THE HIGH COURT

CIRCUIT APPEAL

[2024] IEHC 118

Record No.: 2018/ 255 CA

Between:

MARS CAPITAL IRELAND D.A.C.

Plaintiff

and

JAMES HUNTER

Defendant

JUDGMENT of Ms. Justice Emily Farrell delivered on 29th February 2024

1. This is an application by Mahon Sweeney Solicitors LLP, the solicitors for the Defendant, for an order under section 3 Legal Practitioners (Ireland) Act 1876 for a declaration that that firm is entitled to a charge over the costs awarded to the Defendant as against Mars Capital Ireland D.A.C. (the predecessor in title to the Plaintiff) by Power J. on 27th January 2020.

2. The parties agree that I should make an Order substituting Mars Capital Finance Ireland D.A.C. as the Plaintiff in these proceedings, and I shall make that Order. Mars Capital Finance Ireland D.A.C. is the successor of Mars Capital Ireland D.A.C.. The original plaintiff in these proceedings was Irish Nationwide Building Society (INBS). A number of orders have been made substituting the plaintiff in these proceedings by reason of the sale of the loan and security, and/or merger of the plaintiff into Mars Capital Finance Ireland D.A.C..

Background and Procedural History

3. It is common case that the Defendant was declared bankrupt in the UK in 2004, which was before the creation and registration of the charge the subject of these proceedings. The INBS opted, as it was entitled to do, to rely on its security rather than abandon it and prove in the Defendant's bankruptcy. The INBS instituted proceedings for

possession of the lands secured by the charge on the two folios. It did not name the Trustee in bankruptcy as a defendant. The order sought was a personal one against the Defendant. Similarly, the INBS sought the costs of the proceedings against the Defendant personally, not his Trustee.

4. An order for possession was made in favour of INBS on the 11th January 2010.

5. An application was brought to substitute Mars Capital Ireland D.A.C. for the plaintiff in the proceedings, and for leave to issue execution in respect of the order for possession. The Circuit Court made an order on 12th June 2017 substituting Mars Capital Ireland D.A.C. as plaintiff and the application for leave to issue execution was adjourned to 27th July 2017 and subsequently to 14th February 2018. The Plaintiff did not appear on that date, nor on the subsequent date of 26th June 2018, and the application was struck out on that date.

6. The Plaintiff then appealed that "strike out" to the High Court. On 27th January 2020, Power J. held that there was no decision of the Circuit Court capable of being appealed to the High Court as the Circuit Court had neither heard nor determined an application: [2020] IEHC 192. Therefore, she dismissed the appeal and the costs of the appeal were awarded to the Defendant. An application for a stay on the order for costs was refused by Power J. No application was made to permit the set-off of that costs order as against the previous costs order in favour of the Plaintiff.

7. The sum of €12,000 has been agreed in respect of the Defendant's costs of that appeal.

8. The Plaintiff brought a further application for leave to issue execution. This application was granted by the Circuit Court on 21st October 2021, subject to a stay of six months. That order was appealed to the High Court by the Defendant. That appeal was dismissed by Simons J. on 17th June 2022, with an Order for the costs of the appeal in favour of the Plaintiff, to be adjudicated in default of agreement. No application was made to allow for the set-off of that costs order as against the earlier costs order.

Position of the parties

9. The Defendant's solicitors, Mahon Sweeney Solicitors LLP maintains that they should be entitled to a charge over the costs order despite the Defendant's bankruptcy by reason of having represented the Defendant in the Plaintiff's appeal determined by Power J. on 27th January 2020. They say that the costs order can properly be characterised as "property recovered or preserved" as a result of the appeal, and that it was recovered through the instrumentality of their services.

10. In correspondence, the Plaintiff stated that, in accordance with its asserted right to set-off, it would credit the agreed sum of €12,000 against the full balance of the debt due and owing by the Plaintiff to the Defendant. As I have said, no application had been made for a set-off and the Plaintiff now accepts that it is not entitled to set the costs orders off against the debt or costs orders made in its favour, unless there is an order of the Court to that effect. At paragraph 15 of the first affidavit sworn on behalf of the Plaintiff, it is accepted that the Court has a discretion which may be exercised in favour of the Defendant's solicitor, but the Court was urged not to do so.

