Neutral Citation: [2015] IEHC 576

THE HIGH COURT

[2015 No. 35SP]

BETWEEN

KENMARE PROPERTY FINANCE LIMITED

PLAINTIFF

AND

MARK MCGUINNESS

DEFENDANT

JUDGMENT of Ms. Justice Faherty delivered on the 15th day of September 2015

1. This is an application by the defendant, brought by notice of motion dated 18th August 2015, for an order directing that a *lis pendens* registered by the plaintiff against lands registered on Folio 2664L Co. Westmeath be vacated. The *lis pendens* was registered in the context of the plaintiff's Special Summons proceedings.

Background

2. The Special Summons proceedings are asserted to arise on foot of a guarantee given by the defendant in respect of credit facilities provided to his parents. The affidavit of Jonathan Hanly, a director of the plaintiff company, grounding the Special Summons and sworn on 25th February, 2015, avers that by a letter of offer dated 1st January, 2009 (the facility letter), Anglo Irish Bank Cooperation Plc. (Anglo) offered the defendant's parents loan facilities in excess of €1.7m. It is asserted that the said offer was made subject to the terms and conditions set out in the facility letter, including clause 3 (iii) thereof regarding the security to be given by the defendant. Mr. Hanly asserts that the facility letter was accepted and signed by the defendant's parents as borrowers and by the defendant as guarantor. In paragraph 3(iii) of the letter, the security was expressed to include the *"guarantee of Mark McGuinness supported by and limited to a first legal charge over his interest in apartments 33 & 35 at Marlinstown Park, Mullingar, Co. Westmeath"*. It is further asserted that the defendant, when he signed the "Guarantor's Acceptance" in the facility letter, had the benefit of legal advice. Mr. Hanly asserts that the Guarantee Acceptance provided as follows, including alterations in pen made by the defendant and/or his solicitor: *"I have read the Facility Letter of 1st January 2009 to Aidan and Eileen McGuinness and the Bank's General Conditions which form part of the Agreement between the borrower and the Bank ("the Agreement") and I confirm that I fully understand the terms of the Agreement and acknowledge that I am guaranteeing the performance of the Borrower of its obligations under the Agreement to the Bank limited to my interest and value in apartments 33 & 35 Marlinstown Park, Mullingar and solely confined to same. I acknowledge that I have been given due opportunity to take independent legal advice on the effect of the Agreement and have taken/waived (delete one) the opportunity to take such legal advice."*

3. Mr. Hanly avers that on 17th October, 2011, Anglo changed its name to Irish Bank Resolution Corporation Limited (IBRC). It is further averred that on 7th February 2003, the Minister for Finance ordered the winding up of IBRC pursuant to section 4 of the Irish Bank Resolution Corporation Act, 2013 and appointed two joint Special Liquidators of IBRC. Mr. Hanly avers that on 28th March, 2014, IBRC agreed to assign, and did assign, the benefit of the loan and the facility letter of 1st January 2009 to the plaintiff. It is asserted that arising from the assignment of the benefit of the loan and the facility letter, the plaintiff became entitled to the amounts owing to IBRC on foot of the facility letter. A copy of the Deed of Assignment by IBRC to the plaintiff is exhibited in Mr. Hanly's affidavit, most of which has been redacted.

4. Mr. Hanly asserts that on 9th June, 2014 and 26th June, 2014 respectively the defendant's parents and the defendant were duly informed in writing of the assignment of the benefit of the loan and the facility letter.

5. It is further averred on the part of the plaintiff, that by letter dated 12th December, 2014, the plaintiff demanded that the defendant's parents, and or the defendan,t pay all amounts due and owing in foot of the loan and facility letter on or before 17th December, 2014. It is averred that despite the demand, monies were not repaid and the sum of €1.7m odd remained due and owing from the defendant' parents on a joint and several basis to the plaintiff. Mr. Hanly goes on to aver that on foot of alleged default on the part of the defendant's parents, the plaintiff is entitled to rely on the guarantee given by the defendant and on an asserted equitable mortgage over the defendant's properties in favour of Anglo by virtue of the defendant's agreement to create a first legal charge over his properties in favour of Anglo.

6. It is not disputed that prior to the institution of the Special Summons proceedings, the plaintiff was under the impression that the defendant had created a first legal charge over his properties by way of a Deed of Mortgage dated 13th of January, 2006 in favour of Anglo, the purpose of which was to secure his parents' borrowings.

