

## THE HIGH COURT

[2014 No. 3015 P]

BETWEEN

MARGARET HOSEY

PLAINTIFF/RESPONDENT

AND

ULSTER BANK IRELAND LIMITED AND BRENDAN WELDON PRACTISING AS BRENDAN WELDON &amp; COMPANY

DEFENDANTS/APPLICANT

**EX TEMPORE JUDGMENT of Ms. Justice Murphy delivered on the 7th day of June, 2016.**

1. There are two motions before the Court. The first is the second defendant's motion, Mr. Weldon's motion to dismiss the plaintiff's claim as disclosing no cause of action and alternatively seeking an order directing the plaintiff to furnish particulars and in the further alternative, an order for case management. Also before the Court but a matter that did not take up any time of the Court is the plaintiff's motion for judgment in default of defence.
2. The matter first came before the Court on 5th February, 2016 and following argument on that date, the Court adjourned the matter for two weeks to allow the plaintiff to deliver a more detailed statement of claim. An amended statement of claim was produced by the plaintiff and was furnished on 16th February, 2016.
3. The matter came back before the Court on 19th February, 2016 and on that date, the Court was persuaded or almost persuaded by the arguments of Mr. Fogarty that he was entitled to his order dismissing the plaintiff's claim as disclosing no cause of action and/or on the grounds that was frivolous and/or vexatious and an abuse of the process of the Court.
4. Before the Court made that finding, Mrs. Hosey personally intervened and asked if the Court would consider the matter. In deference to Mrs. Hosey who clearly has been very troubled and concerned by all these events, the Court undertook to go away and read the papers before giving its final view. The Court is glad that it did so because the Court, in fact, having considered all of the papers, is of the view that in fact the plaintiff's claim is not unstateable.
5. The facts giving rise to this appear to be that the plaintiff and her then husband, Patrick Hosey, were joint owners of two properties. One was a property at 47 Brooklawns, in [Pollerton], in County Carlow. The second was a property known as "Rutland", Saint Martins, also in County Carlow. The plaintiff and her then husband were first registered as owners of 47 Brooklawns in 1998 and that is clear from the folio. The plaintiff has lived there and continues to live there since that time it would appear.
6. In 2002, the plaintiff and her husband sought to remortgage the property at 47 Brooklawns (and perhaps Rutland, the Court doesn't have that information at the moment) with First Active and draw down a sum of €152,000. This was done on 25th October, 2002.
7. In the process of doing so, they gave an irrevocable letter of authority to the second named defendant Brendan Weldon. This appears to be dated 2nd December, 2002. The irrevocable authority was given to him to give an undertaking to register First Active as owners of the first legal charge. At para. 2(a) of that undertaking, the solicitor undertakes to ensure that before the loan cheque is drawn down, the borrowers have executed a mortgage deed in favour of the lender. At para. 3 of the authority to give the undertaking, the solicitor agrees and undertakes to register the mortgage and to hold all documents of title pending the registration in trust for the lender. The Court infers from this that the mortgage in favour of First Active which bears the date 8th March, 2008 was in fact executed in or about this time which is 2002.
8. The second defendant, Mr. Weldon was less than diligent in attending to his undertaking and by 2004, the charge in favour of First Active had still not been registered. The Court observes that he was not alone in his dilatoriness. In the madness of the early noughties, the failure to register or complete undertakings seems to have been quite common.
9. In any event, in late 2003, the plaintiff and her husband Patrick Hosey, sought to remortgage a second property which they jointly owned, being St. Martins, Rutland, Bennekerry, County Carlow. This property was already mortgaged to First Active it appears but the Court has not seen all of the documentation relating to this property. The application was to Bank of Ireland for a facility of €250,000 which the Court notes, was a sum sufficient to discharge the mortgages on both properties being 47 Brooklawns and the Rutland property. The eventual facility advanced was in the order of €207,000 which was approximately €28,000 less than what would have been necessary to discharge the First Active mortgages on both properties.
10. Upon receipt of funding in 2004, inquiries were made by Mr. Weldon, the second defendant, as to redemption figures from First Active. The Court has not seen this correspondence from him to First Active but it is alluded to in other correspondence which is before the Court i.e. the letters from First Active to the second named defendant. As a matter of fact, the mortgage on 47 Brooklawns was redeemed in May 2004. The second defendant maintains that this was an error but the plaintiff maintains that this was not an error but was a deliberate act resulting from an agreement between her and her husband whereby on their separation she could have Brooklawns clear of debt. This is the nub of the issue between the parties.
11. Assuming for the moment that this was, as is contended by Mr. Weldon, an error, one would have expected the fact of the error to have manifested itself immediately. If I were being billed for a mortgage which I had believed I had redeemed, I would not sit mute for years and continue discharging the repayments on that mortgage.
12. The Court has been offered no evidence as to what occurred in relation to the Rutland property between 2004 and 2008.
13. According to the affidavit evidence of the plaintiff, in or about 2005/2006, her husband began to regret the earlier agreement that she should have 47 Brooklawns free and clear and began to exert pressure on her to remortgage Brooklawns. This evidence suggests that her husband was well aware that the mortgage on Brooklawns had been redeemed.
14. In any event, in early 2008, purportedly on behalf of both Patrick Hosey and the plaintiff, though at that time he knew or ought to have known that the parties were estranged, and he was acting for Patrick Hosey in that estrangement, the second defendant wrote

