

THE HIGH COURT

[2016 No. 5892 P]

BETWEEN

ARTHUR FFRENCH-O'CARROLL

PLAINTIFF

AND

PERMANENT TSB PLC (FORMERLY KNOWN AS IRISH LIFE AND PERMANENT PLC),  
KEITH LOWE, STEPHEN TENNANT, HAVBELL DAC AND TOM O'BRIEN

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 9th day of  
November, 2017

**Introduction**

1. These proceedings came before me on 25th and 26th October, 2017, by way of a notice of motion issued on 13th February, 2017, on behalf of the fourth and fifth named defendants ("these defendants") seeking specific interlocutory orders arising from their counterclaim.
2. An order by consent was made on 26th October, 2017, changing the name of the fourth named defendant.
3. Following the opening of the application Mr. Brady SC, for the plaintiff/respondent, explained what he considers a killer point to the claim of these defendants to take possession, lease and/or sell premises at the rear of 55 Fitzwilliam Square, previously rented out to a restaurant ("the Fitzwilliam premises"). Mr. Brady prepared written legal submissions overnight on 25th October, 2017, in reply to the submissions of Mr. Fanning SC, for these defendants. This morning, Mr. Brady enlightened me further in relation to a few authorities which he will rely upon at trial including those of Laffoy J. in *EBS v. Gillespie* [2012] IEHC 243 (unreported, High Court, 21st June, 2012), and *GE Capital Woodchester Home Loans Ltd v. Reade and Another (No 1)* [2012] IEHC 363 (unreported, 22nd August, 2012).
4. Although it might comfort the plaintiff for this Court to give an initial view in support of Mr. Brady's strident position, it is clear that such a view cannot be definitive because:
  - (a) This application only involves ascertaining whether there is a *prima facie* or serious *bona fide* issue to be tried.
  - (b) Any view of the Court will be confined to a consideration of the alleged demand letter of 2nd December, 2010, (nearly seven years ago) to the plaintiff from the first named defendant in the proceedings. The Court should not engage in delivering advice or judgments supportive of one side or another in advance of a full trial. It only considers whether there is a fair issue or serious issue to be tried. There are procedures for seeking an order directing the trial of a preliminary issue of fact or law. The Court in making this comment is not encouraging such an application but is merely explaining why it should not take a view at this stage.

- (c) The issue, which Mr. Brady submits is clear-cut, has not been the subject of an application to this Court for determination as between the plaintiff and the first named defendant, who actually sent the letter.
5. Without dwelling much further on this aspect, I stress that there is little if any opposition now by these defendants to the striking out of the applications for interlocutory orders set out at paras. 2-6 inclusive of the notice of motion because they relate to the Fitzwilliam premises. I arrive at this position in view of the following: -
- (i) the contents of the letter from the solicitors for these defendants to the plaintiff's solicitors dated 8th November, 2017, as directed to be furnished by my order made on 26th October, 2017;
  - (ii) the fact that the fifth named defendant ("the receiver") has been and remains in possession of the Fitzwilliam premises with no threat from the plaintiff despite the claim which the plaintiff will make at a plenary hearing;
  - (iii) the welcome attitude of counsel for these defendants to the Court's suggestion that it need not embark on determining whether it has a view which supports the submissions made by Mr. Brady on the law relating to the letter of demand;
  - (iv) the undertaking given on behalf of these defendants, that neither of these defendants will dispose, whether by sale or otherwise, of the Fitzwilliam premises pending the determination of these proceedings.

#### **Longwood Avenue**

6. Again, the Court appreciates the candour of counsel that the receiver can be taken to be lawfully appointed to these properties, at least for the purpose of this application. Certain advices will be given to the plaintiff I am told following a consideration of a judgment delivered by Baker J. notwithstanding the delivery of the amended statement of claim on 1st November, 2017, in accordance with my order of 26th October, 2017. The amended statement of claim indicates that the validity of the appointment of the fifth named defendant remains in issue.

#### **Balance of convenience**

7. The essential issue is the balance of convenience, whether one or other party will be able to pay the other the damages which arise if they lose at the plenary trial. The maintenance of the status quo is also relevant. The plaintiff, in accordance with my order, swore an affidavit giving details about the tenancies and vacancies in the premises on Longwood Avenue.
8. These defendants have given an undertaking to the Court to pay the plaintiff such damages as may be assessed if required and no question arises about their ability to discharge same. The plaintiff, on the other hand, admits to having recovered rent and refers to maintenance and other costs. Although the plaintiff has had a business relationship with the tenants and is familiar with the property, I agree with counsel for these defendants that they will be obliged to perform their statutory and contractual duties to maintain and look after the property whether through professional estate management agents or whoever. It was agreed that whatever rents will be collected and

received by the receiver will be placed in an account from which disbursements can be made for maintenance. The plaintiff does not dispute his multimillion euro debt and does not appear to be in a secure position to repay rents. It is a fair proposal for the receiver to maintain and look after the Longwood Avenue property while collecting rents to be placed in an account for ease of transparency. The Court, therefore, grants an interlocutory injunction in the terms of paras. 2 and 3 of the notice of motion as set out in the letter of 8th November, 2017, from the solicitors for these defendants confined to the properties described in the second schedule to the amended statement of claim delivered on 1st November, 2017.

#### **Books and Records**

9. The plaintiff has furnished an affidavit with exhibits in compliance with my earlier order and rather than make a general order for records to be discovered, I encourage the parties to limit the amount of discovery and work by the orders and directions which I will make now in an effort to allocate a trial date in January or February 2018.

#### **Terms of Order**

10. The following are the proposed orders: -

- (i) an order directing the plaintiff to deliver his reply and defence to the counterclaim by 22nd November, 2017, and copy same to each of the solicitors on record for the other defendants;
- (ii) an order requiring the plaintiff to issue a motion returnable for 23rd November, 2017, and serve with at least five days' clear notice seeking directions for: -
  - (a) the delivery of defences by the other defendants within a specific timeframe or such time as this Court will direct on 23rd November, 2017;
  - (b) the delivery of replies to the defences to the amended statement of claim;
  - (c) the delivery of replies to any particulars or discovery requests which must be sought by each and all of the plaintiff and the defendants by a date which I will ascertain on 23rd November, 2017; and
  - (d) the exchange of estimates of legal fees and outlays which will be incurred by the parties from 23rd November, 2017, to the end of a plenary trial.

11. This latter direction arises from my concern that the legal costs of so many parties at a plenary hearing will be disproportionate to the claims for damages which will be pursued ultimately. In this regard, I mentioned earlier the welcome candour of Mr. Brady concerning the merit of relying on the claim in the amended statement of claim relating to the Longwood Avenue property.

#### **Postscript**

12. On 18th December, 2018, Ní Raifeartaigh J. delivered judgment ([2018] IEHC 794) in which she determined questions posed in a case stated concerning the entitlement to appoint a receiver.