11. Counsel for the Plaintiff confirmed that its principal argument remained that it should be allowed a set-off, as the Plaintiff is owed a significantly greater amount of money than the €12,000 due to the Defendant. However, in its second affidavit, the Plaintiff has contended that the court must refuse the relief sought by the Applicant for a different reason, that is the Defendant's status as a bankrupt. The deponent avers at paragraph 12 of her second affidavit that "*the Costs Order sought to be enforced in this application is not vested in the Defendant and is vested in the Defendant's bankruptcy estate*". I note that the deponent relies on the contents of an email from the firm which was appointed as the main insolvency practitioner for the Defendant, rather than any personal expertise in relation to UK Law.

12. The Plaintiff has appropriately withdrawn an initial objection based on the jurisdiction in which the application has been brought. It is clear from *RHS Energy Limited v. ES Energy Limited* [2019] IECA 146 that it is appropriate to bring the application in the High Court, which is the court that made the order for costs the subject of the application.

13. Another issue was raised by the Plaintiff regarding service of the application on the Defendant, who remains a client of the Applicant firm. An affidavit has been sworn by Sean Mahon, Solicitor of Mahon Sweeney Solicitors LLP, who states that he served the Defendant with a copy of the application and informed him of each adjourned date. I accept the submission made by the Plaintiff that this affidavit of service would not be sufficient for service of a motion by an opposing party, as no evidence of the service by registered post has been exhibited. However, not only is the deponent the Defendant's solicitor, he has clearly averred that he spoke with the Defendant since serving him with the application for the purposes of informing him of the adjourned date. I am satisfied that the Defendant is sufficiently aware of the application.

14. There is no evidence of service on the UK Trustee in Bankruptcy, but it is clear from the second affidavit sworn on behalf of the Plaintiff that the Trustee is aware of this application.

The Bankruptcy of the Defendant

15. As I have said, the Defendant was declared bankrupt in the UK (England and Wales) in 2004. It is not in dispute that the Defendant's bankruptcy in the UK was recognised in the State under Council Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings. This Regulation was repealed and replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

16. It is submitted on behalf of the Applicant that the costs order is properly acquired after adjudication of bankruptcy and also that they are applying to enforce an "*in rem* security interest" in the State. They refer to Article 5(1) of the Regulation of 2000 and section 44 of the Bankruptcy Act, 1988 (the Irish Act) (Article 5(1) of the Regulation of 2000 is recast in the same language in Article 8(1) of the Regulation of 2015). As such, the Applicant submits that the costs order would only vest in the Official Assignee *if and when he claimed it*: section 44(5) of the 1988 Act.

17. The Plaintiff contends that, as the costs order was made since the withdrawal of the United Kingdom from the EU, UK bankruptcy law is applicable but concedes that there is no evidence of UK law before the Court. Whilst an email from a UK qualified insolvency practitioner has been exhibited, this does not elevate the contents of that email to the status of evidence. The email states that

> "*…properties form part of the bankruptcy estate and in the event the properties are sold, the net sale proceeds would vest as an asset in Mr Hunter's bankruptcy estate.*
>
> …
>
> "*any monies received by him could be considered to be an after acquired asset and claimable by the Trustee in Bankruptcy. Accordingly, should the costs of €12,000 be awarded, they fall under the provisions of s307 of the Insolvency Act 1986 and are claimable by the Trustee in bankruptcy*."

18. Notwithstanding this difference, ultimately the parties are at a consensus, albeit by reference to different national laws, that the right to the €12,000 agreed as due under the costs order of 27th January 2020, does not form part of the estate of the bankrupt unless (at the very least) it has been claimed by the Trustee in Bankruptcy. The Applicant bases this view on Irish law, the Plaintiff on its understanding of the UK law. I note that it has not been asserted, whether in the affidavits sworn on behalf of the Plaintiff, the email from the UK insolvency practitioner or otherwise, that the Defendant's Trustee in Bankruptcy has claimed an entitlement to money due under the costs order the subject of this application. Secondly, the Plaintiff has not put evidence before me that a simple assertion of a claim by the Trustee to the benefit of the costs order could defeat the application before me. Therefore, it is not necessary for me to resolve the question whether or not Irish law is the applicable law.

