

BETWEEN

PATRICK MCCOY

PLAINTIFF

AND

ORIENTAL HANDCRAFTS LIMITED AND TOM KAVANAGH

DEFENDANTS

**JUDGMENT of Ms. Justice Reynolds delivered on the 28th day of February, 2019****Introduction**

1. This is an application for an order pursuant to O. 19 of the Rules of the Superior Courts and the inherent jurisdiction of the court to strike out and/or dismiss the proceedings on the grounds that the pleadings disclose no reasonable cause of action as against the defendants or either of them, that they constitute an abuse of process, that they are frivolous and vexatious and/or that they are bound to fail.

2. In the within proceedings, the plaintiff seeks an order for specific performance of a contract for sale dated 5th September, 2001, made between the plaintiff and the first named defendant, whereby the plaintiff agreed to buy and the first named defendant agreed to sell a property known as Apartment 26, Harbourside, Newport, in the county of Mayo in consideration of €12,697 (£10,000), less the deposit as agreed.

3. Further, the plaintiff seeks a declaration that he is entitled to a moiety interest in the property, commensurate with the contractual deposit already paid together with other ancillary relief.

**Background**

4. In 2009, the property was mortgaged as security for a loan facility granted to the first named defendant by Anglo Irish Bank Corporation Ltd by virtue of a facility letter dated 10th August, 2009.

5. By mortgage debenture dated 4th November, 1999 made between the first named defendant and Anglo Irish Bank Corporation Ltd, the first named defendant mortgaged the property as security for its liabilities to the bank, including the loan facility referred to above.

6. Pursuant to Clause 36.1 of the mortgage debenture, it was agreed that the first named defendant "may not assign its benefit, interest or obligation under this Deed."

7. It is common case that the lender's interest in the said loan facility together with the associated security was subsequently acquired by Launceston Property Finance Ltd and that Launceston Property Finance Ltd was subsequently registered as the owner of the mortgage and charge.

8. By Deed of Appointment of receiver dated 24th August, 2016, the plaintiff was appointed as a receiver over the said property.

**The Second Named Defendant's Application to Strike Out**

9. In the grounding affidavit, the second named defendant sets out the reasons why he asserts that the plaintiff's claim is an abuse of process and bound to fail, which can be summarised as follows:-

(a) the plaintiff has been guilty of laches in circumstances where the within proceedings were only commenced in December 2017, some sixteen years after the cause of action would have accrued;

(b) the second named defendant is not a party to the contract of sale and, therefore, no order of specific performance could be made against it;

(c) it is not disputed but that neither of the defendants are the holder of the charge on the property in circumstances where it is registered to Launceston Property Finance Limited;

(d) the plaintiff appears to accept that he has no legal title to the property;

(e) any interest which the plaintiff purportedly acquired in the property was acquired subject to the mortgage and charge;

(f) the plaintiff has failed to substantiate any allegation of wrongdoing on the part of either Launceston Property Finance Limited or the second named defendant in connection with his appointment as receiver over the property; and

(g) the previous consent to the sale of the property as provided by Launceston Property Finance Limited and its commitment to release the charge on the property was contingent on receipt of net sale proceeds of €60,080.58 by Launceston Property Finance Limited, no later than 29th April, 2016. The sale did not complete by the specified deadline nor were the required funds remitted to Launceston Property Finance Limited, as required, therefore, no valid written consent for the sale of the property now exists.

**The Plaintiff's Replying Affidavit**

10. The plaintiff states that on the same day that he entered into the contract for sale i.e. 5th September, 2001, he further entered into a building contract to carry out construction works to the said property and has expended approximately €14,000 in this regard.

11. The plaintiff contends that he has been, at all times, ready, willing and able to complete the said contract and claims part

performance of the contract on the basis of the works done.

12. It is notable that neither the alleged building contract nor evidence of the alleged monies expended on the works are exhibited in the replying affidavit.

13. It is clear that there were title difficulties in respect of the first named defendant's title to the property which were known to the plaintiff after requisitions on title were raised in the ordinary way. This issue was only resolved in early 2016.

14. In April 2016, the plaintiff states that he was advised by Launceston Property Finance Limited that it would consent to the sale of the property for an agreed sum, provided the funds from the transaction were received no later than 29th April, 2016. There is no dispute but that the first named defendant was not in a position to complete the sale by the requisite closing date.

15. The plaintiff contends that when Launceston purchased the loan facilities that Anglo Irish Bank Corporation Limited had advanced to the first named defendant, it knew that the property was charged to secure the repayment of those loan facilities but that the bank had agreed to release the charge it held on the property once the contract had been completed, in accordance with its terms. In the circumstances, the plaintiff contends that Launceston is not entitled to unilaterally alter the terms of the contract or to withdraw the consent that its predecessor in title had already given to the sale of the property. Further he maintains that he is entitled to a lien on the said property.

### **The Law**

16. The principles upon which the court exercises its jurisdiction in such applications are well established. In *Barry v. Buckley* [1981] IR306 Costello J. stated that the jurisdiction should be "exercised sparingly and only in clear cases".

However, the court thereafter concluded that:

"... if, having considered the documents, the court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings..."

17. Those principles were recently endorsed by Creegan J. in *Delaney v. Allied Irish Banks plc.*, [2015] IEHC 52.

18. The onus rests on the defendant, the moving party, to establish the plaintiff's claim cannot succeed on the facts before the court. What is required of the plaintiff is to establish that it has merely a stateable case, not a *prima facie* case (see Clarke J. in *Salthill Properties Limited v. Royal Bank of Scotland*).

### **Delay**

19. It is a well recognised principle that delay or laches provides in certain circumstances a defence to equitable claims.

20. In *O'Domhnaill v. Merrick* [1984] IR151 the court held that "inordinate and inexcusable delay" will bar a claim in equity, even when such claims are brought within the statutory limitation period. In the instant case, the issue of a statutory limitation period does not arise in circumstances where the plaintiff seeks specific performance. However, it is clear that the defendant is entitled to rely on the doctrine of laches where the relief claimed by the plaintiff concerns a contract entered into in September 2001.

21. The reason for the delay is wholly unexplained in respect of the initial fifteen year period. Any merit that the plaintiff may have had in his defence to the within application is overwhelmingly defeated by his delay in initiating the within proceedings. It was at all times open to the plaintiff to seek to rescind the contract dated the 5th September, 2001 or to serve a completion notice but he choose not to do so.

### **Conclusion**

22. In all the circumstances, this Court will accede to the application to dismiss the plaintiff's claim in circumstances where I am satisfied that they constitute an abuse of process and are bound to fail.