to the first defendant seeking to "reverse the error that had occurred in 2004" and reactivate the Brooklawns mortgage and discharge the Rutland mortgage. This was done without any notice to or authority from the plaintiff and entailed a considerable interest penalty for the non-payment of the Brooklawns mortgage for a period of 4 years.

15. The Court has not seen the correspondence from the second defendant to the successors-in-title of First Active, being Ulster Bank, but the Court has seen one of the letters in response from Ulster Bank being a letter of 20th February, 2008. This letter makes clear the consequences of reversing the process and asks the second defendant to bring the details to his clients' attention and revert with their preferred option.

16. There is absolutely no evidence before the Court that this proposal was brought to the attention of the plaintiff as co-owner nor were her instructions sought. The Court is satisfied that the proposed reversal was inimical to the plaintiff's interests in that the house in which she was living which was mortgage free was rendered liable to summary possession without her consent and in circumstances where the second defendant was aware of her estrangement from her husband, his client.

17. Even more worrying from the Court's point of view, is the fact that in effecting the reversal to discharge the Rutland property mortgage and encumber the Brooklawns property, a mortgage deed was produced dated 8th March, 2008. This of course would create the impression that the plaintiff having been advised of the consequences had consented to the mortgaging of Brooklawns.

18. The applicant while accepting that the date is wrong, has offered no explanation to the Court as to how the alteration of the date occurred. This is a matter of serious concern to the Court. This document emanated from his office. He is the one who can explain how, when and why the date was altered. He has chosen not to do so. The applicant makes much of the fact that the plaintiff's claim as to his alleged wrongdoing is non-specific and hangs entirely on a wrong date on the mortgage deed.

19. The plaintiff, not having been privy to the arrangements entered into by the second defendant purportedly on her behalf in 2008 was hamstrung. She knew that mortgage on her home had been discharged in 2004. She knew that a new mortgage had been supposedly executed on 8th March, 2008 without her consent but she didn't know the details of what had occurred. She has diligently sought information from the bank and has had some success but the picture is still not complete.

20. *Prima facie*, the plaintiff has a valid claim that the second defendant remortgaged her property without her consent. The applicant has advanced the argument that it doesn't really matter because she and her estranged husband are joint owners of both properties, the Rutland property and the Brooklawns property, and one way or another, the properties will be made available to satisfy the bank's claims. The Court does not agree.

21. As of May 2004, the Brooklawns property in which the plaintiff resides was unencumbered. In order to make it amenable for payment of the first defendant's debt, the defendant would have to seek judgment in respect of the sum due and thereafter seek a well charging order against the plaintiff's property.

22. By his actions in 2008, without the plaintiff's consent, the second defendant has rendered the property more immediately vulnerable to repossession. There is also the fact that he represented himself as acting on the plaintiff's behalf when in fact he was at least *prima facie* acting to her detriment. Pretending to have authority to act on behalf of a person from whom to your knowledge you have no authority is an extremely serious matter.

23. The Court is persuaded that this plaintiff has as a minimum a stateable claim or cause of action against the second named defendant and the nature and the extent of that claim will only be apparent once discovery has been made. For that reason, the Court is not disposed or prepared to strike out the plaintiff's claim. In the course of the application an amended statement of claim was served. It is in the Court's view, the defendants being Ulster Bank Limited and the second defendant Mr. Weldon should now file a defence to that claim. The Court is willing to case manage the matter and once I allow three weeks for the filing of the defence and thereafter if the parties wish to have the case case managed, I will case manage it. It seems to me that no application could seriously be entertained until after full discovery has been made in this case.