

## THE HIGH COURT

[2012/8370P]

BETWEEN

QUINNS OF BALTINGLASS LIMITED

PLAINTIFF

AND

JIM SMITH AND NUJMIJ LIMITED

DEFENDANTS

AND

GLANBIA plc

NOTICE PARTY

## JUDGMENT of Mr Justice David Keane delivered on the 11th day of July 2017

**Introduction**

1. In this plenary action, the plaintiff ('Quinns') seeks a declaration that the conveyance by the first defendant, Mr Smith, to the second defendant ('Nujmij') of a quantity of grain, or of the entitlement (as a chose in action) to the monies due in respect of the sale of that grain to the notice party, is void as a fraudulent disposition, contrary to s. 74(3) of the Land and Conveyancing Law Reform Act 2009 ('the 2009 Act').

2. Quinns is a grain and agricultural merchant in Baltinglass, County Wicklow. The first defendant and his wife are tillage farmers who reside in Portarlinton, County Laois. The second defendant is a private limited company. Its directors were, at the material time, the first defendant and his wife. They are also the only shareholders in the company, having each subscribed €1 for one of its two issued shares. Indeed, the company's name is a composite word derived from the first three letters in reverse order of the forename of the defendant's wife ('June'), followed by the three letters in reverse order of the defendant's own forename ('Jim'), hence 'Nujmij'. The company was incorporated on 19 July 2012.

3. On 24 August 2012, Glanbia plc ('Glanbia') applied successfully to be joined as a notice party to the proceedings. It did so because, on or about 2 July 2012, Glanbia Foods Ireland Limited, a constituent company within the Glanbia plc group of companies, entered into an agreement with Nujmij for the purchase and sale, respectively, of 400 tonnes of grain. 397 tonnes of grain were subsequently delivered to Glanbia, in respect of which, as of 24 August 2012, Glanbia owed Nujmij the sum of €65,369.26 under the terms of that agreement. Glanbia provided a solemn undertaking to hold that sum pending the determination of these proceedings.

**Background**

4. By Order of the Master of the High Court made on 12 October 2010 in summary proceedings entitled '*Quinns of Baltinglass Limited, plaintiff, and Jim Smith, defendant, Record No. 2010/953S*', the plaintiff obtained liberty to enter judgment against the first defendant in the sum of €292,632.69, together with interest. By Order of this Court, made on 22 November 2010, de Valera J dismissed the first plaintiff's appeal against the Master's Order. An Order of Execution in the sum of €315,209.50 issued on 5 May 2011. A certificate of the registry of that judgment in that sum issued on 23 June 2011.

**The plaintiff's case**

5. The plaintiff's first witness was Mr Liam Quinn, the managing director of Quinns. Mr Quinn gave evidence to the following effect.

6. Quinns is a family owned concern in the business of agriculture supply that has been in operation since 1936. It has more than 4,000 farmer customers, many of whom represent families that have been dealing with Quinns for generations.

7. Farmers who wish to sow winter crops would buy seed and other inputs (fertiliser, herbicides and fungicides) in September or October. Some would pay in cash but most would purchase on credit with a view to discharging their accounts after the harvest.

8. Mr Quinn dealt with Mr Smith's account personally. They did business from 2004 onwards. Each year the account was reconciled and, when there was a surplus, Mr Smith was provided with a cheque for the balance. In 2009, there was a shortfall. Mr Smith told Quinns that he would provide it with a quantity of wheat or barley to that value but never did so. Eventually, Quinns took summary proceedings and obtained the judgment already described.

9. In September 2011, Mr Smith delivered grain to Quinns to the value of €54,677.09. No further payment has ever been forthcoming.

10. Quinns' judgment against Mr Smith has been registered as a mortgage on certain lands owned by him but most, if not all, of those lands were already the subject of prior charges in favour of various financial institutions.

11. Quinns sought execution of their judgment by the Laois County Sherriff but, by letter dated 26 April 2012, the Order was returned marked '*nulla bona*'.

12. To the best of Mr Quinn's knowledge and belief, Mr Smith continues to farm at least 1,600 acres of land, growing cereals as a tillage farmer. Mr Quinn sought to enter into an agreement with Mr Smith to purchase further grain from him subject, of course, to a deduction for the outstanding judgment debt, but Mr Smith failed to engage with Quinns in that regard.