7. The demand for payment which was made on 12th December, 2014 not being met, on 19th December, 2014, the plaintiff, in purported reliance on the Mortgage Deed, duly appointed a Receiver over the defendant's properties.

8. The defendant challenged the validity of the appointment of the Receiver on the basis that he did not execute the mortgage and he instituted proceedings in the High Court, seeking a number of reliefs, including an order discharging the Receiver. The defendant claimed that his signature had been forged. Handwriting experts were retained by the defendant and the plaintiff respectively and both expert reports duly confirmed that it was not the defendant's signature on the mortgage documents. The plaintiff's handwriting expert, in her report, found "strong positive evidence" to support the view that the questionable signatures of the defendant connected to the Mortgage Deed were written by his father, a matter disputed by the defendant's father. As a consequence of the reports' findings and before the injunction application came on for hearing, the Receiver who had been appointed to the defendant's properties was discharged on 11th March 2015, and the burden which had been registered on the defendant's properties on foot of the fraudulent mortgage was vacated on 10th April, 2015.

9. On 17th February, 2015, the plaintiff issued the Special Summons which was ultimately served on the defendant in late February 2015. The plaintiff seeks, *inter alia*:-

i. An order that the total of €1,736,713.26 stand well charged on the defendant's interest in the properties described in Folio WH2664L;

ii. If necessary, a declaration by virtue of a contract formed between Anglo and the defendant, the benefit of which was assigned to the plaintiff, the plaintiff is entitled to and holds a mortgage and charge over the defendants properties described in Folio WH 2664L; and

iii. In default of payment of the sum claimed, an order for sale and, if necessary, an order for possession of the said property.

The *lis pendens* , the subject of the within application, was registered on 4th March, 2015 on Folio WH2664L as a burden in the context of proceedings affecting the interest of the defendant *"pending in the High Court".*

In his grounding affidavit of 25th February, 2015, Mr. Hanly avers as follows:-

> *"15 . The Plaintiff accepts that it does not hold a legal mortgage over the Properties as the Mortgage Deed contains a forged signature of the Defendant. However, I say and believe that the 2007 Facility Letter and the Facility Letter are both signed by the Defendant and there appears to be no dispute on that central issue. It is absolutely clear from the terms of the two relevant facility Letters that the Defendant pledges the properties in order to secure and guarantee the performance of the obligations of the Borrowers to Anglo. It is also clear that the facilities were continued and extended based on the security which the Defendant contracted to provide. The said Facility Letters constitute a contract by virtue of which the Defendant contracted with the Plaintiff to provide the Properties as security for his parent's (sic) borrowing. The Defendant's parents have defaulted on the loans. The Defendant is now liable to pay the plaintiff the sums due and owing in accordance with the Facility Letter, but the Plaintiff's ability to recover the sums due and owing from him is limited to his interest and value in the Properties. It is for that reason that well charging relief is sought in these proceedings."*

10. In his replying affidavit of 24th March, 2015 to the Special Summons, the defendant denies that he ever agreed to grant a mortgage over his properties and contends that the averments in Mr. Hanly's affidavit in respect of alleged borrowings are hearsay as the plaintiff is not a bank and *"not entitled to avail of the evidential proof methods available to banks"* and that the plaintiff has failed to corroborate its position satisfactorily. He denies that he ever had sight of, or read, or received the purported facility letter dated 1st January 2009 and asserts that he was given only a copy of the last page of the letter. He avers that he:

> *"did not agree to provide a guarantee to Anglo Irish Bank before the alleged advancement of funds to the borrowers and had not sight of the purported facility letter in its entirety before signing the final page and it seems that as Anglo had not obtained my agreement to the said purported guarantee before the alleged advancement of funds, which are disputed, to the borrowers nor is the alleged guarantee sealed that no liability can accrue to this deponent on foot of same. I further say that I had or have no borrowings from Anglo Irish Bank."*

11. In his supplemental affidavit sworn on 26th June, 2015, Mr. Hanly avers, inter alia, as follows:-

> *"The plaintiff (sic) alleges that he had no dealings with Anglo Irish Bank. However, he does accept that he received the Guarantors Acceptance page of the Facility Letter. He signed the Guarantor's Acceptance after receiving legal independent advice and after his solicitor made an amendment to the wording of the Plaintiff's (sic) guarantee given in connection with the borrowing of his parents. The giving of a guarantee, albeit it limited the pledging of the two apartments, clearly constitutes a dealing with Anglo Irish Bank on the part of the Plaintiff (sic)."*

