

THE HIGH COURT

[2018 No. 4180 P.]

BETWEEN

ANGELA OMAN

PLAINTIFF

AND

JAMES OMAN, ALLIED IRISH BANKS PLC AND STEPHEN TENNANT

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 13th day of June, 2018

1. The plaintiff in these proceedings instituted by plenary summons issued on 11th May, 2018, against her husband, Allied Irish Banks ("AIB") and the third named defendant ("*the receiver*") principally seeks a declaration that she has a beneficial interest in 114 – 116 Capel Street, Dublin ("*the premises*"). She also seeks:-

- (i) a declaration that the mortgage of 2nd March, 2004, between her husband and AIB is null and void;
- (ii) damages for slander of her title to alleged beneficial interest in the premises;
- (iii) a declaration that the appointment by AIB of the receiver over the premises is null and void;
- (iv) an order prohibiting the disposal of the premises; and
- (v) a *lis pendens*.

Notice of Motion

2. By notice of motion issued on 1st June, 2018, AIB and the receiver ("*these defendants*") sought orders striking out the proceedings on one or more of the following grounds:-

- (i) an abuse of process;
- (ii) they are bound to fail; and
- (iii) they disclose no reasonable cause of action and/or
- (iv) are frivolous and/or vexatious.

3. In addition, these defendants seek an order vacating the *lis pendens* registered by the plaintiff affecting the premises. I am somewhat familiar with the facts up to 21st November, 2017, because I made an order on that day in proceedings having record number [2016 No. 1618 P.] in which these defendants sought possession of the premises from the plaintiff's husband who is the first named defendant in these proceedings. That order was made following an agreement whereby the first named defendant agreed to deliver up possession of the premises with a stay on execution until 1st June, 2018.

4. The plaintiff does not deny that she knew those proceedings were going ahead and she does not deny her knowledge of the terms of the consent order made thereafter. Moreover, the first named defendant in open court, having formally sworn to tell the truth, confirmed that his family members were on notice of those proceedings and he did not inform the Court that the plaintiff here did not understand that she did not have a role or interest in the outcome.

5. No explanation was offered by or on behalf of the plaintiff as to why she delayed until three weeks before the expiration of the stay, to commence these proceedings. The height of the plaintiff's reason for delay is set out in para. 14 of her replying affidavit sworn 8th June, 2018, that although aware of what was going to happen and what happened on 21st November she avers:-

"I was never named as defendant in the proceedings. I did not believe or understand that I had any role in them."

6. This averment can best be described as cautiously cute but could also be characterised as disingenuous or misleading. I say this because she gives no basis for the belief or understanding that she had no role in those proceedings which were concluded in November 2017.

7. I specifically advised at the commencement of the submissions of Mr. Fanning, Senior Counsel for these defendants, that counsel and his solicitor for the plaintiff might wish to have the plaintiff in court because of questions I may pose during the course of the hearing. I had the opportunity from approximately 11.30 am until 2pm today to read the affidavits and I had those read before I heard submissions from Counsel for the parties.

8. In any event, when it came to counsel for the plaintiff's submissions, he addressed the Court by referring principally to the affidavit of Mr. Niall O'Reilly sworn on 5th June, 2018, in order to lay the basis for establishing an arguable case. I brought counsel's attention to para. 14 of the plaintiff's affidavit sworn on 8th June, 2018, and queried whether the last phrase was the plaintiff's own words or an interpretation of instructions. Counsel for the plaintiff without hesitation said that those words were drafted by him and he candidly admitted to the Court that he did not advise the plaintiff about not misleading the Court by her averments.

9. Suffice for me to advise counsel for the plaintiff and his solicitor to reacquaint themselves with their respective duties to the Court particularly when preparing affidavits and advising their clients in respect of affidavits. In this regard, I cite in support the judgment of Finnegan P. in *Law Society v. Walker* [2007] 3 I.R. 581 and specifically the duty of frankness being an attribute of a barrister which in fairness to counsel for the plaintiff, he demonstrated today. Counsel, having acknowledged that the specific phrase arose from his choice of words without advising the plaintiff not to mislead, did not advance submissions based on any alleged ignorance of the

plaintiff about the hearing date of 21st November, 2017, or the consent judgment granting possession.

10. However, in case this matter is the subject for further review, I want to make it crystal clear that despite that last phrase in the said para. 17, counsel for the plaintiff in these proceedings did not submit that she did not know of the purpose or intent of these defendants in agreeing to the consent order with a stay to facilitate moving from the premises.

Strike Out Application

11. The law relating to striking out proceedings under O. 19, r. 28 Rules of the Superior Courts ("RSC") is well established. Costello J. in *Barry v. Buckley* [1981] I.R. 306 at 308 stated:-

"that the Court can only make an order under this rule when a pleading discloses no reasonable cause of action on its face."

