

THE HIGH COURT

COMMERCIAL

[2018 No. 3522 P]

BETWEEN

ENNIS PROPERTY FINANCE DAC AND DAVID O'CONNOR

PLAINTIFFS

AND

MICHAEL CASEY, SALLY CASEY, NIAL FINNEGAN AND JIM EGAN

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 30th day of July, 2019

INTRODUCTION

1. This case involves allegations that the defendants entered into a transaction with the intent of defrauding the first named plaintiff, ("Ennis"). This is an interlocutory hearing regarding three motions by the fourth named defendant, ("Mr Egan"), of Bushypark, Galway. The first motion seeks attachment and committal of the first named plaintiff, Ennis, and attachment and committal of the first named defendant, Dr. Michael Casey, and his wife, the second named defendant, Ms. Casey, (together, the "Caseys") of Carna, Connemara, Co. Galway, as a result of their alleged failure to comply with a court order arising from a settlement of earlier interlocutory proceedings in this case.

2. The second motion seeks the discovery of 18 documents without redaction, which documents have previously been discovered by Ennis to Mr. Egan with redaction. The third motion seeks an order for the trial of a preliminary issue in advance of the trial of the action, which trial is set down for hearing on the 19th November, 2019.

BACKGROUND – allegations of fraud against all the defendants

3. The background to these motions is that the Caseys are indebted to Ennis in the sum of €3.43 million, as a result of Ennis acquiring from Bank of Scotland a loan extended by Bank of Scotland to the Caseys. Ennis also acquired as security for that loan a charge over a nursing home (the "Nursing Home") owned by the Caseys at Carna, Connemara, County Galway. Adjacent to the Nursing Home is a property known as the Priest's House (the "Priest's House") and access to the Nursing Home is by means of a right-of-way through the Priest's House. The Nursing Home also benefits from a way leave agreement through the Priest's House for the purposes of a waste water treatment plant which services the Nursing Home. For the purposes of this interlocutory hearing and for ease of reference, the way leave and the right of way will be simply referred to as the "right-of-way". The Priest's House and the Nursing Home were previously both owned by the Caseys, prior to the transfer of the Priest's House by the Caseys to Mr. Egan, who was the Caseys' accountant for several years before the transfer. The primary claim made by Ennis in the substantive proceedings is that this transfer of the Priest's House by the Caseys to Mr. Egan was made with the intent to defraud Ennis.

4. On the sale of the Priest's House by the Caseys to Mr. Egan, Mr. Egan entered into a deed granting a right of way to the Caseys through the Priest's House to the Nursing Home (which the Caseys retained) and a deed granting the Caseys a way leave through the Priest's House for the benefit of the Nursing Home. The contract for the sale of the Priest's House, the deed transferring the Priest's House, the right of way deed and the way leave deed are collectively referred to, in these proceedings, as the "Instruments". The nub of the substantive proceedings is the claim by Ennis against the Caseys that the Instruments were entered into by the Caseys with the intent of defrauding Ennis. The third named defendant ("Mr. Finnegan") was Mr. Egan's solicitor for the purposes of executing these Instruments and it is claimed that he purchased the Priest's House on trust for Mr. Egan. In particular, Ennis claim that Mr. Egan, through his trustee, Mr. Finnegan, entered into a contract for the purchase from the Caseys of the Priest's House with the intent of defrauding Ennis.

5. In broad terms, Ennis claims that because the defendants realised that the Nursing Home was dependent on the right-of-way through the Priest's House, they came up with a plan to sabotage the value of the security over the Nursing Home held by Ennis by, *inter alia*, executing the Instruments. In this regard, Ennis alleges that the defendants' attempt to sabotage was achieved by engineering the sale by the Caseys of the Priest's House to Mr. Finnegan/Mr. Egan and thereby enabling Mr. Egan to blackmail Ennis, as the mortgagee of the Nursing Home, into consenting to the sale of the Nursing Home at undervalue to the owner of the Priest's House (Mr. Egan).

