

APPROVED

[2024] IEHC 632



THE HIGH COURT

2024 1454 P

BETWEEN

**DORA O'CALLAGHAN (SUING BY HER ATTORNEY JOHN
O'CALLAGHAN PURSUANT TO POWER OF ATTORNEY)**

PLAINTIFF

AND

PROMONTORIA (FINN) DESIGNATED ACTIVITY COMPANY

AND

TOM O'BRIEN

AND

WILSONS AUCTIONS

DEFENDANT

JUDGEMENT of Mr Justice Nolan delivered on the 7th day of November, 2024

Introduction

1. This is a most troubling application for a number of reasons. The named Plaintiff is Dora O'Callaghan. The proceedings seek injunctions prohibiting the Defendants from offering for sale the property known as Penney's Cottage, Ballysheen, Abbeydorney ("*Penny's Cottage*"), Tralee, County Kerry, contained on Folio KY 34955F. However, Dora O'Callaghan

has taken no active part in the matter whatsoever and indeed, it would seem for many years she has not resided in the country. At all material times the affidavits and the submissions, were made by her estranged husband, John O'Callaghan. He purports to act on her behalf by virtue of a Power of Attorney, which he has sworn was granted on the 23rd of September 2023. However, as will become apparent, that cannot be the case.

2. The thrust of the case is that First Active PLC, one of the banks involved in lending money to Dora O'Callaghan and her daughter Sandra O'Callaghan, had ceased to exist at the time that a charge was registered on the Land Registry in 2008.

3. Mr. O'Callaghan says that this is fatal to the rights which the first named Defendant attempted to exercise over the land, when the second named Defendant was appointed as receiver and the third named Defendant, an auctioneer, was appointed to sell the lands in March of 2024.

4. However, there are many twists and turns in this case which, in my opinion, are so fundamental as to make it impossible to grant the reliefs sought.

The First Affidavit

5. The first affidavit sworn by Mr. O'Callaghan on the 20th of March 2024 grounded an ex parte application for short service. In it, he states that he lived at Abigail House, Abbeydorney, County Kerry, a nearby property. He confirms that the registered owner of Penney's Cottage was Sandra O'Callaghan. However, he does not say that she was his daughter. What he says instead is that she is the daughter of Dora O'Callaghan, which is a most unusual way of describing one's own daughter.

6. He states that Sandra O'Callaghan and Dora O'Callaghan accepted a letter of offer dated the 23rd of March 2004 from First Active PLC, the security of the loan of €210,000, being Penney's Cottage. The letter of offer confirmed that the property was to be a residential

investment property (*'RIP'*). Thereafter, a mortgage was executed in favour of First Active, on the 7th of May 2004.

7. He says that an issue arose in relation to the sum which was said to be repaid and therefore a second letter of offer was issued by the bank on the 14th of May 2004, which stated that the first loan was irrevocably withdrawn. But since the mortgage was executed on the 7th of May 2004, he submits that since the first letter of offer was irrevocably withdrawn and therefore void and of no effect, the mortgage must be void and of no effect.

8. His main point however is set out in para. 8 of his affidavit. He says that when the mortgage was registered for the second time on the 28th of June 2010, First Active had ceased to exist and had been taken over by Ulster Bank in February of 2010. He therefore alleges that the Property Registration Authority, now known as Tailte Éireann, the party responsible for the Land Registry, was simply wrong to register the interest of First Active and that the mortgage is void in law and therefore no further interest could be passed on to the first name Defendant.

9. He submits that the mortgage sale deed is illegible, that the deed appointing the receiver must be signed, sealed and delivered and that the time of day that the deed was executed is not clear and therefore the time of execution of it is not indicated. However, he does not press these points. Nonetheless, they appear in the affidavits and the submissions and I shall deal with them.

10. Other arguments include that since the receiver, the second named Defendant, is an agent for both the mortgagor and mortgagee, he should not have accepted the appointment for reasons which are not entirely clear. That Penney's cottage is located on two folios, the first being KF34955 F, whilst a portion is also on the neighboring Folio of KY 25604. He exhibits correspondence with a consulting engineer which makes this point.

11. One final point is worthy of comment. He alleges that since he only became aware of the sale of the property on the 28th of February 2024, he did not have time to notify the

Defendant that the application was being brought. I find that argument hard to accept in circumstances where the affidavit itself was sworn three weeks later. However, further information has come to light which throws even more significant doubt on this assertion.

