

**THE HIGH COURT
COMMERCIAL**

(2018 No. 3759 P)

BETWEEN**ALLIED IRISH BANK PLC****PLAINTIFF**

**AND
MARTIN BURKE
AND
DEIRDRE BURKE**

DEFENDANTS**JUDGMENT of Mr. Justice Twomey delivered on the 21st day of December, 2018****Introduction**

1. In these proceedings the plaintiff, Allied Irish Bank PLC ("AIB"), seeks certain declaratory reliefs against the second named defendant, Mrs. Deirdre Burke ("Mrs. Burke") on foot of two voluntary transfers of interests in lands made as between the first named defendant, Mr. Martin Burke ("Mr. Burke") and Mrs. Burke. Mr. Burke and Mrs. Burke are a married couple both living in Oranmore, County Galway.

2. In particular, AIB seeks declarations that two separate voluntary transfers of land made between Mr. Burke and Mrs. Burke constituted conveyances made with the intention of defrauding AIB. The first voluntary transfer (Registry Folio 96063F) was completed in November, 2017 and the second voluntary transfer (Registry Folio 33759F) was completed in February, 2018. AIB also seeks an order restraining Mr. Burke and Mrs. Burke from conveying, transferring, mortgaging, charging or in any way otherwise dealing with the lands contained in either of the aforementioned Land Registry Folios.

3. For his part, Mr. Burke has played no part in the current proceedings and on 22nd October, 2018 judgment in default of appearance was granted in the Commercial Court against Mr. Burke in favour of AIB regarding the fraudulent nature of the transfers. Accordingly, this hearing is only concerned with seeking similar orders against Mrs. Burke

Background

4. By way of a loan facility letter dated 16th September, 2009, AIB offered Mr. Burke a loan in the sum of €4.83 million. The purpose of this loan was to assist with the purchase of a commercial premises at Eyrecourt, Ballinasloe, County Galway.

5. Mr. Burke failed to make the necessary repayments in respect of this loan facility and, following this, a letter of demand was issued to Mr. Burke by AIB on 15th July, 2015. Mr. Burke failed to respond to this demand letter and summary proceedings (*AIB v. Burke* (2016/887S)) were subsequently issued by AIB against Mr. Burke on 25th May, 2016 resulting in summary judgment being granted in favour of AIB in the sum of €5,453,893.37 by this Court on 17th July, 2017, in respect of the unpaid loan.

6. On 21st November, 2017 Mr. Burke made a voluntary transfer to Mrs. Burke of his interest in lands contained in Land Registry Folio 96063F. On 14th February, 2018 Mr. Burke made a second voluntary transfer to Mrs. Burke of his interest in lands contained in Land Registry Folio 33759F.

7. After discovering that these voluntary transfers had occurred, AIB issued the within proceedings on 27th April, 2018 seeking declaratory orders pursuant to section 74 of the Land and Conveyancing Law Reform Act 2009 (the "2009 Act") that the two voluntary transfers were fraudulent conveyances and therefore void.

Mrs. Burke did not attend the hearing

8. Mrs. Burke is a lay litigant. She did not turn up in Court for the hearing of these proceedings seeking the declarations that the two aforementioned conveyances were void pursuant to s. 74 of the Land and Conveyancing Reform Act 2009.

9. However, counsel for AIB did provide this Court with a copy of a registered letter dated 17th December, 2018 that its solicitors received, which letter is not even signed by Mrs. Burke, but appears to be signed on her behalf by some other person. This letter states:

"I have attached herewith a Doctors Certification for your attention which speaks for itself."

10. The enclosure is from Dr. David Hanney and is dated 3rd December, 2018 and it states:

"To whom it may concern.

Deirdre has been a patient of mine since 2003. She has attended me on four occasions with stress related symptoms. I do not feel that she is currently medically fit to attend court. She will not in my opinion be fit to attend court for at least three months."

11. It is relevant to note that although dated 3rd December, 2018, this medical cert was not sent by Mrs. Burke to AIB until 17th December, 2018 which is just three days before the hearing in this case.

12. While this letter was brought to this Court's attention, it is relevant to note that there was no adjournment application before the Court as neither Mrs. Burke attended this hearing, nor did any lawyer attend on her behalf at this hearing.

13. Counsel for AIB submitted that there was no basis for the adjournment of the proceedings since there was no valid adjournment application before the Court and even if there was, counsel submitted that it should not be granted in all the circumstances.

14. In this regard, it is relevant to note that a similar letter was sent by Mrs. Burke in respect of an earlier hearing in these proceedings, namely a hearing before Haughton J. on 23rd July, 2018. On the 18th July, 2018, Mrs. Burke wrote a letter to AIB's solicitor in the following terms:

"I have attached herewith a Doctors Certification for your attention."

