1,200,000 respectively. It is further pleaded that Mr. Scriven granted to his financier at the time "a first rank in charge over each of the properties listed the plaintiff's indorsement of claim in these proceedings …", that the ownership of the loans and the relevant charges transferred from BOSI to Bank of Scotland plc on the 31st December, 2010, and the loans and relevant charges were further transferred to the second defendant by deed of assignment dated 20th November, 2015. Importantly, it is pleaded (at para. 23 of the defence and counterclaim of these defendants) that: -

> "23. Each Relevant Charge is registered on the folio for the associated Relevant Property, and the second named defendant is the registered owner of each relevant charge."

11. The defence to counterclaim reads as follows: -

> "The Plaintiff is a stranger all of the matters pleaded at paragraphs 19 to 28 of the Counterclaim of the Defendants and the Defendants and each of them are full on full proof (*sic*) of each of the matters pleaded therein."

12. That is where the pleadings rest. The current application is brought grounded on an affidavit of Lorraine Fairley, a senior portfolio manager with Pepper. In this affidavit, Ms. Fairley gives evidence about the transfer of the loans and the charges to Pepper. This evidence has been severely criticised by Mr. Scriven, and I will briefly describe the nature of these criticisms later in this judgment. However, importantly, Ms. Fairley gives evidence that the registered ownership of the relevant charges has been transferred to Pepper "and this is in the course of registration" - see para. 13 of Ms. Fairley's affidavit.

13. In a second affidavit filed on behalf of Pepper in support of the current application, Mr. Seamus Dowling (senior operations manager with Pepper) swears that: -

> "At paragraph 7 of Ms. Fairley's affidavit, each of the twelve relevant properties were listed, and exhibited the folio for each. At paragraph 13 of Ms. Fairley's affidavit, she noted that in addition to the assignment deed, Feniton had executed and delivered a Form 56 to transfer ownership of the relevant charges to Pepper, which was then in the course of registration. That registration has now been completed for all twelve Relevant Charges, as may be seen in the updated copied folios for the relevant properties (listed in the following table) upon which, marked in the manner set out in that table in each case, I have signed my name prior to the swearing hereof."

While there is, at least on the face of it, a significant dispute in these proceedings about the assignment of either the loans or the security to Pepper, there is no dispute about the fact that the ownership of the charges by Pepper is now registered in the Land Registry in respect of each of the properties which are the subject matter of Ms. Scriven's claim.

14. In my view, this is critical. Given the reliefs sought by Ms. Scriven in these proceedings, it would be impossible for them to be properly considered by this court without the joinder of Pepper. In particular, the final relief sought by Ms. Scriven (to the effect that she is the lawful owner of the relevant properties free of any encumbrance) is one on which Pepper is entitled to be heard. In that regard, counsel for the moving parties places reliance upon the passages in *Delany & McGrath On Civil Procedure* (4th Edition) at paras. 6.68 and 6.74. The authors state (in the first of these paragraphs) that: -

> "Generally an order will only be made joining a party as defendant against the wishes of the plaintiff pursuant to Order 15, rule 13 in exceptional circumstances."

15. The authors go on to refer (in the second of the quoted paragraphs) to the judgment of Ryan J. in *Persona Digital Telephony Limited v Minister for Public Enterprise* [20214] IEHC 78 in the following terms: -

> "Ryan J. said there was no question about the applicant's centrality to the fundamental issues involved in the proceedings that it was 'impossible' to think that the actions could proceed to a conclusion and which all the questions involved would be factually and completely decided without his being a leading participant".

He added that it was also difficult to conceive how his interests, "whether legal, proprietary or as to good name" would not be materially affected by the outcome of the litigation. "Ryan J. further stressed that 'It is clear that there must be very exceptional circumstances before the choice made by the plaintiff as to whom to sue will be interfered with by the addition of another defendant", although he stressed that the rule envisages that the court will make a decision that is not dependent on the consent of the plaintiff. He rejected the argument that "The constitutional right to litigate" was threatened by the jurisdiction conferred by O. 15, r. 13 and said that the plaintiff's right to sue had to be balanced against the interests of others and the requirements of justice. As Ryan J put it;

"The right to decide whom to sue is not an absolute right and the entitlement of a party to retain tactical advantages similarly, are even more subject to being set aside or adjusted to take account of other vital considerations".