12. Therefore, Mr. O'Callaghan's first affidavit relates primarily to an argument that First Active did not exist at the time they were registered as the holder of a mortgage on the Land Registry. This argument forms the kernel of his case. Of course, he says on a number of occasions it is not his case but that of his estranged wife Dora O'Callaghan and that he is only bringing this application pursuant to the Power of Attorney. I will return to that issue.

The Defendant's Affidavit

13. Kieran Dowling, head of insolvency at BCM Global ASI Limited, which used to be Capita Asset Services, who is the servicer of the loan, swore an affidavit on behalf of the Defendants. In this Affidavit, for the first time, the point is made that Mr. O'Callaghan has in the past alleged that Penney's Cottage is his family home and that he held a Family Home Declaration to that effect. Mr. Dowling points out that the loan was for the purposes of purchasing a RIP. Having examined the letters, they clearly state that the purpose of the loan was for a residential investment property.

14. His states that Mr. O'Callaghan's name does not appear on the loan documentation at all. He confirms that the interest of First Active and Ulster Bank was transferred to the first named Defendant as purchaser, pursuant to a Global Deed of Transfer, on the 28th of September 2015. He exhibits that Global Deed which specifically refers to Penney's Cottage and to the loan granted to Dora O'Callaghan and her daughter Sandra.

15. He exhibits letters from two firms of solicitors, purporting to act for Mr. O'Callaghan, the first of which was dated the 14th of September of 2016, from Foley Solicitors, whilst the second was from Carley & Associates Solicitors, dated the 20th of October 2016. In the first

letter, an elaborate series of transactions are set out involving Dora O'Callaghan, her daughter Sandra and Mr. O'Callaghan himself, involving numerous transfers of property, execution of mortgages, commitments to indemnify one another from debts and the creation of alleged entitlements to residual monies, as well as the creation of trusts allegedly in favour of Dora O'Callaghan and Mr. O'Callaghan. Other than the reference in this letter, no other evidence of these alleged transactions has ever been produced.

16. One month later, on the 20th of October 2016, the second letter was received from Carley and Associates Solicitors, the entirety of the contents of the Foley letter is absent. For the very first time in print, it is asserted on behalf of Mr. O'Callaghan, that the property is his family home, thereby implying that the Plaintiff and Sandra O'Callaghan have engaged in some form of fraud by successfully securing a mortgage over the property without his knowledge or consent.

17. Exhibited in that letter is a document headed "Statutory Declaration of a Married Couple", undated, stating that the property is a family home. It clearly relates to Penney's Cottage but other than the year of 2003, it has no other date. Further, the print type on the document itself varies, which, for a preprinted form, is most unusual. The paragraphs are out of sequence with paras. 6 to 10 appearing first, then paragraph 5 and then, thereafter 9, 10 and 11. If the matter gets to a full plenary hearing, the legitimacy of this document will, no doubt, be seriously challenged. Without seeing the original, it is very hard to understand how such a document, with its inaccurate paragraph numbering can be a valid statutory declaration. As I say, however, that is for another day.

18. The affidavit goes on to say that Mr. O'Callaghan previously issued a *lis pendens* on the 17th of February 2017. His explanation for this in his replying affidavit, is that he wanted to stop his daughter dealing with the property until, what he describes as, the '*complex title*' was determined, notwithstanding that she is the registered owner of the property. The important

point however, in the context of an application for an injunction, is that there was no previous reference to this *lis pendens* in his grounding affidavit.

19. Indeed, that is not the only thing which Mr. O'Callaghan failed to disclose in his first affidavit. I shall set out the missing information below.

20. The final argument which Mr. Dowling makes is that the Land Registry is definitive since, as a matter of law, the Land Registry is conclusive. There is an entirely different application in respect of fraud or mistake which could be brought in respect of the charge registered over the Folio. However, Mr. O'Callaghan has chosen not to do so.

The Replying Affidavit of Mr. O'Callaghan

21. His second affidavit runs to some 89 paragraphs. At para. 5, he says that he is entitled to remain in his family home notwithstanding that this affidavit, just like the first affidavit, confirms that he actually lives at Abigail House.

22. When it was put to him in court that he had sworn that he lived in two different houses, he confirmed that he does not live at Penney's Cottage and that it was only his family home from 2000 to 2017.

23. I find his failure to properly disclose the truth most disconcerting. Other than the repeating allegations that the various solicitors were all guilty of negligence and potentially fraud and that the property is the subject of a Family Home Protection Act Declaration, which I have referred to above, the affidavit does not progress the factual situation much further.