At paragraph 9 he goes on to state:-

> *"at paragraph 11 of his affidavit, the Defendant denies that he agreed to give the Plaintiff an equitable mortgage. I say that that is a matter for the Court to determine, but it is noteworthy that the written terms of the signed guarantor's acceptance make it clear that the defendant pledged his two apartments to Anglo as security for his parents' borrowing. The said acceptance was included in the security required for the 2007 Facility and the 2009 Facility and I say that in the circumstances, the Defendant created an equitable mortgage over two apartments, the benefit of which has been assigned to the Plaintiff herein."*

In a supplemental affidavit sworn on 6th July, 2015, the defendant avers, inter alia, as follows:-

> *"4. In reply to paragraph 4 of Jonathan Hanly's supplemental affidavit, I say that I did not sign the Guarantor's Acceptance on the Facility Letter dated 1st January 2009 … I say I never made an admission that I signed same. I further say that the final page of exhibit "JH2", titled "Guarantors Acceptance" and dated "17th July 2009", has been exhibited in such a manner in an attempt to present the document as one complete document when in fact two distinct and separate documents are present. I say I only had sight of one page at the material time.*
>
> *5. In reply to paragraph 5 of Jonathan Hanly's supplemental affidavit, I say and believe that the averments in respect of the alleged borrowings are hearsay as the plaintiff is not a bank and not entitled to avail of the evidential proof method available to banks and anyhow has failed to corroborate its position satisfactorily. No judgment has been obtained by the Plaintiff for the alleged debt. The defendant herein is a stranger to proceedings which are in being between my parents and the Plaintiff and my parents and Anglo Irish Bank. I say and believe that the alleged debt being sought by the Plaintiff from my parents is disputed.*
>
> *6. In reply to paragraph 6 of Jonathan Hanley's supplemental affidavit, I say and believe the assertion as stated "appears to be an implicit admission" is denied by the Defendant herein. I understand the Plaintiff, to date, has not provided the Defendant herein details of alleged amounts drawn down or alleged dates of same and dispute exists. I believe the Plaintiff has failed to prove the alleged debt other than relying on hearsay. I say I received no money whatsoever from the Plaintiff or Anglo Irish Bank."*

In the course of that affidavit, the defendant makes reference to the plaintiff having a *lis pendens* attached to his properties, which the defendant contends is *"wrongful and prejudicial to [his] interests"*.

In his second supplemental affidavit, sworn 20th July, 2015, Mr. Hanly addressed the issue of the *lis pendens*:-

> *"4. At paragraph 3 of his affidavit, the Defendant refers to the presence of a lis pendens over the two apartments at issue in these proceedings. I say the said lis pendens is absolutely necessary as I say and am advised by the Plaintiff's solicitors that the Defendant, through his Counsel, has informed the Court that he is actively trying to dispose of the Properties notwithstanding the Plaintiff's claim herein that the properties are subject of an equitable mortgage in favour of the Plaintiff and that the Plaintiff is entitled to the relief, set out in the Special Summons herein. In those circumstances, absent a lis pendens, the plaintiff would be irreparably prejudiced with the sale of the Properties by the Defendant.*
>
> *5. At paragraph 4 of his affidavit, the Defendant states that he did not sign the Guarantor's Acceptance on the Facility letter dated 1st of January, 2009 as is clearly exhibited at "JH2" of my Grounding Affidavit. I say that such an averment has the potential to be highly misleading. In fact, at paragraph 6 of his replying affidavit sworn 25 March 2015 the Defendant has clarified that he did sign the Guarantor's Acceptance at "JH2" but he says it was not attached to the Facility letter at the time of his signature. This is a very different position to that sworn to by the Defendant at paragraph 4.*
>
> *6. I say that by the Defendant's own admission, he signed the Guarantor's Acceptance guaranteeing the borrowings of his parents and he did so having received full independent legal advice. The Defendant had the benefit of independent legal advice from John Quinn Solicitor and Mr. Quinn went so far as to make amendments to the wording of the Guarantors Acceptance in order to clarify that the recourse of the bank was limited to the interest and value in the Defendant's properties."*

12. In his grounding affidavit to the within application for the removal of the *lis pendens*, sworn 18th August, 2015, the defendant reiterates his position, as follows:

> *"13. …. I say that the Plaintiff is relying on a purported granting acceptance section of a facility letter addressed to my parents dated 1st January 2009. I say that I did not sign this facility letter and only signed a page in July 2009 which I deny constitutes an equitable mortgage over my property in favour of Anglo Irish Bank nor did I ever agree to create a mortgage in favour of Anglo Irish Bank in respect of my properties. …"*

He avers that the Special Summons proceedings *"have not been brought in a bona fide manner and are not being prosecuted bona fida."* He further avers that the *lis pendens* is causing him extensive prejudice as he has been unable to complete a sale of his properties and that "the purchaser has indicated that they will now wait only a short number of weeks for confirmation of clear title". The defendant exhibits a redacted contract of sale in respect of the properties at 33 and 35 Marlinstown Park, Mullingar.

In his replying affidavit of 20th August, 2015 to the motion, Mr. John Fitzgerald, solicitor to the plaintiff, reiterates, *inter alia*, the plaintiff's position that the defendant *"did sign the Guarantor acceptance clause on his parents' loan facility pursuant to which he contracted to provide a Deed of Mortgage and Charge over the Properties."*

He exhibits an order of Gilligan J. of 21st July, 2015 from which, he asserts, that it is clear that five sets of proceedings (including the Special Summons proceedings) presently before the High Court involving the defendant, the defendant's parents, the plaintiff and the Receiver were the subject of a case management order. Mr Fitzgerald goes on to state that *"[i]t appears to me that Mr. Justice Gilligan intends that all 5 sets of proceedings be consolidated, and all of the proceedings have been adjourned pending the determination of an appeal brought by the Defendant's parents seeking to have IBRC (In Special Liquidation) joined to one of the actions."* On 30th July, 2015, counsel for the defendant was given liberty to bring the within motion.

The Submissions Advanced by Counsel for the Defendant

13. The central thrust of the submissions advanced on behalf of the defendant is that the Special Summons proceedings initiated by the plaintiff against the defendant are doomed to failure as the plaintiff is not a banker, but rather a private company who has "out of the blue" demanded as due and owing a figure in excess of €1.7m from the defendant. At best, the plaintiff is only an entity who asserts that it has purchased debts from Anglo. As such it does not come within the definition of a bank for the purposes of the Bankers Book, Evidence Act, 1879 - 1989. Thus, counsel contends, the entire of the matters averred to at paragraphs 5, 9, and 11 of Mr. Hanly's affidavit of 26th June, 2015 (and similar averments in his other affidavits) are hearsay. Counsel also contends that insofar as Mr. Hanly, in his further supplemental affidavit of 20th July, 2015, asserts the need for the *lis pendens*, same has only arisen consequent on the demise of the legal mortgage on grounds of forgery and, furthermore, the claim to an equitable mortgage emanates from a private company which is not a bank and which has failed to provide evidence of alleged indebtedness, otherwise than by hearsay. The defendant disputes the plaintiff's assertion that it has an equitable mortgage limited in recourse over the defendant's two apartments; as such an assertion was never made by Anglo. Counsel contends that the plaintiff has not provided and is not in a position to provide proofs to corroborate any alleged indebtedness, absent the ability of the plaintiff to avail of the Bankers Book, Evidence Act, 1879-1989.

14. The Special Summons proceedings and the ensuing *lis pendens* are only an option "B" for the plaintiff in circumstances where Anglo never sought an equitable mortgage or registered a *lis pendens*. In the unique circumstances that the plaintiff's case is built on hearsay, the defendant requests the court to lift the *lis pendens* to allow the defendant deal with his properties.

15. Of particular concern to the defendant is the absence of any averment by Anglo as to the entries regarding the defendant's dealings with the bank, as required by s. 4 of the Bankers Book, Evidence Act, 1879-1989. Since the plaintiff asserts that it purchased the loans in question from Anglo/IBRC, there is, counsel contended, no reality of Anglo's books being in the possession or control of Anglo unless there is some collateral agreement of which the defendant is unaware.