6. Ennis claims that this coercion of a sale of the Nursing Home at under value to Mr. Egan would be possible because whoever controls the alleged right-of-way (Mr. Egan), controls the entry to the Nursing Home, thereby devaluing the Nursing Home, since this point of entry is controlled by a third party, rather than the owner of the nursing home (the Caseys) or the mortgagee of the Nursing Home (Ennis).

7. It follows that the context for these interlocutory motions is that the substantive proceedings issued by Ennis allege fraud against all the defendants. In this regard, particular reliance is placed by Ennis on the terms of an email dated 28th of April, 2015 just two days prior to the signing of the contract for the sale of the Priest's House from the Caseys as seller to Mr. Finnegan/Mr. Egan as purchaser, which sale was completed on the 30th April, 2015. Mr. Egan has averred at para. 10 of his affidavit dated 7th May, 2019 that the trust involving himself and Mr. Finnegan regarding his purchase of the Priest's House has since been unwound and that Mr. Egan is now the legal and beneficial owner of the Priest's House. For this reason, Ennis claim that the references to the "investor", in this email of 28th April, 2015, which is from Mr. Egan to Mr. Keith Gorman, solicitor for the Caseys, is clearly a reference to Mr. Egan himself. This email states:

"Keith,

I had a phone conversation with Niall Finnegan before lunch regarding the purchase of the priests house at Carna. I explained to Niall that the investor acquiring the priests house is doing so on the understanding that he will eventually acquire the nursing home at market value. As you are aware Michael Casey was trying to come up with a proposal to make a settlement with bank of Scotland but was unable to raise the finance required. The situation he found himself in was very awkward as bank of Scotland held the nursing home as security while Ulster bank held the priests house as

security. It was during the negotiations to raise finance that Michael [Casey] *uncovered the problem regarding access to the nursing home and realised that if the priests house was sold by Ulster bank to an outside party access to the nursing home would be compromised*. He had no choice but to try and get the same party to purchase the nursing home, the priests house and the nurses house (a residential unit in Carna used by Michael Casey to provide accommodation for the nurses working in the nursing home). *Michael agreed heads of terms with the investor on the basis that if the investor successfully acquired the priests house and the nurses house that the investor would agree to lease the properties back to him* at a rental of €2,500 per month for each property for 12 months from the date of closing. The investor also agreed that he would pay market value for the nursing home based on a valuation of €950,000 by O'Donnellan and Joyce auctioneers, i.e. valuers on the bank of Scotland panel. It was further agreed if the investor was not successful in acquiring the nursing home within the 12 months period that the rent for both the priests house and for the nurses house would increase to €5,000 per month thereafter. Michael felt that entering into this arrangement provided him with the best opportunity to get maximum value for the nursing home and in so doing secure a deal with bank of Scotland. *The rent under both leases would obviously terminate as soon as the investor acquired the nursing home*. Michael wanted to make sure that he has this agreement signed prior to the investor acquiring either the priests house or the nurses house as otherwise *the investor having acquired the priests house would be in a position to dictate the price he wanted to pay for the nursing home using the access as a bargaining tool*. Michael was anxious to secure the access and at the same time get market value for the nursing home. I am copying Niall Finnegan with this email so he is fully aware of the position. I understand Niall is anxious to close the sale this week and Michael Casey has also confirmed that he is anxious for the sale to be completed as quickly as possible. (emphasis added)

Regards

Jim"

8. In support of its allegations of fraud, reliance is placed by Ennis on the reference by Mr. Egan in this email to the fact that if the Priest's House was sold to an outside party (which seems to be a reference to someone other than the Caseys) that the security over the Nursing Home (which Ennis holds) would be '*compromised*'. Ennis also relies, in its claim of fraud, on Mr. Egan's reference to the fact that the '*investor*' (which Ennis claim is Mr. Egan himself) would be able to dictate the price for the Nursing Home, once he had acquired the Priest's House.