24. The best argument that can be put forward is because this matter is so complex, it should go to a plenary hearing.

25. The continual assertion of fraud, as multiple judgments of the Superior Courts have emphasised over the years, is a most serious allegation. Such allegations cannot be made without evidence, and compelling evidence at that. In this case, there has been no evidence

whatsoever put before the court which is in any way suggestive of fraud of either Dora O'Callaghan, Sandra O'Callaghan, the various solicitors acting in this matter, or indeed, the Defendants.

26. Therefore, I reject entirely any argument put forward by Mr. O'Callaghan on his own behalf or purportedly on behalf of Dora O'Callaghan, that there has been fraud which in any way entitles her or him to seek the injunctions sought. It is material that when I asked him whether the Defendants had engaged in fraud, he could not identify any.

The Hearing

27. At all material times up until the hearing of this application, Mr. O'Callaghan was represented by very experienced junior counsel and solicitor. The matter came on for a hearing before this court on the first day of term, the 8th of October. Submissions had been filed by both parties. When the matter was called Mr. O'Callaghan appeared by himself. I rose for a short while to allow his counsel to appear. He did so shortly thereafter. He apologised and informed the court that his retainer and that of his solicitor had been withdrawn. It would seem that he notified his opposite number of this a number of days ago but made no attempt to notify the court. I find that most regrettable and I hope it never occurs again. In the circumstances, I allowed his solicitor to come off record.

28. I then asked Mr. O'Callaghan and Mr. Hayes BL, counsel for the Defendants, if the matter should proceed. Mr. O'Callaghan said that he wanted to introduce some further evidence, but precisely what evidence that was, was unclear. Mr. Hayes BL said that if the matter were to be adjourned, his clients would withdraw their undertaking not to put the property up for sale. I explained the position to Mr. O'Callaghan. In those circumstances, he decided to proceed and I allowed him to do so.

29. It became very clear in the course of his submissions that his main argument was that since First Active had ceased to exist at the time the mortgage was registered, no good title could have been passed on to the first named Defendant. He described his other arguments as being “technical”. He explained that the original mortgage was granted against his wishes and that every solicitor who became engaged with this case or with him (seven in total) had let him down. When it was pointed out to him that the Land Registry is conclusive, he pointed to another set of proceedings which are not before the court, in which he is litigating against various firms of solicitors and the Property Registration Authority. He stated that there was a third letter of offer, but that was not exhibited anywhere.

30. More importantly, as I noted above, he confirmed that he did not reside at the property but that was only after it was pointed out to him that he had sworn twice that he did. He explained that sometimes he lived at Penney’s Cottage with his son and was trying to assert his rights, notwithstanding that in his second affidavit at para. 86, he claimed he is not the real Plaintiff and was simply acting pursuant to a valid Power of Attorney on behalf of his estranged wife.

The Application for an Interim Interlocutory Injunction

31. There are a number of glaring omissions from Mr. O’Callaghan’s first affidavit. For example, he failed to disclose that he had alleged the property was his family home. The first the court heard of this was reading the replying affidavit of the Defendants. He failed to disclose that he held an alleged declaration that the property was subject to a Family Home Protection Act Declaration. He failed to disclose the alleged complex series of transactions which form part of the Foley letter. He failed to disclose that seven different solicitors allegedly acted negligently in his dealings with them in relation to this property. He failed to disclose that he had allegedly funded the construction of the property and that the mortgage was granted

without his consent or that he had a role in its creation. Finally, he failed to disclose that there were a number of allegedly fraudulent transactions in relation to the creation of the Certificate of Title.

32. Of course, it now transpires that Penney's Cottage is not his family home and that his sworn evidence to that effect is untrue. Both the letters of offer and the mortgage clearly show that the property was registered in the name of Sandra O'Callaghan.

33. The fact that the proceedings have been issued in Dora O'Callaghan's name seems to derive from some form of implied authority from the Power of Attorney. However, the fact that the affidavit states that the Power of Attorney was granted on the 23rd of September 2023 but the document itself exhibited in his first affidavit is dated the 19th of March 2024, suggests that either there has been misrepresentation in the affidavit or in fact there are two Powers of Attorney.

34. At all material times Mr. O'Callaghan has said that he is not the Plaintiff in this case and that he is simply attempting to assert the rights of Dora O'Callaghan. Yet the reliefs which are sought in reality, are reliefs to his benefit. He makes no secret of the fact that if an injunction is not granted, he will lose "*his property*".

The Second Set of Proceedings

35. Contained in the submissions of the Defendants is reference to another set of proceedings. These proceedings are titled *John O'Callaghan v Promontoria (Finn) Ltd and Tom O'Brien and Wilsons Auctions*, record number 2024 1134 P.