16. I accept the submission made on behalf of the moving parties that this is an exceptional situation, in that Pepper is now the registered owner of the charges which Ms. Scriven seeks to have set at naught. Given that, pursuant to s. 31 of the Registration of Title Act, 1964, the register (on which Pepper's interests appear) is conclusive evidence of its contents, to paraphrase the language of Ryan J. (as he then was) the legal and proprietary rights of Pepper (arising from these registrations) would be materially affected by the outcome of the litigation should Ms. Scriven establish her claim to the properties free from incumbrances.

Position taken by the parties

17. Both in the motion papers and in the oral presentation before me, counsel for the moving parties relied upon the provisions of O. 17, r. 4 and O. 15, r. 13. Notwithstanding two brief passages in his oral submission stressing the O. 17 application as opposed to the O. 15 application, it is clear when reading the papers as a whole that the O. 15 application was not at any time abandoned by the moving parties. Indeed, the requirement under O. 15 to exceptional circumstances (referred to in one of the passages from *Delany and McGrath* contained in the applicant's legal submissions) was expressly addressed by Mr. Scriven in his submission to the court.

18. The position of Ms. Scriven as plaintiff to these proceedings, was stated by her solicitor to be "neither objecting or consenting …". However it is fair to say that Ms. Scriven's solicitor was not favourably disposed towards the application to draw in Pepper. He was sceptical that the documentation actually establsihed the acquisition of the relevant loans and charges by Pepper, and was uncomfortable about the costs risk which would arise from the joinder of a further party to the proceedings. However, on that last point it was accepted by

Ms. Scriven's solicitor that an appropriate costs order could be made (at the end of the proceedings) in the event that Pepper should never have been joined as a party in the first place, either because they had not acquired the interest that they claimed to have acquired or for any other relevant grounds.

19. The position of Mr. Scriven, as the first defendant, was far more trenchant. He stressed what he claimed were contradictions between the affidavit of Ms. Fairley and the affidavit of Mr. Dowling both (as I have indicated earlier in this judgment) sworn on behalf of Pepper. He raised the argument that a credit servicing agent (which is what he says Pepper is) can neither appoint receivers nor participate in the novation of receivers already appointed. He makes this submission by reference to the Credit Servicing Firms Act, 2015. He submits that there is no evidence of "relevant loans or a transfer of possible data in Ms. Fairley's affidavit…". He complains about the extent of the redaction of the documentation relied upon by Pepper, and he also made submissions based on the splitting of legal and beneficial interest during the course of certain of the transactions.

20. This account of various arguments raised by Mr. Scriven gives a flavour of the nature of his opposition (both in his affidavit and in his written submissions, as well as his oral presentation to the court) to the application that Pepper be joined as a party to the proceedings. As was accepted by Ms. Scriven's solicitor, and not seriously disputed by Mr. Scriven, the bar to be met by Pepper on the application under O. 17 is a low one. In as much as there is potentially any merit to the arguments made by Mr. Scriven as to why Pepper should not be joined as a party pursuant to O. 17, these appear to me to be matters for the trial of the action as opposed to the current application. For example, the issue raise by Mr. Scriven about the impact of the Credit Servicing Firms Act, 2015 is one that is tailor made for the trial, it is not one to be determined on applications such as this. However, it is also

important to note Mr. Scriven's responses to two questions raised by me during the course of his submission.

21. These two questions were: -

(a) given that Pepper is the registered owner of the charges, should they not be a party to the proceedings in light of the claims made by the plaintiff;

(b) as far as Mr. Scriven is concerned what adverse impact could there be on him as a result of the joinder of Pepper?

