

THE HIGH COURT

[2012 No 7193 P.]

BETWEEN

BRENDAN KELLY AND ASTA O'KELLY

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED

DEFENDANT

JUDGMENT of Mr Justice Sean Ryan dated the 26th September 2012

This is a motion brought by the defendant seeking to vacate a *lis pendens* registered by the plaintiffs in these proceedings and to have the action or part thereof struck out as being an abuse of process.

The property in question is known as "Killbarron" 4 St. Matthias Wood, Church Road, Killiney, Co. Dublin. The plaintiffs mortgaged that property with Irish Nationwide Building Society in 2004. The defendant Bank is the successor of Irish Nationwide, having taken over its assets and liabilities.

Irish Nationwide issued ejectment proceedings against the plaintiffs in the Circuit Court which culminated in a consent order dated the 30th June, 2010. The plaintiffs thereby agreed to an order for possession being made in favour of Irish Nationwide and an order for the costs of the proceedings, with a stay on the execution order for a period of six months. The stay was extended by agreement between the parties from time to time but ultimately, because of default by the plaintiffs the Bank sent the order to the Sheriff for execution. On the 18th April, 2012, the plaintiffs were removed from the property on foot of the execution order and the Bank obtained possession of the property.

Anglo Irish Bank Corporation Limited, the former name of the defendant herein, issued summary summons proceedings on the 21st September, 2011, claiming some €2.3 million and interest against the defendants, who entered an appearance on the 20th July, 2012.

Each of the plaintiffs issued proceedings by way of plenary summons, in each case dated the 1st June, 2012, in which they claimed damages against the Bank and the Sheriff, alleging assault and trespass to the person. The Bank entered appearances in those proceedings on the 13th June, 2012.

This above-entitled action was commenced by another plenary summons which is dated the 20th July, 2012. It was issued on behalf of both plaintiffs who claim damages for (a) slander of title to goods and property and trespass to the mortgaged property. In addition, claim (b) is as follows:-

A declaration that the order obtained by the defendant for possession of the asset which is set out in the Schedule hereto of the plaintiffs or any of them is in breach of contract and/or void and/or otherwise invalid."

The summons also claims restitution and damages for breach of contract, as well as ancillary relief. The plaintiffs registered a *lis pendens* against the property on the same date as the plenary summons. The plaintiffs did not serve their summons, nor did they give the Bank notice of the registration of the *lis pendens*.

Following receipt of possession, the Bank proceeded to market the property and reached agreement with a purchaser on the 27th August, 2012. If the *lis pendens* is not vacated, it will impede and may prevent the completion of the sale.

In correspondence beginning on the 8th August, 2012, the Bank's solicitors wrote to the solicitors for the plaintiffs noting that the summons had not been served and alleging that the proceedings were instituted solely for the purpose of frustrating a sale. The response came in an e-mail of the 24th August, 2012, saying that the plaintiffs' solicitors were

"in the process of seeking instructions from our client and hoped to be in a position to revert to you in due course and when time allows. We also intend to discuss the matter with counsel who is currently on vacation".

They added that their client had a legitimate claim but they did not specify any further the nature of that claim.

The Bank's case on this motion is that the plaintiffs are seeking to attack the Circuit Court order for possession that was made by consent, pursuant indeed to a letter from the plaintiffs expressing that consent. Counsel Mr Declan McGrath relies on the circumstances as detailed in the grounding affidavit of Mr Larkin to propose that the proceedings are an abuse of process, unsustainable and bound to fail. These circumstances are the consent order made in the Circuit Court, the failure to serve the proceedings, the failure to give any information even at this stage on affidavit as to the basis on which the plaintiffs assert that they have a claim to an estate or interest in the land.

In a replying affidavit sworn on the day of the hearing of this motion, the first plaintiff Brendan Kelly said the reason for not serving the plenary summons was that

"it would be imprudent to serve the plenary summons herein before the statement of claim is drafted and ready to serve. I say and am advised that an expert witness report has been commissioned by my solicitors and until this is received, counsel will not be able to fully particularise the statement of claim".

He said that Senior Counsel was in Australia. He was not seeking to impugn orders of the Circuit Court but was

"relying on the unconscionable, unlawful and inequitable conduct of the defendant. I believe that it would be premature for me to reveal particulars of my claim at this time given that I am still involved in ascertaining the full facts of the situation".

He claimed that he had "a highly arguable claim" and complained that the defendant had not been fully candid with regard to the information put before the court and he gave details of that failure as he alleged but none of those proposed particulars is relevant to the question before the court on this motion.

In the result, there is no information before me as to the specific nature of the claim put forward by the plaintiffs.

The court has express statutory power to vacate a *lis pendens* under s. 123 of the Land and Conveyancing Law Reform Act 2009. Under s. 121, it is a necessary condition of the registration of a *lis pendens* that "a claim is made to an estate or interest in land". Under s. 123, so far as material to this application, the court may make an order to vacate a *lis pendens* where it is satisfied that "the action is not being prosecuted bona fide".

In the case of *O'Malley v. Irish Nationwide Building Society and Others* (Unreported, 21st January, 1994) Costello J. held that what was in effect an attempt in those proceedings to appeal against an order of the Circuit Court in a manner that was not permitted constituted an abuse of process. Giving the judgment of the Supreme Court in *McCauley a minor v McDermott and McCauley* [1997] 2 I.L.R.M. 486, Keane J. (as he then was) cited with approval a comment by Lord Halsbury L.C. in *Reichel v. Magrath* as follows:-

"I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

In this case, it seems to me that everything goes back to the consent order for possession of the property that was made by the Circuit Court. I think the Bank is correct in suggesting that the plaintiffs are endeavouring to re-visit and appeal, in effect, that order. The proceedings, insofar as they assert an interest in land such that would justify the registration of a *lis pendens*, constitute an abuse of process. The fact that the plaintiffs are unable, even when faced with this motion, to suggest any detail or even any basis for advancing a claim as to an interest in land, is very telling and in my view is quite fatal to their claim and confirms the absence of bona fides in doing so. It seems to me to be quite obvious that the claim at paragraph (b) of the endorsement on the summons was introduced for the sole purpose of providing a colourable justification for registering a *lis pendens* in the hope of frustrating a sale of the property. The circumstances of the case point irresistibly to that conclusion and there is nothing in the materials put before the court or in any submission made by Counsel Mr. Dixon to suggest any legitimate basis for registering the *lis pendens*.

It would be a clear injustice to permit the processes of the court to be employed for the purpose and only for the purpose of frustrating the exercise of legitimate rights. That would be the case here if the *lis pendens* were to be permitted to remain. I propose accordingly to order that it be vacated and that paragraph (b) be struck out.