13. On 20 August 2012, Mr Quinn received an anonymous letter, together with certain enclosures, to the effect that Mr Smith had incorporated Nujmij and was delivering grain to Glanbia in the name of that company, with a view to frustrating the claims of his existing creditors. On the following day, 21 August 2012, Quinns sought and obtained a Mareva injunction against the defendants in respect of the dissipation of the proceeds of the sale by them of any agricultural produce other than to discharge Mr Smith's indebtedness to Quinns. That Order was slightly amended on 7 September 2012, to permit the payment by Mr Smith of certain farm and household bills and outgoings. By Order made on 19 September 2012, Glanbia was directed to retain the sum of €65,000 due to Nujmij, pending the determination of these proceedings.

14. In cross-examination, counsel for the defendants put three principal matters to Mr Quinn. The first was that Mr Smith's grain or other produce was his to do with as he might wish. Mr Quinn accepted that this was so, save that he did not believe Mr Smith was entitled to benefit his own family by seeking to avoid his lawful debts. The second proposition put to Mr Quinn was that Quinns should have sought relief against Mr Smith under the Debtors Ireland Act or the Enforcement of Court Orders Act, rather than through execution by the County Sheriff or by way of the present proceedings. Mr Quinn indicated that he was not aware of any such obligation. The third matter put was that weather conditions had adversely affected cereal crop yields in 2012. Mr Quinn accepted that. Indeed, Quinns' second witness was Dr Nicholas Bielenberg, an expert agricultural consultant and farmer. Dr Bielenberg acknowledged that the 2012 harvest was beset by difficulties, but expressed the view that, on a conservative estimate, Mr Smith would have harvested between 4,482 and 4,490 tonnes of grain from the 1,660 acres of land that, by his own account, he had under tillage that year.

15. The third witness called by Quinns was Pauline Murray, a book-keeper with that company. Ms Murray stated that she has been with Quinns for almost 37 years and was familiar with Mr Smith's account. She confirmed that the sum currently outstanding on that account was then, in round figures, €352,000. Ms Murray was not cross-examined. That concluded the plaintiff's evidence.

16. The defendants called a single witness, Mrs June Smith.

17. Mrs Smith is a farmer by occupation. She is a director of Nujmij. She stated that, in acting in that capacity in respect of the transaction at issue, it was not her intention to defraud anyone.

18. Under cross-examination, Mrs Smith acknowledged that she is an experienced business woman. She stated that the company Nujmij was incorporated on the advice of the couple's accountant, having been discussed between them over the preceding months. Mrs Smith stated that the couple's purpose in establishing the company was twofold: first, to create an entity with a good credit rating; and second, to set up a business for their children. Mrs Smith acknowledged that, on 2 July 2012, Nujmij entered into an agreement with Glanbia Foods Ireland Limited whereby it was to sell, and Glanbia was to purchase, 400 tonnes of grain, although Nujmij was not incorporated until 19 July 2012. Mrs Smith accepted that Quinns had a money judgment against Mr Smith at that time and that several other creditors were pursuing him. Nevertheless, Mrs Smith denied that Nujmij had been established to prevent Mr Smith's creditors generally, and Quinns in particular, from having recourse to the value of the grain concerned in full or partial satisfaction of those debts.

19. Mr Smith did not give evidence.

20. It is apposite to note that, at paragraph 12 of the defence delivered on behalf of Mr Smith on 17 January 2014, it is acknowledged that the grain at issue was delivered to Glanbia plc in the name of, and to the account of, Nujmij. There is no suggestion that Mr Smith received any credit or payment whatsoever as part of that transaction.

### **The law**

21. Section 74, sub-ss. (3) and (4) of the 2009 Act provide:

'(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.

(4) *Subsection (3)* does not-

(a) apply to any estate or interest in property conveyed for valuable consideration to any person in good faith not having, at the time of the conveyance, notice of the fraudulent intention, or

(b) affect any other law relating to bankruptcy of an individual or corporate insolvency.'

22. Under s. 3 of the 2009 Act, the terms 'conveyance' and 'property' are each very broadly defined: the former 'includes an appointment, assent, assignment, charge, disclaimer, lease, mortgage, release, surrender, transfer, vesting certificate, vesting declaration, vesting order and every other assurance by way of instrument except a will'; and the latter 'means any real or personal property or any part or combination of such property.'

