Neutral Citation [2016] IEHC 443

THE HIGH COURT

[2015 No. 55 CA]

DUBLIN CIRCUIT

COUNTY OF THE CITY OF DUBLIN

BETWEEN

ADRIAN MCNAMARA, PRACTISING UNDER THE STYLE AND TITLE OF MURPHY MCNAMARA SOLICITORS

PLAINTIFF

AND

PETER MCCANN AND JOAN MCCANN

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 21st day of July, 2016

1. This is an appeal from an order of the Circuit Court dated 12th March, 2015 whereby Linnane J. made a declaration in favour of the plaintiff pursuant to s. 74(3) of the Land and Conveyancing Law Reform Act 2009. By way of conveyance dated 5th November, 2010 the first named defendant and the second named defendant did convey to the second named defendant:

> *"ALL THAT AND THOSE that part of the lands of Shankill containing three acres statute measure or thereabouts together with the dwelling house erected thereon known as Kilmurray House, Falls Road, Shankill, in the Barony of Rathdown and County of Dublin, which said premises are more particularly delineated on the map endorsed on a certain indenture of lease dated 9th September, 1947 and made between Charles Spottiswoode Weir and others of the one part and William J. Rooney of the other part and thereon edged red."*

It is argued on behalf of the plaintiff that the said conveyance is void by reason of it having been made with the intention of defrauding the plaintiff, a creditor of the first named defendant and that the plaintiff was prejudiced by the said conveyance. On the same day the Circuit Court found the said conveyance to be void and made a further order setting aside same.

2. The background to these proceedings is that on 15th May, 2012, the plaintiff obtained judgment in default of defence in the Central Office of the High Court in the sum of €411,845.22, as against the first named defendant. Thereafter, the first named defendant sought to dispute the judgment and issued a motion pursuant to Order 13 rule 11 of the Rules of the Superior Courts seeking, *inter alia,* an order setting aside the judgment obtained by the plaintiff. This Court, O'Neill J., refused the reliefs sought by the said motion. That decision was upheld by the Court of Appeal in a decision delivered on 22nd October, 2015.

3. The background to the judgment obtained by the plaintiff against the first named defendant is that the plaintiff is a solicitor practising under the style of Murphy McNamara Solicitors, and he had provided very extensive legal services to companies owned by the first named defendant, in connection both with conveyancing contracts and litigation in which those companies were involved. In 2008, a very significant transaction in which those companies were involved ran into difficulty. The plaintiff gave evidence before this Court that those difficulties were of a kind that caused him to fear reputational damage to his firm and he and his partners decided to cease acting on behalf of the companies, which were owned and controlled by the first named defendant. The plaintiff gave evidence that he met with the first named defendant to discuss this and that the first named defendant urged the plaintiff to continue acting on his behalf and, importantly, that the first named defendant assured the plaintiff that he personally would indemnify the plaintiff and his firm in respect of any legal costs due to the plaintiff's firm by any of the companies on whose behalf the plaintiff had acted. According to the plaintiff, this was in July, 2008. The plaintiff acknowledged however that he did not request the first named defendant to complete an indemnity in writing, nor did he write to the first named defendant or keep any written attendance note of this promise of indemnity. He said he did not do so because he trusted the first named defendant having worked on his behalf since the mid 1990s, and because he had at all times enjoyed a very good working relationship with the first named defendant. Having discussed the matter with his partners, the first named defendant agreed to continue providing services to the companies of the plaintiff on the basis that such an indemnity in respect of fees would be provided.

4. The plaintiff said in evidence that the two year period following July, 2008 was his busiest period acting on behalf of the plaintiff and his companies. There were 28 litigation cases involved and a solicitor was specifically assigned to the affairs of the first named defendant and his companies.

5. The companies went into liquidation in May, 2010. On 9th August, 2010 the plaintiff wrote to the first named defendant in relation to fees. In this letter, he referred to efforts that he had made to contact the plaintiff by telephone to discuss the same and also to text messages that he had sent the first named defendant, as well as to a meeting that they had had together in Cashel, Co. Tipperary, when they discussed the issue of fees. In this letter the plaintiff referred to the personal assurances given by the first named defendant in relation to discharge of fees.

6. The plaintiff sent a further letter to the first named defendant on 17th August, 2010 referring to "*specific personal assurances with regard to fees*". He stated that:

> *"under no circumstances would we have continued to work to any extent where those personal assurances not forthcoming (sic). In fact on the last occasion that such personal assurances were forthcoming was at our meeting in*

Cashel when you were to follow up the proposal."

This letter concluded by stating that unless adequate proposals to discharge fees were forthcoming, then the plaintiff would have to institute proceedings against the first named defendant for recovery of the same.

