

THE HIGH COURT

COMMERCIAL

[2017 No. 6658 P.]

BETWEEN

JONATHAN BENNETT, PAUL MCCLEARY AND SEAN O'DONOGHUE TRADING AS BMO PARTNERS
FIRST, SECOND AND THIRD PLAINTIFFS

AND

BENNETT MCCLEARY ARCHITECTS LIMITED

FOURTH PLAINTIFF

AND

EARLSFORT CENTRE (DEVELOPMENTS) UNLIMITED COMPANY

DEFENDANT

JUDGMENT of Mr. Justice Brian McGovern delivered on the 13th day of February, 2018

1. The defendant has brought a motion in these proceedings seeking the following reliefs:-

(i) an order pursuant to the inherent jurisdiction of the court vacating the *lis pendens* registered on Folio 135340F in the city of Dublin on 2nd August, 2017, arising out of the within proceedings on the grounds that it does not comply with s. 121 of the Land & Conveyancing Law Reform Act 2009 and/or an order pursuant to s. 123(b)(ii) that the action has not been prosecuted *bona fide* to the extent required to support a *lis pendens*; and

(ii) an order pursuant to O. 25 and/or O. 36 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court directing a trial of a preliminary issue and/or a modular trial on the construction of the agreement dated 13th April, 2007, made between the plaintiffs of the one part and the defendant of the other part.

2. Connected with the application to vacate the *lis pendens* is a motion brought by the plaintiffs seeking to amend their statement of claim. While the motion does not state the order upon which this is brought, it is clear from the arguments made that the application is brought pursuant to O. 28, r. 1 which provides:-

"The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

3. Since the defendant argues that the amendments sought are not necessary and are clearly for the purpose of enabling the plaintiffs to validly register a *lis pendens*, it is necessary to deal with this motion in conjunction with the defendant's application to vacate the *lis pendens*.

4. It seems to me that the most logical way to deal with the motions is to rule on the application to amend the statement of claim first and then to consider the defendant's application to vacate the *lis pendens*. Approaching the matter in this way will involve the court considering the pleadings to see what the real issues are between the parties. A decision on that issue will determine whether or not the amendments sought should be granted but may also have a bearing on whether or not the court should make an order vacating the *lis pendens*.

Application to Amend the Statement of Claim

5. I have already referred to the text of O. 28, r. 1 above. In *Citywide Leisure Limited v. IBRC* [2012] IEHC 220, I summarised the factors to which the court should have regard when considering an application for leave to amend. At para. 16, I stated:-

"1. A party who applies for an order allowing it to amend its pleadings must furnish reasons as to why the court should exercise its discretion in its favour.

2. The court is entitled to look at those reasons and the evidence adduced therefrom to inform the exercise of its discretion.

3. Fundamentally, the exercise of that discretion involves an analysis as to whether the new claim involved the real issues in controversy between the parties.

4. The court is entitled to look at other factors.

5. The court can enquire if the new claim or new plea is bound to fail.

6. The inquiry by the court as to whether the new claim is or is not bound to fail can involve analysis by reference to either or both of the tests set out in Order 19, rule 28 or the court's inherent jurisdiction.

7. If the new claim fails to meet both these tests, then it is not one of the real issues in controversy between the parties.

8. If the new claim was bound to fail, the amendment will not be allowed."

6. A reading of the general endorsement of claim on the plenary summons describes the claim as one in which the plaintiff seeks to enforce an agreement made on or about 13th April, 2017. The plaintiffs seek certain declarations and specific performance and damages. While the endorsement of claim at para. (d) claims *an injunction restraining the defendant from assigning, disposing or*

otherwise dealing in ALL THAT AND THOSE the lands, hereditaments and premises comprised in Folio DN135340F" there is no claim made by the plaintiff for any interest in the land.

7. By an agreement in writing dated 8th February, 2007, the first, second and third named plaintiffs contracted to purchase the lands comprised in Folio DN135340F ("the land") from Eugene Murphy for the sum of €3,750,000. By an agreement in writing dated 13th April, 2007, the first, second and third named plaintiffs of the one part and the defendant of the other part agreed that in consideration of a payment by the defendant to the first, second and third plaintiffs of the sum of €1,400,000, the defendant would take an assignment of the first, second and third named plaintiff's interest in the contract dated 8th February, 2007, to purchase the site. The defendant thereupon paid Eugene Murphy the sum of €3,750,000 which was the agreed price of the lands as well as a further €1,400,000, to the first, second and third named defendants.