36. When the matter was raised, I asked Mr. O'Callaghan about them. He denied knowledge of them but thought that they may have something to do with the removal of the *lis pendens* in 2017. However, it is very clear that that is not the case. It transpires that an application, identical to this application was moved before Ms. Justice Stack, on the 6th of March 2024, in which Mr.

O'Callaghan was the named Plaintiff and sought precisely the relief which is sought in these proceedings.

37. Indeed, he swore an affidavit on the 5th of March in practically identical terms to the affidavit that he swore in this case. It beggars belief that he could have forgotten that he had instituted High Court proceedings as the named Plaintiff, and instructed solicitor and counsel to move an application for liberty for short service seeking an interim injunction, in relation to exactly the same property. What is shocking however is that at no stage, either before Sanfey J. at the ex parte stage or when the Defendants gave an undertaking not to sell the property pending the determination of the case or in any of the affidavits, was there any reference to the fact that he had brought a similar application one week before, which was refused.

Decision

38. It is well settled law that there is a duty of candor upon any party seeking injunctive relief to come to court with clean hands and make full disclosure of all matters both for and against their case (*Cork Harbour Alliance for a Safe Environment v An Bord Pleanála* [2019] IEHC 85).

39. In this case there has been an entire failure on the part of Mr. O'Callaghan, who says that he brings these proceedings in the name of somebody else, to tell the whole truth. He failed to disclose that he issued proceedings in his own name, seeking the same relief, which were refused, presumably on the grounds that he had no interest in the property. That failure to disclose alone would, in my view, militate against the granting of any equitable relief. However, the failures don't stop there. As set out above there have been multiple failures, some of them which go to the heart of the issue.

40. There is a serious question mark as to whether Dora O'Callaghan has any interest in the property such as to be able to permit her, even if she were here, to bring this case, since her

name was never registered on the Land Registry. However, that will be a matter for the full hearing of this case, if there is a full hearing.

41. The law in relation to the conclusive nature of the Land Registry is well settled, a fact which is acknowledged in the submissions prepared by counsel for Mr. O'Callaghan.

42. Section 31 of the Act reads as follows:-

“The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just”.

43. In *Tanager DAC v Kane* [2018] IECA 352, Baker J. said:

“The first observation to be made with regard to the power of rectification is that the jurisdiction is limited to rectification in the case of actual fraud or mistake, and s. 31(1) of the 1964 Act expressly excludes from the power of rectification any argument that might derive from the knowledge of the registered owner of any “deed, document, or matter relating to the land”. The purpose of that restrictive power is to remove from registered title the vexed question of express or implied notice of any equities that might affect the ownership of land, precisely the type of issue that made and continues to make the conveyancing of unregistered land complex and, at times, uncertain”.

44. The Plaintiff’s submissions put forward an argument that the court has jurisdiction to correct the Registry in cases of actual fraud or mistake, but this can only be determined in separate equity proceedings. It is suggested that these proceedings are such proceedings. In

fact, they are not. The reliefs sought make no mention of attempting to rectify the Registry but are restricted to seeking an injunction to prohibit the sale, together with declaration that the first named Defendant has no interest in the property and that the second named Defendants appointment is void.

45. For the avoidance of doubt, the Land Registry is conclusive and therefore, the first named Defendant is entitled to rely on the registration of First Active, into whose shoes it stepped pursuant to the Global Deed, as owner of the mortgage (see *Tanager v Kane*). Therefore, even if all of the alleged matters which Mr. O'Callaghan complains of prior to the registration of the mortgage with the Land Registry on the 28th of July 2010, are true, the fact remains that the registration is conclusive.

46. I find that the acceptance of the second letter of offer, even with its reference to the first offer being "*irrevocably withdrawn*" does not affect the registration of the mortgage by First Active, nor indeed the first named Defendant, who is now registered on the Land Registry. By the same token the fact that First Active had ceased to exist is irrelevant.

47. I find that the second named Defendant was validly appointed, in that the appointment does not have to be under seal pursuant to the mortgage deed. I find that the mortgage is not void in law. I also find that the redactions referred to do not in any way affect the Global Deed and that in point of fact, Penney's Cottage, Mrs. O'Callaghan and Miss O'Callaghan are all referred to in it.