7. A further letter was sent to the first named defendant on 18th August, 2010, apparently in response to a fax sent by the first named defendant to the plaintiff. In this letter the plaintiff stated:

> *"It is completely clear that you are attempting to renege fully on the continual assertion furnished by you in relation to all works completed by this office on your behalf.*
>
> *You are aware that over the years you continually confirmed your assurances in this respect, such assurances were furnished more particularly in later years when it was clear that there were major difficulties with the recovery of any fees following the difficulties that Cork Corporation had with your workmanship. You requested that we would maintain the same level of commitment to you since that dreadful meeting with Cork Corporation in 2008, to suggest otherwise by you now is completely wrong (sic) and purely for the purposes of trying to reduce or evade your personal exposure.*
>
> *I have met now with my partners in this office and I am afraid that your recent correspondence has left us with no option but to immediately institute legal proceedings against you for recovery of all sums due and owing by you personally to this firm.*
>
> *Unless we hear from you with a satisfactory response immediately we will have no option but to have these proceedings issued and served on you personally."*

8. Further correspondence ensued between the parties in relation to payment of the fees. While the first named defendant did send the plaintiff an email on behalf of Lance Properties, one of the companies concerned, acknowledging a liability to the plaintiff in the sum of €200,000, no payment was forthcoming and this email did not commit the plaintiff personally to payment of any of the fees.

9. Eventually, the plaintiff issued proceedings on 30th May, 2011. An appearance was entered on 19th July, 2011. The plaintiff delivered a statement of claim on 9th August, 2011 and, following upon the failure of the first named defendant to deliver a defence, the plaintiff obtained the judgment referred to above on 15th May, 2012.

10. The first named defendant in these proceedings expressed enormous dissatisfaction with the manner in which judgment was obtained against him, complaining in particular that he was deprived of the opportunity to have a full hearing into the plaintiff's claim. Arising out of this complaint, the first named defendant has issued proceedings against the Minister for Justice and Equality, Ireland and the Attorney General by way of plenary summons issued on 15th March, 2016 in which he seeks, *inter alia*, declarations that the Rules of the Superior Courts and in particular, Order 27 thereof (whereby judgment was obtained against the first named defendant) are repugnant to Articles 38, 40.3 and 43 of the Constitution and Article 6 and protocol 1, Article 1 of the European Convention on Human Rights ("the Convention"). The Court was informed that the first named defendant intends to issue a motion joining the plaintiff to those proceedings. It should be observed that the first named defendant first raised a complaint under the Convention when delivering his defence in the Circuit Court in these proceedings, in June, 2013 – two years and nine months before he issued proceedings in the High Court claiming relief under the Convention.

11. The plaintiff went on to give evidence to the effect that following the liquidation of the first named defendants' companies, he had corresponded with the liquidator and also with the receiver appointed over the assets of those companies and established very quickly that there would be no assets to discharge his fees. Having obtained his judgment against the first named defendant, the plaintiff then carried out searches with a view to identifying assets of the first named defendant. These searches disclosed that on 11th January, 2011 a deed described as a deed of conveyance and rectification dated 5th November, 2010, between Peter McCann and Joan McCann (as grantors) of the one part and Joan McCann (as grantee) of the other part in respect of property described as premises at Falls Road, Shankill, Rathdown, Co. Dublin, was registered in the registry of deeds. It is common case that the property therein described is the family home of the defendants.

12. The plaintiff's case is that this conveyance was executed by the defendants for the express purpose of avoiding the debt due by the first named defendant to the plaintiff.

13. The plaintiff called in evidence Mr. Thomas Menton, the solicitor who acted on behalf of the religious order which sold the property to the defendants in 1993. He confirmed that he prepared the contract for sale to the defendants and that the contract was between his client and both defendants. He also approved the draft deed of conveyance of the property into the joint names of the defendants, which he would have received from the solicitors then acting on behalf of the defendants. He confirmed he would have prepared what are known as the PD Forms for stamp duty purposes, and these forms would have shown both the defendants as the purchasers of the property. He further confirmed that it was never suggested to him up until these proceedings that there was any error as regards the names into which the property was conveyed, and he believed he would recall if this was ever suggested. He also stated that there was never any communication with him or his office in relation to the rectification of an error.

14. The defendants do not dispute the occurrence of this conveyance. In his evidence to the Court in this appeal, the first named defendant denies that he ever gave an assurance to the plaintiff that he personally would discharge the liabilities of his company to the plaintiff. He also took the opportunity in evidence to complain that he had not received adequate particulars of amounts claimed by the plaintiff, that he had never entered into an agreement in writing with the plaintiff in relation to fees and that the disputed a considerable amount of the amounts claimed. However, he did acknowledge that some of the accounts were due by him personally, in relation to services provided to him personally.