16. In this context, counsel referred to what was required under the Bankers Book, Evidence Ac,t 1879-1989, as summarised by Cregan J. in *ACC Bank Plc. v. Byrne and O'Toole* [2014] IEHC 530 :

> *"51. In my view therefore what the Bankers' Books Evidence Acts now require, for modern applications to court in today's world, where details of loans and other accounts are kept on computer, (and where bank statements are then printed off from computer records) is as follows:*
>
> *1. A printed copy of a computer entry (e.g. a bank account statement) contained in the bank's computer records [see s.3 of the Act]*
>
> *2. Formal proof, given by an officer of the Bank,*

(1) that the computer records (from which the copy of the bank statement was taken) are one of the ordinary computer records of the bank [see s.4]

(2) That the entry of the account details into the computer records was made in the usual and ordinary course of the business of the bank [see s.4]

(3) That the computer records are in the custody or control of the bank [see s.4]

3. Formal proof that the bank account statements printed off from the computer and adduced in evidence have been reproduced directly from the bank's computer records [s.5 (1) (a)]

(This must be proved by the person in charge of the reproduction – see [s.5 (2) (a)]

4. Formal proof (if there is a copy of a copy) that the copy of the bank statement produced in court is a correct copy of the bank statement printed off from the computer (see 3 above) and that the two have been compared (see [s.5 (1) (b) (i)]

[This must be proved by the person who has compared the copy produced in court with the original copy (see s.5 (2) (b)]

5. Formal proof that the copy reproduced in court is also a copy which, in effect, could have been reproduced directly from the bank's computer records [see s.5 (1) (b) (ii)]

[This must also be proved by the person in charge of the reproduction at 3 above [s.5 (2) (a)]

6. Formal proof that the copy of the bank statement produced in court has been examined with the original entry in the bank's computer records and that it is correct [s.5 (1) (c)]

(This must be proved by a person who has examined the copy with the original entry in the computer [see s.5 (2)(c))

51. It is clear from the Act that all these proofs set out at s.4 and s.5 of the Act must be proved so that a copy of an entry in a bank's computer records can be received as evidence of the entry and of the account and of the transactions and accounts recorded therein (s.3)

52. If they are not proved, the Act is quite clear that the "copy of the entry"….. "shall not be received in evidence." (See s.4 and s.5.) (Emphasis added)"

17. Moreover, counsel submits that the plaintiff, as a private company, is not in the list of banks set out in section 9 (2) of the Act.

Counsel referred to the dictum of Keane CJ. in *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168 (cited with approval in ACC v. Byrne):-

"It is clear that, in accordance with the rules of evidence normally applicable in civil proceedings, the documents in question could be proved only by their authors giving sworn evidence and being subject to cross-examination, unless advantage was taken of the provisions of the Bankers' Books Evidence Act 1879 – 1959. The documents in question, accordingly should not have been admitted in evidence in the High Court, unless as the plaintiff contends, they were admissible under the provisions to which I have just referred."

18. Counsel contended that the dictum of Keane CJ. was particularly apposite as the plaintiff seeks to rely on a figure in excess of €1.7m for the well charging proceedings, but has not adduced evidence of how it was calculated or other necessary averments, as required by the Bankers Book, Evidence Act, 1879-1989.

19. Counsel placed particular reliance on the decision of O'Malley J. in *Ulster Bank Ireland Ltd. v. Dermody* [2014] IEHC 140. where she stated, inter alia :-

"50. The issue that arises then is whether Mr. Evans can be said to be an "officer" of the plaintiff bank within the meaning of the Acts. In my view he cannot. I accept that for the purposes of the Acts an employee may be considered to be an officer of the bank. However, Mr. Evans is not an employee of the plaintiff, but of a separate legal entity. The plaintiff accepts that this is not a case in which the principles relating to lifting or piercing the corporate veil are relevant, but relies on the closeness of the corporate structure of the Ulster Bank Group. In my view the fact that the two companies are closely related does not alter their separate legal existence. I can see no legal or factual difference between the service that Ulster Bank Limited provides to Ulster Bank Ireland Limited in debt collection cases and that provided by Certus to Bank of Scotland, as considered by Peart J. in Stapleton."

It is thus submitted that the present scenario falls full square within the ambit of the decision of O'Malley J. in *Ulster Bank v. Dermody*, and in fact the present position is more remote than that which presented in the *Dermody* case.

20. The Court was also referred to the decision of Peart J. in *Bank of Scotland Plc. v. Stapleton* [2012] IEHC 549.

21. In the context of the plaintiff's position, the proceedings are not *bona fide*. If the defendant were *bona fide*, Anglo would have been co-plaintiff with the plaintiff to prove the debt or alternatively it would have provided corroborative evidence. However, what the defendant received was a letter dated 1st January, 2009 and a letter dated 12th December 2014 apparently obtained from Anglo/IBRC in the course of a sale, which the plaintiff is attempting to rely on as first hand evidence of the admissibility of the said letters, yet there is not a shred of corroboration regarding the letters provided to the defendant. There has been no particularisation of the claim despite the defendant's solicitors request for same. Counsel argues that it is not possible for the plaintiff to mend its hand in these proceedings in order to properly corroborate the defendant's alleged indebtedness, as required by law. The defendant has been faced merely with an assertion from a private company that it has acquired some Anglo loans. Counsel submits that it goes to the root of the *locus standi* of a private company to corroborate the defendant's alleged indebtedness.

