

THE HIGH COURT**2007 741 SP****BETWEEN****KEITH GANNON****PLAINTIFF****AND****CATHAL YOUNG AND ODRAN YOUNG****DEFENDANTS****Judgment of Miss Justice Laffoy delivered on the 23rd day of October, 2009.****The application**

This is an application by the plaintiff for an order directing that a certain *lis pendens* registered by the defendants against the lands registered on Folio 8576F of the Register of Freeholders County Mayo (the lands) be vacated. The application was initiated by way of special summons which issued on 27th September, 2007. The *lis pendens* which it is sought to have vacated was registered as a burden on Folio 8576F on 31st March, 2004 as proceedings affecting the interest of Michael Dawney (otherwise Michael O'Duchanna) and Vincent Fegan (the vendors) in the lands "pending in the High Court". The proceedings in question are plenary proceedings which, as originally constituted, were between the defendants on this application, therein described as Odran Young and Cathal Young, as plaintiffs, and the vendors, as defendants, under Record No. 2004 No. 1261P (the plenary proceedings).

At the time this application was initiated the plaintiff was not a party to the plenary proceedings. He is now, having been joined as a co-defendant by order of the Court.

Material chronology and facts

In the plenary proceedings, which were initiated by a plenary summons which issued on 2nd February, 2004, the defendants claimed an order for specific performance of an agreement dated 29th June, 2003 between the vendors and the second defendant in trust for the first defendant for the sale by the vendors to the first defendant in trust of the lands at the price of €76,000 and alternative and ancillary relief. The *lis pendens* in relation to those proceedings was registered in the Central Office of the High Court on 19th March, 2004 and, as I have stated, was subsequently registered as a burden on Folio 8576F on 31st March, 2004.

The plaintiff's case is that before the plenary proceedings were initiated and registered as a *lis pendens* in the Central Office and on Folio 8576F the plaintiff had contracted with the vendors to purchase the lands for €120,000 and had completed the purchase by paying the entire purchase money to the vendors and obtaining a transfer of the lands from the vendors. The date which appears on the contract between the vendors and the plaintiff is 31st October, 2003. However, the plaintiff has averred that sometime in September 2003, on his first visit from his home in England to this jurisdiction to view the lands, he agreed with the vendors to purchase the lands for €120,000. Subsequently, he instructed solicitors to act for him in this jurisdiction. The vendors' solicitors furnished the contract on 9th October, 2003. On 20th October, 2003 the plaintiff came to Dublin and signed the contract, which was returned by his solicitors on 29th October, 2003 to the vendors' solicitors. When the sale was closed on 31st October, 2003, that date was inserted on the contract.

A complicating factor is that the contract between the vendors and the plaintiff shows the purchase price as €80,000. The plaintiff has averred on this application that after he did the deal with the vendors for €120,000 he was informed by the property agent based in Liverpool who had put him in touch with the vendors that the vendors suggested that he pay €40,000 of the purchase price "separately to the sum of €80,000", the latter sum being the figure which would appear in the contract and the conveyancing documentation. He acceded to that suggestion. When he completed the purchase on 31st October, 2003, he paid the balance of the purchase money as shown in the contract, €72,000, through his solicitors, having already paid a deposit of €8,000 through his solicitors. He paid the sterling equivalent of €40,000 directly to the property agent in Liverpool on behalf of the vendors.

The plaintiff has averred on this application that registration of the transfer to him was delayed "solely by the issue of the apportionment of the stamp duty as between the residential and non-residential parts" of the lands. In a subsequent affidavit the plaintiff averred that the apportionment did not become available until about June 2004. It is not clear when the transfer from the vendors to the plaintiff was lodged in the Land Registry for registration. No copy of the transfer has been put before the Court on this application. I assume that it was after June 2004 and, perhaps, as late as early 2005.