9. Ennis also rely on the fact that the Caseys, just prior to the impugned transactions, owned the Nursing Home and the Priest's House, and therefore at that stage, prior to the sale of the Priest's House in 2015, the Caseys (who are indebted to Ennis in the sum of €3.43 million with Ennis having security over the Nursing Home for that debt) had access to the Nursing Home through the Priest's House, by virtue of the fact that they owned both the Nursing Home and the Priest's House. Ennis places reliance in its allegation of fraud on the fact that the Caseys agreed in 2015 to sell the Priest's House to Mr. Egan for €150,000, yet at the same time the Caseys entered into an agreement with Mr. Egan, whereby the Caseys would continue to have access to the Nursing Home. However, this right of access was achieved at a cost of €300,000, which was twice the purchase price they received. This is because the right of access was achieved by Mr. Egan, the new owner of the Priest's House, granting the Caseys a right-of-way through the Priest's House to enable access to the Nursing Home. However, at the same time as the Caseys *received* €150,000 as the purchase price for the Priest's House from Mr. Egan, they agreed to *pay* Mr. Egan €300,000 over the course of five years to have a right-of-way to access the Nursing Home through the Priest's House even though they had such access prior to the sale of the Priest's House. In addition, the Caseys also agreed that this right-of-way, which entitled them to access the Nursing Home, could be terminated by Mr. Egan/Mr. Finnegan with just three months' notice.

10. In reply to the submissions and evidence giving the background to these motions, counsel for Mr. Egan made only one point, namely that the email of the 28th April, 2015 from Mr. Egan refers to purchasing the nursing home at '*market value*' on a number of occasions in the email.

11. While this Court has no role in determining the factual issues between the parties at this interlocutory stage, it does seem clear from the evidence before the Court at this interlocutory stage, that this case involves very serious allegations of fraud against all four defendants which will have to be heard at the trial of this action.

12. This therefore is the context for this Court's consideration of the following motions brought by Mr. Egan.

CONTEMPT MOTION

13. The background to the first motion is that Ennis sought in April 2018 an interlocutory injunction against the four defendants to prevent them restricting the right of access of Ennis to the Nursing Home through the Priest's House pending the trial of this action on the 19th November, 2019.

14. These interlocutory proceedings were settled on the 20th April, 2018, and the terms of that settlement were made an Order of court with the consent of all parties. The substance of the settlement contained in the court Order is set out in the three schedules to that Order. The First Schedule prohibits the Caseys from, *inter alia*, obstructing Ennis in accessing the Nursing Home through the Priest's House. The Second Schedule obliges Mr. Finnegan not to interfere with the agreements and undertakings given by the Caseys and Mr. Egan set out in the First and Third Schedule regarding that access. The key schedule for the purposes of these proceedings is the Third Schedule and it is alleged by Mr. Egan that both the Caseys and Ennis are in breach of the terms of this Schedule and therefore are guilty of contempt and should be attached and committed to prison. This Schedule states:

THIRD SCHEDULE

"*BY CONSENT* the Court doth note the following confirmations from the Fourth Named Defendant [Mr. Egan]:

(a) That the Fourth Named Defendant will not take any steps to register the Deed of Right of Way dated 28 October 2015 and the Wayleave Agreement dated 28 October 2015 as referred to at paragraphs (c) and (d) to the First Schedule of the Plenary Summons up to the hearing of the Trial;

(b) That the Fourth Named Defendant will not take any step to alienate, convey, transfer, assign, mortgage, charge, settle or otherwise deal with any portion of any of the properties, hereditaments or rights forming the subject matter of the instruments described in the First Schedule to the Plenary Summons (the "*Instruments*") up to the hearing of the Trial;

(c) That the Fourth Named Defendant will continue to honour the terms of the right of way and wayleave referred to at (a) above on the terms set out hereunder and in accordance with the terms of the Instruments up to the hearing of the Trial;

(d) Subject to and conditional upon what is provided for below, that the Fourth Named Defendant will not impede, obstruct or otherwise interfere with the use and enjoyment of the rights, privileges, entitlements and easements described in the Fourth Schedule to the Plenary Summons herein (subject to the addition of the words "*and make good any damage caused*" after Paragraph (b)(ii) thereof) and such other rights, privileges, entitlements and easements as may be required for the proper use and enjoyment of the Property, which undertaking is subject to the following:

(i) The First and Second Defendants maintaining the licence fee payments in the amount of €6,000.00 per month as set out in the Instruments (the "*Licence Fees*") for so long as the First and Second Named Defendant s shall remain in possession and control of the nursing home business that is traded from the Property; and

(ii) Confirmation by the Plaintiffs that, in the event that the First and Second Named Defendants s (sic) remain in possession and control of the nursing home business that is traded from the Property but default in respect of their obligation to pay the License Fees, in all material respects at the trial of the action, the Plaintiffs' undertaking as to damages in connection with the Notice of Motion dated 20 April 2018 extends to any Licence Fees that are unpaid to the Fourth Named Defendant, and

(iii) Confirmation by the Plaintiffs that, in the event that the Second Plaintiff, his servants or agents, take possession and control of the nursing home business that is traded from the Property and the Instruments being held to be valid in all material respects at the trial of the action, the Plaintiffs' undertaking as to damages in connection with the Notice of Motion dated 20 April 2018 extends to any Licence Fees that are unpaid to the Fourth Named Defendant from the date of the second named Plaintiff taking possession and control of the nursing home,

(iv) That the Fourth Named Defendant will permit the Second Plaintiff his servants or agents to carry out inspection of the waste water treatment plant and percolation area, as referred to in the Wayleave Agreement dated 28 October 2015 and defined therein as the "Treatment Plant" and any connected or ancillary facilities upon reasonable notice;"

15. First, it is important to note that, as is clear from the opening words, this Third Schedule contains an obligation on the part of Mr. Egan (who, it must be remembered, is alleging a breach of this court Order by some of the other parties) to refrain from partaking in certain activities. Second, it is also relevant to note that it contains no obligation upon the Caseys to do anything. The obligations upon the Caseys are set out in the First Schedule. There is however a reference in the Third Schedule to the Caseys paying the licence fee payments of €6,000 per month to Mr. Egan as a condition of Mr. Egan not obstructing the right-of-way. However, it is important to note, that while this may be a condition for Mr. Egan complying with his obligations under the settlement agreement set out in this court Order, this is not an obligation that is imposed upon the Caseys under the terms of this settlement agreement as set out in the court Order. It follows that the motion brought by Mr. Egan seeking the attachment and committal of the Caseys for breach of this Order falls at the first hurdle, since the Caseys, by not paying the licence fee, are not in breach of any court Order.

16. Mr Egan also seeks the attachment and committal of Ennis for its alleged breach of this court Order. To ground this application, Mr. Egan relies on the fact that after the said Order of 20th April, 2018, Ennis sought a *Garnishee Nisi* Order, on 10th December 2018, against the Caseys and when the Caseys subsequently requested that the *Garnishee Nisi* Order be varied to allow for the payment of the licence fee to Mr. Egan, Ennis refused its consent. This is clear because evidence was provided that by letter dated 17th December, 2018, solicitors for Ennis stated to solicitors for the Caseys that:

"Our client does not consent to the payment of €6,000 to [Mr. Egan's Solicitors] – Priests House Licence. This money should be paid to our client immediately."

17. Mr. Egan claims that since Ennis consented to the terms of the settlement set out in the court Order, which settlement terms provided that as a condition of Mr. Egan not impeding the right-of-way that the Caseys would pay the licence fee to Mr. Egan, it follows that the withdrawal by Ennis of its consent to that licence fee payment out of the bank account subject to the *Garnishee Nisi* Order, amounts to a breach by Ennis of the court Order.

18. As with the contempt proceedings against the Caseys, these contempt proceedings against Ennis fall at the first hurdle, since there is no obligation upon Ennis under the terms of the court Order to facilitate, support or not impede in any way, whether by means of not seeking a *Garnishee Nisi* order or otherwise, the payment by the Caseys of the licence fee.

19. This is because, while the court Order is filled with details of the obligations of the defendants, it is silent on the obligations of Ennis. Accordingly, there is no question of Ennis being in contempt of court by being in breach of this court Order, since there is no obligation upon Ennis to fund or otherwise facilitate the payment of the licence fee by the Caseys to Mr. Egan.