15. The first named defendant denied knowing that the plaintiff was pursuing him personally in respect of liabilities due by his companies at the time that the deed of conveyance was completed. In his direct evidence he explained that the title deeds to the property were returned by the bank where they were held towards the end of 2009. This was a large bundle of title documents which he and the second named defendant were keeping at home. He recalled a number of people saying to him at the time that it might not be secure to keep his title documents at home and these people suggested having title to the property registered in the land registry.

16. He said that at about this time, the defendants noticed that the property appeared to be registered in their joint names and that this was not correct; he said that the property was acquired with funds provided by the second named defendant from the sale in 1993 of a house in Leixlip that she owned outright in her own name, together with other funds provided by the second named

defendant from an investment in a company in Temple Bar, in which the first named defendant, was also a shareholder. He said that it was only at this time that they realised that an error had been made and that the property should always have been registered in the sole name of his wife. Accordingly, he says, he arranged for the second named defendant to meet with a solicitor with whom he was acquainted, with a view to rectifying the title. This was in early 2010. The deed was not ultimately completed until November, 2010 and registered in January, 2011. The property was never registered in the land registry and remains an unregistered title.

17. The first named defendant was also cross-examined about a transaction that took place at the same time the property was originally acquired, whereby a portion of the same was sold onwards to a Mr. Stewart Malcolm. He explained that this was by agreement with a Mr. Malcolm who owned an adjacent property, at the time that the property was acquired by the second named defendant. The conveyance in favour of Mr. Malcolm was completed by both defendants. The first named defendant said he did not look at any of the documents that he signed at the time the property was acquired, or the time a portion of the same was sold to Mr. Malcolm.

18. The defendants had agreed to make voluntary discovery of documents in the course of the Circuit Court proceedings. Two headings of documentation were initially agreed:

1. The deed of conveyance and;

2. Any documents predating commencement of the proceedings, i.e. before 22nd May, 2013 concerning:

    i. The deed of conveyance;

    ii. The circumstances whereby it was entered into by the defendants and;

    iii. The intended purpose of the deed, to include all records of any instructions given by the defendants or either of them to their legal advisors concerning the deed of conveyance.

19. The first named defendant then swore an affidavit of discovery in which the only document discovered was the deed of conveyance. No other documents from the file of the solicitor (a Mr. Galligan) acting in the transaction were discovered. The first named defendant said he requested whatever documents were available and all he was given was the deed of conveyance.

20. Subsequently a further request for discovery was made by the plaintiff and agreed to by the first named defendant. This request involved three further categories of documentation:

1. The contract for sale whereby the defendants or the second named defendant acquired the property;

2. Any records regarding the source of funds used to acquire the property and;

3. Any records from 1993 as to the intentions of the defendants regarding who should be the legal owner of the property.

21. The first named defendant swore an affidavit of discovery dated 18th December, 2013 saying that he had no documents within his power, possession or procurement, and never had any such documents, within these agreed categories. He did confirm in evidence that the defendants had in their possession all of the title documents relating to the property but it appears the view was taken that none of these documents fell within the categories discovery of which was requested and agreed. The title documents were not produced in court.

22. The second named defendant gave evidence substantially corroborating the evidence of the first named defendant. She, of course, was a stranger to the issue of the indebtedness of the first named defendant to the plaintiff. She confirmed that house was purchased by her with funds from the sale of her house in Leixlip and the sale of an investment in Temple Bar. The combined sale proceeds, she said, equated to the purchase price of the property. She said that all utility bills for the house were in her sole name.

23. While she confirmed attending with Mr. Galligan for the purposes of instructing him to rectify the title to the property, she had no recollection of seeing him generate any documentation regarding the transaction. She said that she did not discuss the making of discovery of documentation with the first named defendant. Her recollections of her dealings with Mr. Galligan were scant.

24. She confirmed the evidence of the first named defendant in relation to the return of the title documents in 2009 and the subsequent decision to rectify the title. She was asked if she was aware that the plaintiff was claiming monies from her husband before November, 2010 and she said she was unsure when she became aware of that, although she did recollect the first named defendant attending a meeting with the plaintiff in Cashel in August, 2010. She was asked if she was aware that at that meeting the plaintiff sought payment from the first named defendant of monies due, and she confirmed that she was so aware, but she said that the first named defendant did not owe the plaintiff any money.

25. One other matter of relevance is that there was handed into court a certified extract from the valuation lists issued on behalf of the commissioner of valuation. The certificate which is dated 12th March, 2015, refers to a date of issue of the certificate of 10th May, 1994 and the certificate identifies that first named defendant as the occupier of the property. While it was unclear as to how the certificate came to be issued in May, 1994, it was suggested that it may have come about as a result of the splitting of the property following the disposal to Mr. Malcolm; but in any case it discloses first named defendant as the occupier of the property in 1994, for rating purposes.