23. It is generally accepted that s. 74(3) of the 2009 Act was enacted to recast the provisions of s. 10 of the Conveyancing Act (Ireland) 1634, 10 Car. 1 (Ir.) sess. 2, c. 3 ('the 1634 Act'), also known as the Statute of Charles, in much simpler form; *Law Reform Commission Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 – 2005), p. 217. Section 10 of the Statute of Charles operated to render 'clearly and utterly void and of [no] effect', amongst other acts, any 'conveyance of lands, tenements, hereditaments, goods and [chattels]', which is 'devised or contrived of malice, fraud, covin [an archaic term derived from Old French, describing 'a conspiracy between two or more persons to act to the detriment or injury of another'], collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others' of their lawful debts or other entitlements.

24. In *Rose v Greer* [1945] IR 503, Overend J expressed the opinion (at 510) 'that the class of fraud which is contemplated and against which the statute is directed is one in which the debtor attempts to defeat his creditors by bogus or colourable transactions under which the debtor retains a benefit to himself', although it has been suggested that this is too narrow a definition; Keane, *Equity and the Law of Trusts in the Republic of Ireland*, 2nd ed (Dublin, 2011) at p. 270.

25. *Smith v Tatton* (1879) 6 LR Ir 32 was a case in which a widow and her son, who owed rent as tenants, purported to convey their tenancy, together with various goods and chattels (including crops and livestock), to the son's father-in-law, the plaintiff, for a consideration equivalent to the arrears of rent. They applied that purchase money to discharge those arrears and the son's father-in-law, as purchaser, covenanted to pay the rent as it fell due from then on and to perform the covenants attached to the original lease. All the son's existing debts were paid by his father-in-law at the time of the execution of the deed. However, later the son became indebted to the defendant who obtained a decree against him and sought to execute it by taking from the lands a colt out of a dam that had been assigned under the deed. When sued for the return of the colt, the defendant sought to impeach the deed as fraudulent, contrary to the Statute of Charles. He failed before a jury on the facts just described. Nonetheless, in describing the effect of the statute, Fitzgerald B commented (at 41):

'Where there are existing debts, and the deed is voluntary, the execution of the deed shows the intent to take the property from the creditors, and the existence of the debts makes that intent fraudulent, because it is in the nature of fraud to take the property from the creditors and give it to a volunteer. A man must be honest before he is generous.'

26. In *Re Moroney* (1887) 21 LR Ir 27, Palles CB quoted the material part of s. 10 of the Statute of Charles, before going on to explain (at 61-2):

'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 the 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 the mind of the party to defeat and delay his creditors, and from such an intent the law presumes the conveyance to be fraudulent and 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, as stated by Mellish L.J., in *Re Wood* LR 7 Ch App 302, the intent is, as a matter of law, assumed from the necessary or probable consequences of the act done....'

27. In *McQuillan v Maguire* [1996] 1 ILRM 395 at 399, Costello P. applied the construction adopted in *Re Moroney*, stating that the Court 'need not find that the agreement was motivated by actual fraud – if it can be shown that the necessary or probable result of the agreement was to defeat or delay creditors then it could be avoided.'

28. In *Motor Insurers Bureau of Ireland v Stanbridge* [2011] 2 IR 78 (at 88), Laffoy J noted that the Statute of Charles was a statute of the Parliament of Ireland, which corresponded to an earlier English statute, the Fraudulent Conveyances Act 1571, 13 Eliz. 1, c. 5, also known as the Statute of 13 Elizabeth, and that there is authority for the proposition that both statutes were merely declaratory of the common law and, by extension, of the broad scope of the Court's jurisdiction to suppress fraud. Thus, in addressing the scope of s. 10 of the 1634 Act, May, *The Law on Fraudulent and Voluntary Conveyances*, 3rd edn, (Stevens and Haynes, 1908) states:

'The jurisdiction of the Court, however, is not strictly confined by the words of the Statute. In whatever way the disposition of property be effected, it will be held within the meaning of the Statute, which is general, for the suppression of fraud; and a man will not be allowed to do in one way what he cannot do in another.'

29. In *Keegan Quarries Ltd v McGuinness & Anor* [2011] IEHC 453, Finlay Geoghegan J expressed the view that the principles in *Re Moroney*, as applied by Costello P in *McQuillen v Maguire* and by Laffoy J in *MIBI v Stanbridge*, apply equally to s. 74(3) of the 2009 Act. That is a view with which I respectfully agree. The purpose of s. 74(3) of the 2009 Act was to update and simplify the language of s. 10 of the 1634 Act, not to alter the law encapsulated by it.