In any event, the plaintiff was eventually registered as full owner of the lands on Folio 8576F on 1st April, 2005 in succession to the vendors, who had been registered as owners on 20th May, 2003. By letter dated 14th April, 2005 the Land Registry notified the plaintiff's solicitors that the registration had been completed. The plaintiff has averred in his final affidavit that the first occasion on which he learned that the defendants or any other party had a claim in relation to the lands was when his solicitors received the letter of 14th April, 2005, with which there was enclosed a copy of the Folio showing the *lis pendens* registered against the lands.

The evidence before the Court is that, when the plaintiff's solicitors first became aware in January 2006 that the real purchase price paid by the plaintiff to the vendors was €120,000 and that €40,000 portion of that sum had been paid directly to the vendors via the property agent, they immediately notified the Revenue Commissioners that the correct stamp duty had not been paid on the transfer to the plaintiff. Subsequently, the Revenue Commissioners computed the shortfall and that amount together with the appropriate surcharge and interest was paid by the plaintiff. The Revenue

Commissioners, by letter of 21st May, 2007, acknowledged receipt of the sum in question and stated that the case was closed.

The plenary proceedings were not progressed by the defendants until 2008. By order of the Court made on 29th January, 2008 the plaintiff was joined as a co-defendant in the plenary proceedings. An amended statement of claim was delivered on 8th April, 2008, in which the defendants plead as against the plaintiff that the contract of 31st October, 2003 "was fraudulent and was tainted with illegality". The only elaboration on that plea is an allegation that it was agreed between the plaintiff and the vendors that €40,000 of the consideration payable to the vendors "would not be declared to the Revenue Commissioners in order to defraud the Revenue Commissioners of the appropriate stamp duty and presumably also to defraud the Revenue Commissioners of the appropriate Capital Gains Tax payable in respect of the sale of the said lands in question". I assume that elaboration relates to the plea of illegality. It is further pleaded that the contract "was entered into and executed between the parties with extreme and undue haste in order to defraud in so far as possible the Plaintiffs herein [i.e. the defendants on this application] of their entitlement to have the sale of the lands in question to them closed". It is further pleaded that the plaintiff's registration as owner of the lands subsequent to the registration of the *lis pendens* was "pursuant to the said purported and fraudulent sale". There is a subsequent plea that, at the time of the sale of the lands to the plaintiff, he "had actual and/or constructive notice of the Plaintiffs' [i.e. the defendants on this application] interest in the said lands". It is further pleaded that the contract was "in any event void for illegality and that it is just and equitable that it should be set aside". Among the reliefs claimed by the defendants, as plaintiffs in the plenary proceedings, in the prayer in the statement of claim are the following:

- (a) an order declaring the purported sale by the vendors to the plaintiff "to be void for illegality" and
- (b) an order directing the rectification of Folio 8576F.

It is necessary to make some observations in relation to the evidence from which the foregoing chronology and facts have been extracted. First, the vendors are not parties to the application and there is no evidence from them before the Court. Moreover, the plenary proceedings have not gone beyond the stage of the delivery of the amended statement of claim and no defence has been delivered by any of the defendants. Secondly, there are matters averred to by the plaintiff which the defendants are obviously not in a position to refute at this juncture, for instance, his averment that his first knowledge that the defendants had a claim in relation to the lands was on receipt of a copy of Folio 8576F following completion of his registration in April 2005. Thirdly, the only evidence adduced on behalf of the defendants comprises affidavits sworn by two solicitors in the firm of solicitors who are acting for the defendants in these proceedings and in the plenary proceedings. There is more speculation and advocacy in those affidavits than fact, which is neither appropriate nor helpful. For instance, in the final affidavit filed on behalf of the defendants it is averred by their solicitor that the defendants do not accept that the plaintiff was ever a bona fide purchaser for value without notice of the defendants' interest under the contract of 29th April, 2003, which is based on the deponent's speculation of what transpired between the plaintiff and the vendors. Having said that, the hearing of the plenary proceedings on oral evidence is the appropriate forum in which to determine that issue, when the plaintiff will be subject to cross-examination and the attendance of all relevant witnesses can be procured, if necessary, by sub poena.