8. The agreement of 13th April, 2007, provided, *inter alia*:-

"IT IS HEREBY AGREED as between the Vendors and the Purchaser that as soon as practicable after the completion of this agreement Bennett McCleary Architects shall after appropriate consultation with the Purchaser cause a planning application for residential development to be lodged in respect of the lands comprised in Folio 135340F County Dublin and it is agreed between the parties hereto that in respect of each square foot of net apartment space (excluding common areas) over and above the square footage of 35,000sq ft achieved on foot of the planning application, the Purchaser will pay to the Vendors the sum of €165 per square foot it being understood and agreed as between the parties hereto that the consideration so payable shall be paid on the grant of a full planning permission without objection from any third party. The consideration aforesaid shall be payable 21 days after the date of issue of the aforesaid grant of full planning permission."

9. A planning permission was lodged in or around July 2007 and planning permission was granted for the site. But on 31st July, 2008, An Bord Pleanála upheld a third party appeal and refused planning permission. Further discussions took place between the parties resulting in the fourth named plaintiff preparing a revised planning application in September 2008, engaging in discussions with Dublin City Council in October 2008 and then submitting a new planning application in November 2008. Nothing came of that application and in 2009, a planning application was made by the defendant for a nursing home development. The planning application was lodged by another firm of architects unconnected with the plaintiffs. Permission was granted in 2010 but the defendant did not proceed with the development.

10. On 21st October, 2016, some nine years after An Bord Pleanála refused to grant the fourth named plaintiff's application on behalf of the defendant, a new planning application was made by another firm of architects, namely Pierce & Associates, for the site. This application provides for 65,000sq ft of habitable space. This planning application was made on behalf of Coralvale Limited (now Earlsfort Homes Limited) and, if granted, would provide for an extra 30,000sq ft over and above the 35,000sq ft threshold referred to in the agreement of 13th April, 2007.

11. In para. 26 of the statement of claim, the plaintiffs' claim:-

"In September 2016, the defendant without reference to the plaintiffs instructed a company called Coralvale Ltd to lodge a revised planning application for the Site with Dublin City Council which application provides for 65,000sqft of habitable space which is 30,000sqft in excess of the 35,000 threshold resulting in balancing consideration of €4,950,000."

12. Paragraph 31 of the statement of claim pleads that the defendant holds the site on trust for the plaintiffs:-

"...either by way of constructive, remedial or resulting trust, and further hold monies, assets, benefits, rental income, receipts, mesne rates or other profits howsoever arising therefrom the (sic) on trust for the plaintiffs and the plaintiffs and each or either of them have an equitable and beneficial interest in the Site, pending completion of the agreement."

13. The land registry certificate in respect of the folio shows that the plaintiffs never bought the land from Eugene Murphy but allowed the defendant to step into their shoes and it was the defendant who completed the contract and was duly registered as full owner on 29th October, 2009.

14. The central issue in this case is whether or not the defendant is liable to the plaintiffs in the sum of €165 per square foot for the excess over 35,000sq ft. One of the issues to be determined by the court is whether or not a planning permission had to be obtained by the fourth named plaintiff for the payment to become due. This case involves a construction of the agreement of 13th April, 2007.

15. The amendments sought to be introduced by the plaintiffs do not involve any alteration to the body of the statement of claim but rather include four new paragraphs in the prayer at the end of the document. The amendments sought are as follows:-

"I.A declaration that the defendant in refusing to acknowledge its obligations to the plaintiffs under the 4th paragraph of the agreement of 13th April, 2007, is wrongfully refusing to discharge the consideration due to the plaintiffs on foot of the agreement of 13th April, 2007.

J. A declaration setting aside the transfer of the Site, the subject matter of the agreement of 14th April, 2007, together with the removal of all consequential registrations as may be necessary.

K. A declaration that the defendant holds the Site on trust for the plaintiffs by way of constructive and/or remedial Trust and/or resulting trust and further hold monies, assets, benefits, rental income, receipts, mesne rates or other profits howsoever arising therefrom the (sic) on trust for the plaintiffs and the plaintiffs, and each or either of them, have an equitable and beneficial interest in the Site pending completion of the agreement by way of payment of the consideration due under the agreement of 13th April, 2007.