The Submissions Advanced on Behalf of the Plaintiff

22. The plaintiff submits that there is a clear dispute between the parties as to:

1. The plaintiffs title to the loans and security at issue and

2. The extent to which the plaintiff is required to prove that certain sums are due and owing to it.

It is argued that these issues are not required to be considered in the context of the present application, rather the issue is whether the plaintiff has a *bona fide* claim. Insofar as counsel for the defendant alluded to the fact that at no stage had Anglo sought an equitable charge, there was good reason for that, namely Anglo's belief that it had a legal charge over the defendant's properties. At the time of the sale by Anglo/IBRC of the loans and security to the plaintiff, there was no reason to doubt the veracity of the defendant's signature on the 2006 mortgage document. The plaintiff had in good faith appointed a Receiver on foot of that legal charge until it was discovered that the defendant's signature was forged. The plaintiff acknowledges that just because the mortgage document was forged did not necessarily give rise to the plaintiff's entitlement to well charging relief. However, the basis of the plaintiff's case is that while it is now accepted that the defendant did not sign the Mortgage Deed, he did sign the facility letter and contracted to provide a guarantee supported by a mortgage and charge over his two properties. Part 3(iii) of the letter of 1st January 2009 provides the basis for the equitable mortgage and the well charging order, which are matters to be determined in due course.

23. The plaintiff submits that the provision of the Land and Conveyancing Law Reform Act, 2009, under which the present application is brought, require the court to be satisfied that the plaintiff's action is not being prosecuted *bona fide.* The courts jurisdiction in the present application comes down to this basic point. While counsel for the defendant, effectively, urges on the court that the present application is the forum for the plaintiff to prove its ownership of the loans and indebtedness and security and to prove its figures, the plaintiff submits that those are issues to be determined in the context of a full plenary hearing. These Special Summons proceedings comprise part of the order made by Gilligan J. linking some five sets of proceedings. If, at the end of the day, the plaintiff is unable to show that it did not validly acquire the loans and security then the plaintiff's action must fail but, it is submitted, the present application is not the forum to determine this issue.

24. Insofar as the defendant claimed that there is an urgency to the present application in the context of the contract for sale of the properties deposed to in the defendants affidavit, the plaintiff submits that should the plaintiff's claim fail, any loss that might accrue to the defendant, by virtue of his inability to sell the properties because of the lis pendens, can be taken account of in the context of the damages claim which the defendant has instituted against the plaintiff. The defendant's proceedings are part of the case management order of the High Court. The plaintiff sought details of the contract of sale in the context of seeing whether it could consent to the sale going ahead, with the sale proceeds to be held in escrow pending the determination of the proceedings between the plaintiff and the defendant. The defendant however declined to provide that information.

25. The plaintiff contends that there are major issues of fact between the parties which require to be determined in the context of the Special Summons proceedings. Accordingly, the defendant's application for the removal of the *lis pendens* is misconceived. In requesting that the court refuse the application, the plaintiff cited decisions of Laffoy J. in *Gannon v. Young* [2009] IEHC 511; Clarke J. in *Dan Morrissey (IRL) Ltd., Dan Morrissey Ltd. v. Donal Morrissey, Lismard Developments Ltd., Lismard Properties Ltd.* [2008] IEHC 50; 3 IR 752 and Ryan J. in *Kelly v. IBRC Ltd.* [2012] IEHC 401.

Considerations

26. Section 123 of The Land and Conveyancing Law Reform Act 2009 provides:

> "123. — Subject to section 124 , a court may make an order to vacate a *lis pendens* on application by —
>
> [LPA 1867, s. 2]
>
> (a) the person on whose application it was registered, or
>
> (b) any person affected by it, on notice to the person on whose application it was registered any person affected by it, on notice to
>
> (i) where the action to which it relates has been discontinued or determined, or
>
> (ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted bona fide."