During the course of Mr. Scriven's submissions, I asked: -

> "But if you take Mr. Whelan's point that Pepper is the registered owner of the charges and, clearly, that's an essential role to play given the claim made by Mrs. Scriven in the case. Don't Pepper have to be in the case if only to address that fact?
>
> Mr. Scriven: My opposition to Pepper coming into the case is not for the benefit of the plaintiff. My opposition is that I felt there was a capacity for me - and Mr. Whelan did actually reference it - where I have engaged extensively with the plaintiff to settle these proceedings, but where now, a number of years on, Feniton are here, are not trying to exit. We're now in a set of proceedings with defendants, me being the first defendant. Mr. Charleton, a Receiver, as a defendant. Under the Supreme Court undertaking that he had to give there - he is only entitled to collect rent or has been for the last number of years. Mr. Cotter is retired and there is a deed of discharge even though he is still a part of the proceedings. Feniton, who want to stay in the proceedings, are in liquidation, and one of the queries is: why are Legado not here looking to join?"

22. The continuation of the existing defendants was addressed by Mr. Whelan in the reply, where he indicated that Mr. Scriven had delivered notices of indemnity and contribution

against these defendants, and there would therefore have been difficulty in seeking to release them from the proceedings. In as much as Mr. Scriven suggested that the joinder of Pepper would compromise his ability to settle the proceedings, that seems to make little sense. While it is the case that Mr. Scriven clarified (later in his submission) that he was talking of settling with Ms. Scriven, that focus is unreal given that there are other parties who claim an interest in the relevant properties. As to the joinder of Pepper, it seems to me that including in the action a party which (rightly or wrongly) claims to have acquired the debt would ensure that every party asserting an interest in the properties would be focused on this claim, which is likely to make settlement easier rather than harder.

23. The status of Pepper as the registered holder of the charges was taken up again with Mr. Scriven a short time later. I asked: -

> "Well Mr. Scriven we're all focused a great deal on the application under Order 17. There's also an application under Order 15, I think, which is that Pepper is an appropriate party to the proceedings. Given that they're registered charge holders, doesn't that make them appropriate parties to the proceedings?"

Having parried the question somewhat, Mr. Scriven answered: -

> "And I don't want to be disagreeable. What I am saying is that if they've come in declaring they are a credit servicing firm then they are not in a position to be even owning the charge."

24. This completely evades the question put to Mr. Scriven. Notwithstanding the provision of his affidavit, his oral submissions and his written submissions (which ran to over 6,000 words) Mr. Scriven has put up no coherent submission as to why Pepper should not be joined as an additional defendant to this claim given its status as the registered owner of the charges which form a central part of these proceedings. The argument contained in Mr. Scriven's

submissions (that the charges registered in Pepper's name do not necessarily indicate anything about the underlying debt) makes no sense. The fact is that Pepper is the registered owner of the charges, and the action brought by Ms. Scriven seeks to declare the relevant properties free of encumbrances. Equally, while it is not in any way influential in deciding this application, I note that Mr. Scriven has provided any plausible reason as to why he has gone to such lengths to resist the joinder of Pepper. The reason offered by Mr. Scriven (which is that he would find settlement more difficult) is not credible. A more likely reason is that his resistance to what should be a fairly straightforward application (whichever way it is decided) has resulted in a motion which has caused considerable delay in bringing this action to trial. This delay is, in turn, frustrating enforcement measures being taken against Mr. Scriven in respect of very substantial sums borrowed by him which he has not yet repaid.

Decision

25. I have decided that, given its status as the registered owner of charges in respect of the relevant properties, Pepper should be joined as a co-defendant to these proceedings. This will be done pursuant to O. 15, r. 13. To use the language of that rule, the presence of Pepper is "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter …" In coming to this decision I have considered carefully all of the materials put before me in the original Motion Booklet (to include the written submissions of the moving parties) and subsequent documentation (to include the written submissions of Mr. Scriven).