19. The Plaintiff also contends that in bringing the application, the Applicant firm seeks to change its status as an unsecured creditor of the bankrupt to a secured and/or preferential creditor. The patent purpose of an application under section 3 of the 1876 Act is to allow a solicitor to obtain a charge over property retained or preserved in proceedings through the instrumentality of the solicitor. This clearly applies even when the client is insolvent: e.g. *RHS Energy Limited v. ES Energy Limited*.

20. Furthermore, I accept the Applicant's argument that the Plaintiff's attempt to rely on the supposed rights of the Trustee is a classic *jus tertii* argument: an assertion of a right on behalf of a third party who has not asserted it. It also seems inconsistent with the Plaintiff's position in obtaining an order for costs against the Defendant personally. The Plaintiff maintains that the Defendant is liable for its costs and those of the original plaintiff in the proceedings. It can hardly assert that the Defendant is personally liable to it, but nonetheless, it can have no liability to him in his own right.

Section 3 of the Legal Practitioners (Ireland) Act 1876

21. Section 3 of the 1876 Act provides as follows:

> "*In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit matter or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit matter or proceeding has been heard or shall be depending to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit matter or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs charges and expenses out of the said property as to such court or judge shall appear just and proper;* " [remainder of the section omitted].

22. It is clear from authority that an order may be made under section 3, in respect of a costs order that had been in favour of the solicitor's client : *Lett & Co. Ltd. v. Wexford Borough Council* [2015] IESC 24, [2016] 1 I.R. 385; *RHS Energy Limited v. ES Energy Saving Systems Limited & Ors* [2019] IECA 146; [2020] 1 I.R. 799.

23. The purpose of section 3 was considered in both of these cases – in *Lett & Co,* McKechnie J. explained that section 3 offered *"protection to solicitors in seeking*

remuneration for work undertaken on behalf of a client in their professional capacity which had the effect of obtaining or acquiring some benefit or advantage (for the client), in the sense of leading to the recovery or preservation (for him) of some item of property." (para. 22)

24. McKechnie J. held that section 3 was grounded on "*equitable considerations, the equity being that professional efforts which secure, either by acquisition or defence, an asset on behalf of a client, should not, without contrary agreement, go unrewarded*". (para. 23.)

25. That the declaration, which may be granted under section 3, may be granted in respect of taxed costs is clear from *RHS Energy Limited*. Baker J. held that the right pursuant to section 3 is "*a right to seek that to have costs secured, and is akin to, but not identical to, a lien*." (para. 38.) She held that "*All that is required is to establish a link between an asset recovered or preserved and an entitlement to be paid for the work done in the process of the recovery or preservation of that asset.*" (para. 40.)

26. The right to apply for such a declaration vests once the costs order is made in favour of the client of the solicitor but the security in respect of an identified asset is inchoate or incompletely constituted until a charge is declared.

27. It is not in dispute that the Applicant firm was engaged by the Defendant to defend the appeal which was dismissed by Power J. on 27th January 2020. The Defendant was sued personally as the proceedings related to the charge over the lands owned by him.

28. It has not been argued that the costs order made by Power J. is not "property recovered or preserved" as a result of the appeal nor that the order was not obtained through the instrumentality of the Applicant firm.

29. I am satisfied that the conditions are met which would permit me to grant a declaration under section 3 of the 1876 Act, subject to the determination of the question whether a set-off should be allowed to the Plaintiff, which would, in effect, obliterate the "property recovered or preserved" and defeat the application.

The question of a set-off

30. Order 99, r. 6 RSC provides:

> "*A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought*."

31. The amount due by the Defendant to the Plaintiff greatly exceeds the sum of €12,000. It is therefore apparent that, if set-off is allowed, no sum would remain against which the Applicant could be granted a charge under section 3 of the 1876 Act.

32. No application had been made prior to the hearing of this application for a set-off. No such application was made when the costs order was made in favour of the Defendant on 27th January 2020, or when Simons J. awarded the costs of the second appeal, which had been brought by the Defendant, to the Plaintiff. Unlike in *Larkin v. Groeger* [1990] 1 I.R. 461, the Plaintiff has not brought a motion seeking an order of set-off, although this does not seem to be strictly required by the Rules. Notwithstanding this, the Plaintiff sought an order allowing a set-off at the hearing, the effect of which would be to defeat the application under section 3.