L. A declaration that the plaintiff (sic) have and hold an unpaid vendor's lien over the Site pending payment of the consideration due under the agreement of 13th April, 2007."

16. While the court should apply a liberal approach to amendments sought under O. 28, r. 1, it still has to consider whether the amendments sought are necessary for the purpose of determining the real questions in controversy between the parties.

17. I am satisfied on a true reading of the statement of claim as originally drafted that this is a claim for specific performance and/or damages which the plaintiffs claim arising out of an alleged breach of the agreement. It is not a dispute about the ownership of, or

title to, the land. The transfer of the land was from Eugene Murphy to the defendant. The plaintiffs were never the registered owner of the lands nor did they pay the purchase money for same. If the plaintiffs discharge the burden of proof in this action, they will recover damages in accordance with the terms of the agreement. That, in essence, is what this action is about. Paragraph I. of the amendment adds nothing to what is already contained in the statement of claim. Paragraph J. is not necessary for the purpose of determining the real questions in controversy between the parties. While it refers to the "*transfer of the Site*", this was a transaction which took place between Eugene Murphy and the defendant. So far as para. K. is concerned, I am satisfied that this is sought to be introduced for the purpose of maintaining an entitlement to register a *lis pendens*. It does not reflect the real issues in controversy between the parties. Likewise, para. L. is not relevant to the real issues in controversy between the parties because the plaintiffs were not the vendor of the land to the defendant. In those circumstances, the question of an unpaid vendor's lien could not arise.

18. I refuse the plaintiffs' application to amend the statement of claim.

Application to Vacate *Lis Pendens*

19. The defendant has brought a motion before the court seeking, *inter alia*:-

"An order pursuant to the inherent jurisdiction of the court vacating the lis pendens registered on Folio 135340F in the city of Dublin on 2 August 2017 arising out of the within proceedings on the grounds that it does not comply with s. 121 of the Land & Conveyancing Law Reform Act, 2009 and/or an Order pursuant to Section 123(b)(ii) that the action has not been prosecuted bona fide to the extent required to support a lis pendens."

20. The defendant claims that the registration of the *lis pendens* will make it impossible for the defendant to sell or otherwise deal with the site pending the determination of these proceedings. The defendant has a planning permission for a substantial development on the site.

21. Section 121(2) of the 2009 Act provides that the following may be registered as a *lis pendens*:-

"(a) any action in the Circuit Court or the High Court in which a claim is made to an estate or interest in land (including such an estate or interest which a person receives, whether in whole or in part, by an order made in the action) whether by way of claim or counterclaim in the action; and

(b) any proceedings to have a conveyance of an estate or interest in land declared void."

22. Section 123 of the Act gives the court the power to vacate a *lis pendens* where there has been an unreasonable delay in prosecuting the action or the action has not been prosecuted *bona fide*.

23. In dealing with the application to amend the pleadings, I set out my views on what I perceive to be the real issues between the parties in this case. The claim is, in essence, a claim for specific performance and/or damages. The specific performance element of the claim is not for the performance of a contract for the sale of land. The plaintiffs, quite simply, were never the owners of the land in question and that is not in dispute.

24. These proceedings do not, in reality amount to a claim being made by the plaintiffs to an estate or interest in the land. Paragraph E. of the prayer in the original statement of claim is for the following relief:-

"If required, an order setting aside all purported assignments, disposals or other dealings made by the Defendant in respect of the Site which have as their objective or affect their denial to the First to Third Plaintiff of the benefit of their agreement with the Defendant."

25. This is not a claim that comes within the scope of section 121(2)(b). It is true that in para. J. of the prayer in the statement of claim as sought to be amended, the plaintiffs seek a declaration setting aside the transfer of the site which is the subject matter of the agreement of 14th April, 2007, and for rectification of the register. I have refused to allow this amendment. But, in any event, the purchase money was paid by the defendant to Eugene Murphy who was the vendor and the register is conclusive evidence of the current and prior ownership of the land.

26. I am satisfied that the amendments sought are for the purpose of trying to give legitimacy to the registration of the *lis pendens*. Considering the true nature of these proceedings, the action is not being prosecuted *bona fide* in so far as it is being used to justify the registration of the *lis pendens*, but is an attempt to exert the maximum pressure on the defendant to meet the demands of the plaintiffs arising out of the agreement of 13th April, 2007. The issues in dispute will be resolved in due course at the hearing. These issues involve the construction of a contract and a determination as to whether or not the plaintiffs are entitled to damages. The issues do not involve a *bona fide* claim to an estate or interest in land. I will make an order vacating the *lis pendens* registered on Folio 135340F.