Decision

26. At the outset it must be observed that I emphasised to the parties in the course of this hearing that I did not consider that it was any part of the adjudication of the issues arising in these proceedings, for this Court to re-open the judgment already obtained by the plaintiff as against the first named defendant. That judgment has already been affirmed by a decision of this Court. Insofar as the plaintiff has a grievance about the manner in which the judgment was obtained, and is now pursuing that grievance by way of the proceedings issued against the Minster for Justice and Equality, Ireland and the Attorney General, those proceedings have no bearing upon the matter at issue in these proceedings and should not be allowed to defer the outcome of these proceedings, as was suggested by counsel for the first named defendant, not least because the first named defendant waited almost three years to issue those proceedings from the time he first articulated a complaint under the Convention when filing his defence to these proceedings in the Circuit Court.

27. I am fully satisfied from the evidence given by all of the parties that, at the time that they executed the deed of conveyance, the defendants were aware that the plaintiff was intending to pursue the first named defendant personally for debts incurred by the first named defendant's companies to the plaintiff.

28. I am further satisfied that this was the motivation behind the decision to have the property conveyed into the sole name of the second named defendant. No evidence at all was produced to the Court to support the oral testimony of the defendants that the conveyance of the property into their joint names in 1993 was a mistake. Not only that, it is quite simply incredible that the defendants do not have any other documentation in their power, possession or procurement within the categories of documentation in respect of which discovery was agreed, other than the deed of conveyance itself. It is also in my view very unsatisfactory that the title documents to the property were not produced either to the plaintiff or in Court, even though these were available to the defendants. Not all of these may have fallen precisely within the categories of documentation, discovery of which was agreed, but it is likely that some of them would. Acknowledging that that is somewhat speculative, however, this latter issue does not form any part if the *ratio* of this decision.

29. Section 74(3) of the Land and Conveyancing Law Reform [2009] Act 2009 provides as follows:

> *"(3) Subject to subsection (4), any conveyance of property made with the intention of defrauding a creditor or other person is voidable by any person thereby prejudiced."*

Section 74(4) of that Act has no application to the circumstances of this case.

30. In the case of *Keegan Quarries Limited v. Michael McGuinness & Marie McGuinness* [2011] IEHC 453, Finlay Geoghegan J. interpreted and applied s. 74 of the Act of 2009. Noting that the Act of 2009 repealed the Irish Statute of fraudulent conveyances 1634 and that the leading authority on the fraudulent intention required to bring a conveyance within the scope of s. 10 of the Act of 1634 was the case of *Re Moroney* [1887] 21 LRIR 27 in which Palles C.B. stated at p.61:

> *"Therefore to bring a conveyance within the statute, first, it must be fraudulent; secondly, the class of fraud must be an intent to delay, hinder or defraud creditors. Whether a particular conveyance be within this description may depend upon an infinite variety of circumstances and considerations. One conveyance, for instance, may be executed with the express intent and object in mind of the party to defeat and delay creditors, and from such an intent the law presumes the conveyance to be fraudulent, and it does not require or allow such fraud to be deduced as an inference of fact. In other cases, no such intention actually exists in the mind of the grantor, but the necessary or probable result of his denuding himself of the property included in the conveyance, for the consideration, and under the circumstances actually existing, is to defeat or delay creditors, and in such a case…the intent is, as a matter of law, assumed from the necessary or probable consequences of the act done; and in this case, also, the conveyance, in point of law, and without any inference of fact being drawn, is fraudulent within the statute. In every case, no matter what its nature, before the conveyance can be avoided, fraud, whether expressly proved as a fact, or as an inference of law from other facts proved, must exist."*

31. Finlay Geoghegan J. noted that these principles were applied more recently by Costello P. in the case of *McQuillen v. Maguire* [1996] 1 I.L.R.M. 394,399 and Laffoy J. in the *Motor Insurers Bureau of Ireland v. Stanbridge* [2008] IEHC 389 and she also expressed the view that these principles apply to s. 74(3) of the Act of 2009.

32. I am satisfied, on the evidence set out above, that it was an express intent and object in the minds of the defendants when conveying the property into the sole name of the second named defendant, to defeat any potential claim of the plaintiff and accordingly I find that the plaintiff has proved a fraudulent intent on the part of the defendants, in the execution of the deed of conveyance, as a fact. I also conclude that as "the necessary or probable consequences of the Act done" was to defeat, delay or hinder the plaintiff as a creditor, as a matter of law the court should infer fraud from the fact of the deed of conveyance in accordance with the above principles.

33. Accordingly, the plaintiff is entitled to a declaration that the deed of conveyance is void, and an order setting the same aside pursuant to s. 74 of the Land and Conveyancing Law Reform Act 2009. I therefore affirm the order of the Circuit Court and dismiss the appeal.