12. Clarke J. in *Salthill Properties v. Bank of Scotland* [2009] IEHC 207 at para. [3.12] said "*the court must accept the facts as asserted in the plaintiff's claim*" or as Baker J. said in *Wilkinson v. Ardbrook Homes Limited* [2016] IEHC 434 at para. 19, "*ask whether the plaintiff could possibly succeed on the case as pleaded*". Also it is well established that the court takes the plaintiff's case at its height. Counsel for these defendants submitted that these proceedings are a collateral attack on the order known to the plaintiff made last November.

13. Counsel for the plaintiff argued that there was a duty on these defendants to have joined the plaintiff just as it did in respect of Mr. Connaire. The acquiescence and delay on the part of the plaintiff since the mortgage in 2004 to the actions and agreements of her husband in his dealings with AIB will defeat the plaintiff's actions. Nothing was submitted on behalf of the plaintiff to dispute the characterisation of the collateral attack on the order made on 21st November, 2017.

14. Assuming for the purpose of argument that the plaintiff may devise some ground on a factual basis between now and a plenary hearing of these proceedings to scupper such a successful plea, the Court will now examine the plaintiff's claim at its height based on the information which the plaintiff has put forward on affidavit and in submissions.

15. Counsel for these defendants submitted cogently that the plaintiff could have no interest recognisable or enforceable as against the interests of these defendants. At the time of the mortgage in 2004 she was residing with her husband and family in Belgrave Square, Rathmines and she never notified AIB of her purported acquisition of a family home interest in any part of the premises, at least prior to her letter of 15th October, 2017, which was in advance of the hearing on 21st November, 2017. At that time, she merely told the solicitors for these defendants that High Court proceedings would be issued immediately.

16. What followed was a consent order with a stay against her husband of which she does not plead ignorance before or after 21st November, 2017.

17. I accept the submissions of counsel for these defendants that the joint-venture, partner, merging of business-type of argument which the plaintiff's counsel elaborated upon by referring to the backing of her previous business into the sole trading business of the plaintiff could not create an enforceable equitable interest in property over which AIB had a mortgage.

18. The plaintiff's husband was the legal owner of the property. The point made by counsel for the plaintiff that a bank which obtains security should inspect the property and make inquiries about potential joint venturers who have no registered interest in the property has no legal basis.

19. I was not impressed with the reply from counsel for the plaintiff to my question about whether there is an obligation on banks or solicitors to look behind family home protection declarations. Counsel was unable to cite any legal authority when I repeated my request for that proposition. In other words, the plaintiff has not established even at the height of the facts advanced that she had an equitable interest which could defeat the bank's rights as finally incorporated in the order directing the delivery of possession with a stay until 1st June, 2018.

20. I end this part of my judgment by posing the question which the plaintiff should have been asked by her own newly appointed solicitors and counsel: how could AIB have discovered the plaintiff's rights over its legal title without the plaintiff advising it before and after 2004? Furthermore, there is no resemblance of the facts in this case to those in *Northern Bank Limited v. Henry* [1981] I.R. 1, as cited by counsel for the plaintiff. The judgment of Gilligan J. in the matter of *Jeffel (In Receivership)* [2012] IEHC 279 and particularly para. 62 is apposite as submitted for these defendants.

21. Counsel for the plaintiff is correct in one submission and that is that he needs to show that the plaintiff has an arguable case. I find that the plaintiff does not have an arguable case and for the reason already outlined earlier, if she had, it would be defeated by the plea of acquiescence and delay. The submission that the plaintiff was never invited to make known her interest begs the question as to how AIB was to know of the plaintiff's alleged interest which I have dealt with in the context of inquiries, the Family Home Protection Act declaration and the knowledge of the plaintiff before and after last November's order directing the giving up of possession.

22. Therefore, I direct the striking out of the plaintiff's claim as against the second and third named defendants.

The *lis pendens* issue

23. Counsel for these defendants usefully referred the Court to the comprehensive judgment of Cregan J. in *Tola Capital Management LLC v. Linders* [2014] IEHC 324, which set out s. 123 of the Land and Conveyancing Reform Act 2009. The court may make an order vacating a *lis pendens* for any person affected by it, where the court is satisfied that the action has not been prosecuted *bona fide*. The collusion between the plaintiff and her husband who is the subject of an order of Baker J. is evidenced by the similarity of the pleadings in both cases.

24. Moreover, the plaintiff's husband now has no interest in the premises and having struck out the claim against these defendants it follows that there is no *bona fide* reason for the prosecution of these proceedings against the plaintiff's husband, the first named defendant seeking an order in respect of the premises. Therefore, I will make an order vacating the *lis pendens* registered by the plaintiff against the premises.