The respective positions of the parties in outline

The position adopted by counsel for the defendants on the hearing of the application was that the Court should adjourn the application to be heard in conjunction with the hearing of the plenary proceedings. Whether, in his transaction with the vendors, the plaintiff was a bona fide purchaser for value without notice of the defendants' interest in the lands is a material consideration in the determination of the issues between the parties in the plenary proceedings, it was submitted, and it is an issue which cannot be determined on this application. The defendants are entitled to avail of all of the processes available to them in the plenary proceedings, for example, discovery, in exploring and addressing that issue.

Counsel for the plaintiff, on the other hand, submitted that whether the *lis pendens* should be vacated was capable of determination on this application. The main plank in his argument was that, when the plaintiff paid the entire purchase money to the vendors on 31st October, 2003, he became the beneficial owner of the lands and there was no interest remaining in the vendors which was capable of being captured by the *lis pendens* which was subsequently registered as a burden on Folio 8576F. As authority for that proposition counsel relied on the decision of the Supreme Court in *Coffey v. Brunel Construction Company Limited* [1983] I.R. 36. Counsel for the plaintiff accepted that, in order to succeed on this application, he had to establish that the defendants' claim against the plaintiff is bound to fail. He also acknowledged that he had to address two difficulties flowing from the defendants' case against him.

The first is the difficulty arising from the complicating factor of the non-disclosure to the Revenue Commissioners initially of the true consideration for the purchase by the plaintiff from the vendors. However, it was submitted, in reliance on the analysis of the law in *Farrell on Irish Law of Specific Performance* (Butterworth, 1994), paras. 9.48 to 9.55, that, as the contract has been completed and the lands have been transferred to the plaintiff, who is now registered on Folio 8576F, even if the contract was illegal, the transfer has been effective and remains so, referring specifically to *Farrell* at para. 9.52 and the decision of this Court (*Costello J.*) in *Hortensius Limited v. Bishop* [1989] ILRM 294.

The second is the defendants' contention that the plaintiff purchased with notice of their claim. Counsel for the plaintiff pointed out that the defendants' deponents were not in a position to contradict his averment that he had no notice. He further argued that the facts, and, in particular, that the plaintiff was prepared to pay €44,000 more for the lands than the defendants, were not consistent with the plaintiff having notice.

The relevant law

The system for registering *lites pendens* was introduced by the Judgments (Ireland) Act 1844. As is pointed out in *Farrell*, op. cit., (at para. 10.11), that Act does not alter the nature of a *lis pendens*. However, s. 10 provides that "no *lis pendens* shall bind or affect a purchaser or mortgagee without express notice thereof unless and until a memorandum or minute" of it has been left with the appointed officer who must enter the particulars in a book, as provided in s. 10. In the case of registered land, a *lis pendens* is a burden which may be registered as affecting the land under

s. 69 of the Registration of Title Act 1964. Section 2 of the *Lis Pendens* Act 1867, which is the provision invoked by the

plaintiff on this application, provides that the Court before which the property sought to be bound is in litigation may "upon the determination of the lis pendens, or during the pendency thereof, where the Court shall be satisfied that the litigation is not prosecuted bona fide, make an order, if it shall see fit, for the vacating of the registration without the consent of the party who registered it ...". Accordingly, the test on an application such as this to vacate a lis pendens, where the plenary proceedings are pending and the defendants, who registered the lis pendens, are not consenting, is whether the defendants, as plaintiffs therein, are prosecuting the plenary proceedings in relation to the lands bona fide. That involves showing that no issue of fact remains between the parties (Flynn v. Buckley [1980] I.R. 423 at p. 429).