The Defendant's Application for Trial of a Preliminary Issue

27. The defendant seeks the trial of a preliminary issue pursuant to O. 25 and/or O. 36 of the Rules of the Superior Courts and/or under the inherent jurisdiction of the court. The overriding consideration for the court is whether the trial of a preliminary issue will result in an obvious saving in both costs and time. In *L.M. v. Commissioner of An Garda Síochána* [2015] 2 I.R. 45, O'Donnell J. held that it would be inappropriate to try a preliminary issue which was heavily fact dependent. The defendant claims that in this case, the trial will involve the construction of the agreement. Since the well established rules of construction provide that the intention of the parties is to be looked for on the face of the document and in the words which the parties have themselves chosen to express their agreement, there is no necessity for any discovery and a minimal necessity for oral evidence.

28. It is only where it is necessary to interpret the words of an agreement by reference to surrounding circumstances that the court will admit such evidence. The plaintiffs argue that there is a claim based on estoppel set out in the statement of claim and this point cannot be determined without background facts. The plaintiffs accept that background evidence would not be admissible interpretation except where this was necessary to resolve some ambiguity or properly interpret the words. Counsel informed the court that the plaintiffs will have three witnesses and will provide witness statements and that a unitary trial would not take very much longer. They also argue that a unitary trial is the default option.

29. The defendant argues that this action is really about an interpretation of the agreement of 13th April, 2007. It argues that no evidence will be admissible as to the intention of the parties in the absence of some ambiguity and that anything that happened after the contract is wholly inadmissible and irrelevant. For that reason, the defendant argues that a simple preliminary issue as to the interpretation of the contract will be sufficient to dispose of all matters.

30. In *Tara Expiration & Developments Limited v. Minister for Industry and Commerce* [1975] 1 I.R. 242 at 256, O'Higgins C.J. said:-

"In addition, it must appear to the court to be convenient to try such question of law before any evidence is given. This will involve a consideration of the effect on other issues in the case and whether its resolution will reduce these significantly, or shorten the hearing. Convenience in this respect must also be considered in the light of what appears fair, proper and just in the circumstances."

31. In *L.M. v. Commissioner of An Garda Síochána*, O'Donnell J. stated at para. 34:-

"It is, as a general matter, important that the point sought to be tried as a preliminary issue should have the possibility of either terminating the claim altogether or at least resulting in an obvious saving in both costs and time consequent on a reduction of the issues to be tried."

32. In this case, the defendant suggests the formulation of a preliminary issue in the following terms:-

"(a) is the planning application bearing Register References No. 42934/07 (lodged by the fourth named plaintiff on 16th July, 2007 and determined by Dublin City Council on 10 of December 2007 and refused by An Bord Pleanála on 31 of July 2008) the only planning application governed by the agreement of 11 of April 2007; and

(b) are the first to third named plaintiffs entitled to payment on foot of the planning application Register Reference 39734/16 or any other application on foot of the agreement of 11 of April 2007?"

33. The reference to 11th April, 2007, is clearly a reference to the agreement which is in dispute and which is dated 13th April, 2007.

34. Whether the claim includes a plea based on estoppel, it does not appear to be particularly relevant in the context of the application for the trial of a preliminary issue. Whatever peripheral issues exist around the agreement, the action is essentially one of construction of the agreement. But the other peripheral issues will not add significantly (if at all) to the length of the trial. At the end of the day, the case will largely turn on the construction of the contract and there is well established jurisprudence on this topic which is summarised by the Supreme Court in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 285. If there is to be discovery, it will have to be rooted in the pleadings and be relevant and necessary to the issues to be decided by the court. It will also have to be proportionate. If witness statements are generated which appear to introduce evidence which would not be admissible under the principles of contractual interpretation as applied in *Analog Devices*, then the court may have to rule on whether or not such evidence can be given. So it seems to me that both on the issue of discovery and witnesses, it should still be possible to keep the case within reasonable boundaries which will avoid an unnecessary waste of court time and resources.

35. In all the circumstances, I am not satisfied that this is an appropriate case in which to direct the trial of a preliminary issue. The case is one involving the interpretation of the contract and any peripheral issues raised will not take up a significant amount of court time. I, therefore, refuse the application for the trial of a preliminary issue.