27. As to the purpose of, and the entitlement to register a *lis pendens*, in *Moorview Developments Ltd. v. First Active Plc.* [2011] 1 IR 117 Clarke J. stated as follows:

> *"11 Secondly, it is true to say that part of the basis put forward on behalf of the second defendant for seeking to have the lis pendens vacated was that he was, he asserted, somewhat impaired in his personal dealings by having alis pendens registered against his name. There was a debate at the hearing before me as to whether such an assertion was factually correct. However, that consideration seems to me to be irrelevant. Either the lis pendens is properly registered, in which case it must remain in place, or it is not properly registered, in which case it should be vacated. The second defendant is entitled to have the lis pendens vacated if it is not properly registered irrespective of whether its registration has any affect on him. The test is not similar to the consideration which a court may have to give in the case of an interlocutory injunction, where the court needs to balance the interests of the parties concerned. There either is or is not a sufficient piece of litigation in place as against the second defendant to warrant the continuance of a lis pendens. If there is not, then the second defendant is, in my view, entitled to a vacation of that lis pendens as of right.*
>
> *12. Finally, it is said that there is no urgency about this matter so that the second defendant's application could conveniently be left over until all of the issues arising in the proceedings linked with these proceedings have been determined. This again seems to me to be an irrelevant consideration. If the second defendant is properly entitled to have the lis pendens vacated, then he is entitled to have that done now rather than have to wait until other unconnected issues are determined.*
>
> *13. It follows that it seems to me that I should now decide the issue of principle which arises between the parties as to whether the connection which the second defendant may have to the relevant property justifies the registration of a lis pendens against him. I now turn to that question.*
>
> *14 Neither counsel was able to find any direct authority on the point. In those circumstances it seems to me that the*

matter must be determined from first principles. A lis pendens is designed to give notice of the fact that proceedings relating to land are pending before the court. Insofar as a lis pendens is registered against a named individual, then it seems to me that its purpose must be to bring to the attention of any interested party, the fact that there are proceedings in being against the person concerned which relate to the ownership of property or an interest in property. It may be that there is contained within the one set of proceedings a number of claims against a number of defendants in circumstances where not all of the claims are pursued against all of the defendants. It seems to me that, as a matter of first principle, it could never be the case that a defendant who happened to be properly joined in a set of proceedings in relation to some relief that did not relate directly to land in which the relevant defendant had an interest, could properly be the subject of a lis pendens. There would, in those circumstances, be no lis pending in relation to the ownership of land or an interest in land in respect of the person concerned. The underlying rationale behind the registration of a lis pendens is as was noted by Geoghegan J. in this court in A.S. v. G.S . [1994] 1 I.R. 407. In the course of his judgment in that case Geoghegan J. noted at p. 413 with approval the explanation by Lord Cranworth in Bellamy v. Sabine (1857) 1 De. G. & J. 566. The relevant passage at p. 578 speaks of "litigation…pending between a plaintiff and a defendant as to the right to a particular estate …".

15. That quote seems to me to express the fundamental proposition. The issue between the parties must relate to the ownership of some interest in land. Where there is more than one defendant in the proceedings, then in order that a lis pendens be validly registered in respect of a particular defendant, the issues which arise on the pleadings and which are being bona fide pursued by the plaintiff, insofar as the relevant defendant is concerned, must relate to the ownership of some interest in land."

28. In *Tola Capital Management LLC v. Linders* and other [2014] IEHC 324, Cregan J. considered the meaning of s.123, in the following terms:-

"129. The defendants submit that, even if they are wrong in relation to the first argument, the lis pendens should be vacated because the action is not being prosecuted bona fide.

130. I turn to an assessment of the wording of s. 123(b)(ii). This section provides that a court may make an order vacating a lis pendens where the court is satisfied that the action is not being prosecuted bona fide. The subsection does not refer to a situation where a claim is not being brought bona fide, but rather "where the action is not being prosecuted bona fide".

131. In those circumstances, one must consider what is meant by the phrase "the action is not being prosecuted bona fide". In my view this phrase can be interpreted as meaning either:-

A. That the action as a whole is not being prosecuted in a bona fide manner, or

B. That specific steps in the action are not being prosecuted in a bona fide manner.

132. In my view both interpretations are valid and the meaning of the section is that a court may make an order vacating a lis pendens if it is satisfied that the action as a whole is not being prosecuted in a bona fide manner or if particular steps in the prosecution of the action are not being taken in a bona fide manner."