48. I do not accept his argument that the mortgage sale deed is illegible, nor do I accept that the time of day that the deed was executed is not clear and therefore, I do not accept that the time of its execution is relevant. Indeed, he did not press these points and described them a "*technical*". Either way they have no merit, nor does his argument that the receiver was agent for both parties and therefore should not have accepted the appointment due to some alleged

conflict. In my view he was not the agent of both parties but, as with all receivers, has a duty of care to the mortgagee. But of course, Mr. O'Callaghan was not the mortgagee.

49. His next argument that Penney's Cottage is located on two folios, the first being KF34955 F, whilst a portion is also on the neighboring Folio of KY 25604, may well be a matter for the sale, but it is not a matter for this court.

50. I should say, however, that I find it very hard to accept the convoluted and complex web of transactions which he has referred to in his second affidavit, of which there was not a shred of evidence.

51. In relation to the other arguments raised on the pleadings and the submissions, I find that the second named Defendant was validly appointed, and that the appointment does not have to be under seal pursuant to the mortgage deed.

52. I emphatically reject his argument that in some way this property was a family home. The document, which is said to be a Family Home Declaration, is very questionable. Leaving aside that document, the fact remains that Mr. O'Callaghan has confirmed in open court that it is not his family home now, but that it may have been at some time in the past. It must have been clear to him when he brought his own case, which was refused, that he had no legal entitlement whatsoever. No doubt that is the reason why he was emphatic in saying that he was bringing the case on behalf of the named plaintiff.

53. The law is clear, it is not open to Mr. O'Callaghan to raise that issue now, given that the mortgage was registered with the Land Registry.

54. Therefore, I reject all of the arguments put forward either by way of pleadings or the submissions.

The Law Relating to an Interim Injunction.

55. The law relating to an interim injunction is very clear and I do not intend to set it out

in any detail. The criteria to be applied in these cases is as set out in the cases of *AIB V Diamond* [2011] IEHC 505 and *Okunade v Minister for Justice & Others* [2012] IESC 49 and *Maha Lingham v HSE* [2005] IEHC 186. The first requirement is that the Plaintiff must establish that it has a strong case that is likely to succeed at trial rather than establishing there is a fair issue to be tried, in order to obtain an interim mandatory injunction.

56. Thereafter, the court must consider the issue of balance of convenience and the balance of justice as set out by O'Donnell J. (as he then was) in *Merck Sharpe & Dohme v Clonmel Healthcare* [2019] IESC 65.

57. The overriding principle is to minimize the risk of injustice. The issue of delay must be part of the analysis of the balance of convenience. This is an equitable concept (See *Irish Times Ltd v Times Newspapers Ltd* [2015] IEHC 490).

Fair Issue to be Tried

58. Mr. O'Callaghan has offered no basis upon which the letter of loan offer or the mortgage are invalid, why the Land Registry does not constitute conclusive evidence of the entitlement of the first named Defendant to dispose of the property or why he, as a non-party is entitled to challenge anything.

59. His position fails to take account of the settled law in respect of registered land, and in doing so asks the High Court to look behind the Land Registry. On that ground alone, I do not believe there is a fair issue to be tried. However, as I have set out above, and I repeat, the manner in which Mr. O'Callaghan has acted throughout this case, with delay, obfuscation and downright untruths, would, in my view, prohibit him from any relief he seeks, leaving aside the fact that he has not satisfied me that he has any locus standi to bring this application. Therefore, as far as this primary issue is concerned, I find against him. There is no fair issue to be tried.

60. Even if I were incorrect on this view, I do not believe that the balance of convenience rests with him since I am not satisfied that he has locus standi, nor do I believe that he has been truthful in the manner in which he has come to court. The balance of convenience clearly rests with the party who is legitimately trying to seek repayment of the debt that is properly registered, and which was properly purchased by the first named Defendant by virtue of the Global Deed. Further, since this is not a family home, it seems to me that even in the event that Mr. O'Callaghan were to be successful in his action, damages would be an adequate remedy. Even if I were incorrect on this view, it seems to me that there is no evidence that Mr. O'Callaghan is not in a position to honour any undertaking as to damages.

61. I would like to return to one further point. At the outset I said that in his first affidavit was an averment to the effect that no letter of warning issued because time did not permit it. I said that I found that argument hard to accept in circumstances where the affidavit itself was sworn three weeks later. I said that further information had come to light which threw even more significant doubt on this assertion. It transpires that exactly the same averment is contained in the affidavit sworn in his own proceedings on the 5th of March 2024. That was two weeks before the ex parte application was brought before Sanfey J in this case. I find it incredulous that given that new proceedings were then issued using the name of Dora O'Callaghan, that notification could not have been given. The explanation given in the affidavit simply could not be true.

62. In all the circumstances I refuse the application.