20. Furthermore, the court Order itself expressly contemplates the non-payment of the licence fee by the Caseys and provides a remedy for that eventuality. That remedy is that Ennis' undertaking as to damages would extend to any such licence fees being unpaid by Caseys to Mr. Egan. It seems clear to this Court therefore that this is the remedy available to Mr. Egan for the non-payment of the licence fee by the Caseys, i.e. that Ennis would be liable for that non-payment if Ennis loses its case alleging fraud against the defendants, and the remedy is not contempt proceedings against the Caseys or Ennis.

21. Accordingly, the application for the attachment and committal of Ennis is similarly dismissed.

MOTION FOR THE TRIAL OF A PRELIMINARY ISSUE

22. The next motion seeks a trial of a preliminary issue in advance of the trial of the action in relation to the following legal issue (the "Legal Issue"):

"Whether or not the rights specified in the Fourth Schedule to the Plenary Summons issued herein by the Plaintiffs on 20 April 2018 are easements appurtenant to the nursing home property described in the Third Schedule to the Plenary Summons."

23. Although the motion seeks this preliminary issue to be tried '*in advance of the trial of the action*', the actual application which was made to this Court at the hearing of this motion was not for the Legal Issue to be tried *in advance of the trial* of the action, rather the application was that this Legal Issue be dealt with *on the first day of the trial*.

24. On this basis alone, there are grounds for dismissing the Notice of Motion, since the actual terms of the Notice of Motion were never pursued at the hearing of the motion. On this basis, this Court would dismiss the motion.

25. However, if this Court were to entertain the motion, as one, not for the trial of a preliminary issue in advance of the trial of the action, but rather as an application regarding the sequencing of the trial, it is this Court's view that this is a matter which should be dealt with by the trial judge (particularly since the trial is due to start in only two 'legal months' time on the 19th November, 2019). This is because any such ruling regarding the sequencing of issues at the trial would deprive the plaintiff of its prerogative to run this trial, which is at its heart a trial involving serious allegations for fraud, in whatever way it chooses.

26. In any case, this Court is of the view that dealing with the Legal Issue on the first day of the trial, would not necessarily save any time, which is one of the arguments put forward by Mr. Egan in support of his application. This is because it was suggested on behalf of Mr. Egan that a finding on this Legal Issue (which is essentially a claim that as a matter of law it was not possible for there to be pre-existing rights of way between the Nursing Home and the Priest's House when they were both owned by the Caseys), is likely to lead to the end of the case. Mr. Egan's argument is that if there were no pre-existing rights of way between the Nursing Home and the Priest's House while those two properties were both owned by the Caseys (on, it seems, the basis that the Caseys could not have a right of way over their own land) then it follows, according to Mr. Egan, that the creation of the subsequent right-of-way by Mr. Egan in favour of the Caseys, when he bought the Priest's House, could not amount to a derogation of grant, for the very simple reason that there was no such right-of-way in the first place in favour of the Nursing Home. Mr. Egan argues that if anything, the grant of the right-of-way in favour of the Caseys actually improved Ennis' position, if he is right on this Legal Issue, that there were no pre-existing rights-of-way between the Priest's House and the Nursing Home, when they were both owned by the Caseys.

27. However, it is clear from the plenary summons that what Ennis is seeking is not only a declaration that the Caseys have breached the doctrine of non-derogation of grant, but also a declaration that the Instruments were created with the intention of defrauding the Caseys' creditors.

28. For this reason, even if it was found as a matter of law that there was no pre-existing right-of-way, the Instruments could still have been created with the *intent* of defrauding creditors. This issue can therefore be decided irrespective of whether, as a matter of law, there was a pre-existing right of way between the Priest's House and the Nursing Home. For this reason, a finding that there were no pre-existing rights will not necessarily shorten the trial.

29. For all these reasons, this Court rejects the application to try this legal issue as a preliminary issue in advance of the trial of the action.

DISCOVERY

30. The motion for discovery was also heard by this Court and Ennis was given further time to put in a more detailed affidavit of discovery to enable greater clarity to be provided regarding the reasons for the redaction. This was in the hope that this matter might then be more easily resolved between the parties and/or enable the Court make a decision on the redaction without the need to examine each document.