29. The plaintiffs claim is that a sum of €1,736,713.26 stands well charged over the defendant's interest in WH Folio 2664L. The principal argument put forward to ground the claim is that the defendant provided a guarantee for his parents' borrowings to Anglo and that an equitable mortgage was created by the defendant in favour of Anglo pursuant to part 3(iii) of the facility letter of 1st January, 2009 and the Guarantors Acceptance signed by the defendant on 17th July, 2009. The plaintiff claims to have become entitled to the loans and indebtedness and security in issue in the Special Summons proceedings on foot of a Deed of Assignment dated 28th March, 2014 and a Deed of Transfer dated 23rd May, 2014 from IBRC.

30. In the course of three affidavits, two of which were sworn in the context of the Special Summons proceedings and the third being the grounding affidavit to the present application, the defendant challenges the plaintiff's entitlement to pursue him, on the following grounds:-

i. The Special Summons is a misconceived impulse reaction by the plaintiff to endeavour to obtain a mortgage from the defendant in circumstances where the legal mortgage had to be discharged for the reason set out in the various affidavits;

ii. The defendant's denial (without prejudice to any dispute which may be related to the alleged facilities) that he had sight of or read or received a copy of the facility letter dated 1st January, 2009, having been given only a copy of the last page which, while signed by the defendant, was signed subsequent to any alleged signing by his parents or any alleged drawdown by them of facilities from Anglo;

iii. The defendant's denial that he pledged his properties to Anglo;

iv. That the plaintiff is attempting to obtain an equitable mortgage by stealth; and

v. That the averments in the plaintiff's affidavits in respect of alleged borrowings, indebtedness and security are hearsay as the plaintiff is not a bank and is not entitled to avail of the evidential proof method available to banks and that the plaintiff has failed to corroborate its position satisfactorily. As such, the plaintiff's action is destined to fail.

31. It seems to me that the issue is whether the Special Summons proceedings pursuant to which the *lis pendens* was registered can be said, in the words of Clarke J. in *Morrissey v. Lismard* [2008] IEHC 50, to be *"a set of genuine proceedings" "which could have an affect on property"*. As stated by Clarke J., *"the whole point of registering a lis pendens is to protect the plaintiff's interest. The plaintiff is entitled to protect those interests in all circumstances subject only to having a bona fide claim to protect."*

32. In *Gannon v. Young* [2009] IEHC 511, Laffoy J. set out the test to be applied in the context of an application such as the present when she stated :

"Accordingly, the test on an application such as this to vacate a lis pendens, where the plenary proceedings are pending and the defendants, who registered the lis pendens, are not consenting, is whether the defendants, as plaintiffs therein,

are prosecuting the plenary proceedings in relation to the lands bona fide. That involves showing that no issue of facts remain between the parties …"

33. To adopt the words of Laffoy J. in *Gannon v. Young*, the test on this application is whether, in such circumstance, the plaintiff is now prosecuting the Special Summons proceedings against the defendant *bona fide*.

34. As Laffoy J. put it, if the plaintiff's claim is doomed to failure, it is not prosecuting its claim *bona fide*. On my reading of Gannon v. Young, proceedings such as those in issue here will be doomed to failure if no issues of fact remain between the parties. That is the salient test, to my mind.

35. In the present case, the Special Summons and the ensuing *lis pendens*, while triggered in the wake of the discharge of the fraudulent legal mortgage over the defendant's properties, are not premised upon that circumstance, but rather on what is claimed by the plaintiff to be dealings on the part of the defendant in 2009 (as referred to earlier in this judgment) such as to give rise to a claim that an equitable mortgage was created over his properties to which the plaintiff, the claimed successor in title to the Anglo loans and security, now asserts the entitlement to pursue in the Special Summons proceedings. That is the basis of the plaintiff's claimed entitlement. The factual matrix upon which the plaintiff relies is disputed by the defendant. Thus, it cannot be said that there are no issues of fact arising as to what did or did not occur in 2009 as between the defendant and Anglo, given the contents of the various affidavits to which the court has already referred.

36. Accordingly, at this juncture, this court is not satisfied that the defendant has established that the action is not being prosecuted *bona fide* and at this juncture this court will refuse to direct the *lis pendens* be vacated and will adjourn the application to the hearing of the proceedings.

37. I express no view on the merits or otherwise of the plaintiff's claim or the evidential requirements to sustain it, this is a matter which can only be determined when the matter comes on for hearing.