15. Attached to this letter was an earlier doctor's cert again dated 18th July, 2018 from Dr. David Hanney in the following terms:

"To whom it may concern

Deirdre is a patient of mine. I understand that she had been called to give evidence in court on 23/07/18. She has been suffering from anxiety and insomnia. I do not feel that she is currently fit to give evidence in an informed and coherent manner. I would ask that she be excused from giving evidence for six weeks. I would expect that at that stage she will be medically fit to give evidence."

16. It is relevant to note that on that occasion Mrs. Burke sent the medical cert on the same day as it is dated (18th July, 2018) to AIB, while in this case, there is a two week gap between the date of the medical cert (3rd December) and the letter from Mrs. Burke (17th December).

17. The proceedings to which the July medical cert refers were the proceedings for the entry of this dispute into the Commercial Court which was due to be heard on 23rd July, 2018. This Court was advised by counsel for AIB that Haughton J. was given this medical cert before dealing with the proceedings before him on that date and he did not adjourn the proceedings before him but made the relevant Order on the 23rd July, 2018.

18. It is also relevant to note that it was necessary for AIB to seek an order for substituted service of the plenary summons in this case (by means of ordinary post to Mrs. Burke's address in Oranmore, Galway), as three unsuccessful attempts had been made to serve Mrs. Burke. In this regard, sworn evidence was provided by Ms. Colette Rooney on behalf of AIB of her belief that Mrs. Burke was seeking to avoid service.

19. It is also relevant to note that Mrs. Burke appealed the decision of Haughton J. to admit these proceedings to the Commercial Court. However, she failed to prosecute her appeal and the matter was struck out by Irvine J in the Court of Appeal on the 14th November, 2018.

20. Finally, it is also relevant to note that the original Court Order dated 20th July, 2017 for the summary judgment against Mr. Burke in the sum of €5,455,893.37 was amended (in favour of Mr. Burke) because of an error in that Order, since it had to be reduced by €2,000 to €5,453,893.37 because of a typographical error in the Order. The amended Order was dated 10th October, 2017. Counsel for AIB advised this Court that Mr. Burke sought to have this Order of 10th October 2017 set aside by motion on 12th November, 2018, but that this motion was struck out by O'Hanlon J. on that date.

21. In all of these circumstances, and in light of the nature of the proceedings before this Court, this Court has exercised its discretion not to adjourn the proceedings and to proceed with the case in Mrs. Burke's absence.

Fraudulent intent

22. Section 74(3) of the Land and Conveyancing Law Reform Act, 2009 states:

"...any conveyance of property made with the intention of defrauding a creditor or other person is voidable by any person thereby prejudiced."

23. The case-law on this area and, in particular, the seminal case of *Re Moroney* (1887) 21 LR Ir. 27 establishes that fraudulent intent in this regard is '*an intent to delay, hinder or defraud creditors*' and such intent can be assumed from '*the necessary and probable consequences of the act done*'.

24. It is an important factor in this case that the two alleged fraudulent transfers of property on 21st November, 2017 and on 14th February, 2018 by Mr. Burke were both made after the summary judgment had issued against him on 20th July, 2017, and indeed even after the amended Order of 10th October, 2017, which was served on Mr. Burke under cover of a letter dated 26th October, 2017.

25. It is also relevant that sworn evidence was provided on behalf of AIB to the Court that these two properties had a combined value in excess of €1 million.

26. Counsel for AIB advised this Court that Haughton J. ordered that Mrs. Burke's defence to these proceedings be deemed to be her witness statement. In that defence, Mrs. Burke claims that the High Court Order dated 10th October, 2017 is not an '*absolute judgment*'. However, this is not the case and the typographical error in the original Order does not compromise the validity of the Order dated 10th October, 2017 and so this defence does not avail Mrs. Burke.

27. Mrs. Burke also claims that AIB holds a charge over a separate piece of property (folio GY21319) in Mr. Burke's name which, she says, has an asking price of €5.5 million. Since the judgment against Mr Burke is in the sum of €5,453,893.37. Mrs Burke claims that there is sufficient money likely to be realised from the sale of folio GY21319 and so the two conveyances at issue should not be declared void.

28. However, the asking price of a property is very different from its value and in any case AIB dispute that this land is of the value suggested by Mrs. Burke. Furthermore, even if folio GY21319 was of the value suggested by Mrs. Burke, the test for the application of s. 74 of the 2009 Act is not whether a creditor might recover sufficient funds by taking a different approach, but rather whether the actions in question hinder the creditor in the recovery of his money.

Conclusion

29. It seems clear to this Court, in a situation where AIB has judgment for over €5 million against Mr. Burke, that it is a necessary and probable consequence of the conveyance of the two properties at issue at the time when they were conveyed (i.e. shortly after judgment had been obtained against Mr. Burke), that AIB would be hindered in its recovery of that amount.

30. On this basis this Court finds that the two conveyances were made with the intention of defrauding creditors and that they are both therefore void and of no legal effect under s. 74 of the 2009 Act