33. Order 99 r.6 RSC (which applies by virtue of Order 67 r.16 CCR) does not provide for a mandatory set-off; it is permissive in nature and does no more than permit the Court in certain circumstances to make provision for set-off, notwithstanding the existence of a solicitor's lien, or charge over the costs order.

34. The Plaintiff correctly submits that this is not a question as to whether there is more than a loose connection between the costs order. I accept that there is mutuality and that there is sufficient connection in between the costs orders that an order of set-off could be granted. However, as is clear from *Larkin v. Groeger*, the justice of the case must be assessed.

Discretion

35. The costs order the subject of the application under section 3 was made by Power J. on 27th January 2020 in respect of an appeal which it was held the High Court could not determine as there had been no hearing of the application by the Circuit Court.

The Circuit Court Order striking out the motion was made due to the failure of the Plaintiff to appear and move its application for leave to issue execution of the Order of possession**.**

36. It is not in dispute that the Defendant is indebted to the Plaintiff for a greater sum than the value of the costs order. Similarly, it is clear that the Applicant firm successfully defended the appeal before Power J. on behalf of the Defendant, which led to the making of the costs order.

37. The first mention of a set off was made in the letter of 8th February 2022, in response to the letters sent by the Defendant's solicitor seeking payment of the sum of €12,000 which had been agreed in respect of the costs owed to the Defendant. No application was made for a set-off prior to the bringing of this motion by the Defendant's solicitor. Prior to the matter being re-listed to enable the parties address me in relation to the UK bankruptcy, the Plaintiff contended that I should exercise my discretion against granting the order under section 3, and that a set-off should be allowed. Subsequently, whilst maintaining that position, the Plaintiff also submitted that the Applicant firm was not entitled to the Order sought as the costs had vested in the UK Trustee in Bankruptcy.

38. It was contended by the Plaintiff that the appeal to Simons J. by the Defendant was equivalent to that determined by Power J., but it is clear from the judgment of Simons J. that this is not so. Power J. essentially held that the appeal was misconceived and that the High Court did not have jurisdiction to hear that appeal. She held that the appropriate step for the Plaintiff to take after the Circuit Court had struck out its application, by reason of the failure of the Plaintiff to move that application (on two occasions), was to bring a fresh application to the Circuit Court. That was done, and the Order of the Circuit Court was then appealed to the High Court. While the appeal before Simons J. was unsuccessful, it was not an appeal brought without jurisdiction. The Defendant was also represented by the Applicant firm in the appeal brought by the Plaintiff.

39. It has been submitted that the Plaintiff should not effectively be punished twice by the making of the Order sought, and refusal to allow a set-off. The intention, or effect, of

an order under section 3 would not be to punish the Plaintiff. As Barrington J. stated in *Larkin v. Groeger*, "*It is sad when one has to decide which of two innocent people is to bear a loss*", but in this case the choice is between the solicitors who successfully defended their client in a misconceived appeal, or the party who had brought that appeal. Had that appeal not been brought, the costs order would have been avoided, as would the work involved in defending that appeal.

40. Whilst in many cases the appropriate order would be to allow a set-off of costs orders made in the same proceedings in relation to two unsuccessful appeals, I do not consider that it would meet the justice of the circumstances of this case. Allowing a set-off in this case would be to allow the Plaintiff escape the adverse consequences of bringing an inappropriate appeal. The fact that Power J. stated that she agreed with the approach of Barrett J. in *Permanent TSB plc formerly Irish Life and Permanent place v. O'Connor* [2018] IEHC 339, reinforces my view that the appeal was wholly unnecessary, and that the representation provided by the Applicant firm to the Defendant was necessitated by the pointless actions of the Plaintiff.

Order

41. I decline to allow a set-off between the costs order made in favour of the Defendant on 27th January 2020 and the costs orders made against the Defendant and/or against the debt owed by the Defendant to the Plaintiff. I shall make a declaration pursuant to section 3 of the Legal Practitioners (Ireland) Act, 1876 that Mahon Sweeney Solicitors LLP are entitled to a charge over the costs order made by the High Court on 27th January 2020 in favour of the Defendant, against Mars Capital Ireland D.A.C. (since substituted by the Plaintiff).

Emily Farrell.
29th February 2024.