The decision of the Supreme Court in Coffey v. Brunel Construction determined the position in relation to registered land, where the factual context was analogous to the factual context which prevailed when this application was initiated. In that case, the plaintiffs had, on 8th November, 1979, contracted to purchase the lands comprised in the relevant Folio from the registered owner for the sum of £340,000. The plaintiffs duly paid the full purchase money and a transfer was executed by the registered owner on 7th December, 1979 transferring his interest in those lands to the plaintiffs. The transfer was not lodged in the Land Registry for registration until 25th February, 1981. In the interim, on 9th May, 1980, the defendants had commenced proceedings in this Court against the registered owner seeking a declaration that he held those lands as trustee for them. On 16th May, 1980, those proceedings were registered in the Land Registry as a lis pendens affecting the interest of the registered owner in those lands. On an application by the plaintiffs to vacate the lis pendens, the Supreme Court held that, upon payment of the agreed purchase price in full, the plaintiffs had acquired the full beneficial interest in those lands. At the time when the lis pendens was registered, which was the relevant date, the registered owner had no beneficial interest in those lands and was a mere trustee for the plaintiffs (per Griffin J. at p. 46). As a registered burden, the defendants' lis pendens would be entitled to its due priority over burdens, but it was not entitled to priority over the right thus acquired by the plaintiffs, which arose earlier and was not a "burden" (per O'Higgins C.J. at p. 42).

Application of the law to the facts

What distinguishes this case from Coffey v. Brunel Construction is that in the latter case the defendants were not pursuing any claim for a proprietary interest in the lands against the plaintiffs when the application to vacate the lis pendens was heard. The position is different in this case since the plaintiff was joined as co-defendant in the plenary proceedings and the defendants are seeking therein to have the plaintiff's registered title on Folio 8576F negated. The test on this application is whether, in the changed circumstances, the defendants are now bona fide prosecuting their claim against the plaintiff in the plenary proceedings. Clearly, if their claim is doomed to failure, they are not.

That leads to the question whether, on the authority of the decision of the Supreme Court in Coffey v. Brunel Construction, it is the case that the defendants' claim against the plaintiff cannot succeed because they initiated the plenary proceedings and registered the lis pendens after completion of the purchase and the payment of the entire purchase money by the plaintiff to the vendors. If it were the case that the defendants had not procured the joinder of the plaintiff as a co-defendant in the plenary proceedings and were not alleging wrongdoing and pursuing a claim against the plaintiff in the plenary proceedings, then the plaintiff would be entitled to have the lis pendens vacated on the authority of the decision of the Supreme Court.

However, as I have outlined earlier, the defendants are alleging against the plaintiff that the contract of 31st October, 2003 –

- (a) was fraudulent,
- (b) was tainted with illegality,
- (c) was entered into and executed between the parties thereto in order to defraud the defendants, and
- (d) was entered into at a time when the plaintiff had actual or constructive notice of the defendants' interest in the lands.

Therefore, as pleaded, there are three grounds on which the defendants base their entitlement to negate the plaintiff's ownership and registered title: fraud, illegality and notice. It is true that fraud, which is a very serious allegation, is pleaded in the most general way without particulars, as is required by Order 19, rule 5(2) of the Rules of the Superior Courts 1986. However, having said that, in my view, it cannot be said that there are no issues of fact remaining on the fraud and notice grounds, or that the defendants are bound to fail on all three grounds. Accordingly, a finding that the defendants are not bona fide prosecuting the claim against the plaintiff cannot be made at this juncture.

In the circumstances, it is not necessary, and it would be inappropriate, to express any view on the difficult questions as to the effect of the admitted failure by the plaintiff to declare the real purchase price of the property in the transfer and to the Revenue Commissioners on the plaintiff's title to the lands and as to the extent to which the fact that the plaintiff has remedied the default has cured any infirmity in his title.

Order

The order of the Court will refuse to direct that the lis pendens be vacated at this juncture. These proceedings will be linked to the plenary proceedings and the application will be adjourned to the hearing of the plenary proceedings.