30. Most recently, the Court of Appeal endorsed the *Re Moroney* principles in *Doherty v Quigley* [2015] IECA 297.

### Analysis

31. Having carefully considered the evidence, I am satisfied that the transfer by Mr Smith of the ownership of the grain at issue to Nujmij, was made with the intention to defraud Quinns as a creditor of Mr Smith. Mrs Smith's unsupported assertion that it was done on the advice of the couple's accountant to create an entity with a good credit rating and to set up a business for the couple's children, poses more questions than it answers.

32. A credit rating is an estimate of the ability of a person to fulfil his or her financial commitments, based on previous dealings. In her evidence, Mrs Smith implied, but did not state, that Mr Smith's credit rating was, to use a neutral expression, sub-optimal, since if the couple's goal in setting up Nujmij was to trade through an entity with a good credit rating, it seems to follow that Mr Smith was unable to trade with a good credit rating in his own right. There can be no clearer indication that Mr Smith knew that his own creditors were at risk in the context of the relevant transfer of his assets to another entity.

33. The tillage farming business in which the Smiths are engaged had already been in operation for some considerable time prior to the incorporation of Nujmij and the transfer to it of the grain at issue. Accordingly, in taking those steps, Mr Smith was not 'setting up' a business for his children but, rather, seeking to transfer the assets of his existing business into a new entity that would continue to benefit his family at the expense of his creditors. Adapting the phrase of Fitzgerald B, he was being generous without first being honest.

34. It follows that the conveyance of that property at issue, namely Mr Smith's grain, was done with the express intent and object in Mr Smith's mind of defeating and delaying his creditors, and from that intent a presumption of law operates to render that conveyance fraudulent under s. 74(3) of the 2009 Act. Even if the evidence fell short of directly establishing intent, there can be no doubt that the necessary or probable result of Mr Smith's action in transferring ownership of the grain concerned, for no consideration in the circumstances already described, was to defeat or delay his creditors, and in such a case, as stated by Mellish L.J., in *Re Wood* LR 7 Ch App 302, the relevant intent must, as a matter of law, be assumed, which would also make that conveyance voidable under s. 74(3).

35. Insofar as an argument to the contrary was raised in passing on behalf of the defendants during the trial, I am satisfied that the terms 'conveyance' and 'property' are sufficiently broadly defined under s. 3 of the 2009 Act to capture the transfer of property at issue here.

36. Finally, the defendants argue that Quinns is not entitled to the declaration it seeks under s. 74(3) of the 2009 Act that the conveyance of the grain is void because, as a judgment creditor of Mr Smith, it has not exhausted all means of legal execution at its disposal before proceeding to seek equitable relief. In advancing that argument, the defendants rely on the decision of Kearns P in *Waterside Management Company Ltd v Kelly & Anor* [2013] IEHC 143. That was an appeal from the Circuit Court against an Order appointing a receiver by way of equitable execution over rents due to the respondent debtors from properties owned by them. The debt concerned was a judgment in the sum of just less than €10,000 in respect of unpaid property management fees.

37. The power to appoint a receiver by way of equitable execution is one that was developed by the Courts of Chancery. Its exercise in the Circuit Court was at the material time governed by Order 39, rule 1 of the Circuit Court Rules. That rule permits such appointment to be made where it is 'just and convenient' to do so. It seems to me that the judgment in *Waterside* goes no further than the uncontroversial proposition that it is not just or convenient to appoint a receiver where reasonable methods of legal execution have not been exhausted, where the appointment sought would be unreasonably prejudicial to other creditors, and where the sum involved is 'a relatively small one.' There was no issue in *Waterside* of an established intent to delay, hinder or defraud creditors. The power at issue there was an equitable, rather than a statutory, one. Accordingly, I find that decision of no assistance in the circumstances of the present case.

38. Counsel for the defendants acknowledged in argument, quite correctly in my view, that there is no other basis for the proposition

that Quinns, as a judgment creditor, was obliged to bring proceedings under the Enforcement of Court Orders Acts, 1926-2009 or the Debtors (Ireland) Act 1872, or both, before seeking relief under s. 74(3) of the 2009 Act. As is plain on first principles and from the judgment of Laffoy J in *Honniball v Cunningham* [2010] 2 IR 1 (at 13-14), there is no hierarchy or mutual exclusivity between different enforcement procedures.

### **Conclusion**

39. For the reasons given, I will grant a declaration that the transfer by the first defendant to the second defendant of a quantity of grain in or about the month of August 2012 is void as a conveyance of that property made with the intention of defrauding the plaintiff, as creditor, and as one whereby the plaintiff has been prejudiced.