THE COURT OF APPEAL

APPEAL NO. 2015 NO. 89

Finlay Geoghegan J.
Peart J.
Sheehan J.

BETWEEN:

DANA DOHERTY (A PERSON OF UNSOUND MIND NOT SO FOUND) SUING BY HER NEXT FRIEND FINTAN GALLAGHER

PLAINTIFF/RESPONDENT

AND

MICHAEL QUIGLEY AND ALICE QUIGLEY

DEFENDANTS/APPELLANTS

JUDGMENT of Mr Justice Peart delivered on the 21st day of December 2015:

1. It is unusual these days for the determination of an appeal to turn on the interpretation of a statutory provision enacted during the reign of King Charles I of England, almost four hundred years ago. But s. 10 of the Conveyancing Act (Ireland) 1634 (10 Chas. 1 sess. 2 c.3) was not repealed until the commencement of the Land and Conveyancing Law Reform Act, 2009 on the 1st December 2009, and was therefore extant on the dates of the two transfers of property made in 1998 and 2000 by the first defendant in favour of his wife the second defendant, and which the plaintiff seeks to have set aside. The language of the section is of its time, and therefore arcane and tortuous to modern eyes. However, just as Theseus unravelled a string to ensure his safe escape from the labyrinth having slain the Minataur, I have for the reader's assistance underlined the essential words of this ancient section as a guide to its conclusion. It provides:

> "10. And furthermore for the avoiding and abolishing of fained, covenous and fraudulent feoffments, gifts, grants, alienations, conveyance, bonds, suits, judgements and executions, as well of lands, and tenements, as of goods and chattels … which feoffments, gifts, grants, alienations, bonds, suits, judgments and executions have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accompts, damages, penalties, forfeitures, herriots, mortuaries, and reliefs, not only to the lette or hindrance of the due course or execution of law and justice, but also to the overthrow of all true and plaine dealing, bargaining and chevisance between man and man, without the which no common wealth or civill society can be maintained or continued; All and every feoffment, gift, grant, alienation, bargaine and conveyance of lands, tenements, hereditaments, goods and chattels … made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken only as against that person or persons, his or their heires, successors, executors, administrators, and assignes, and every of them, whose actions, suits, debts, accompts, dammages, penalties, forfeitures, herriots, mortuaries and reliefs, by such guileful, covenous fraudulent devises and practices, as is aforesaid, are, shall, or ought to be in any wise disturbed, hindered, delayed or defrauded to be clearly and utterly void, and of none effect …".

2. The plaintiff seeks to have these two transfers set aside on the grounds that they were effected for the purpose of ensuring that the lands would not be available to satisfy any judgment which she might obtain against him, even though by then no proceedings had actually been commenced, nor even a letter written warning of a possible claim in damages being made. However, the trial judge found as a fact that he had reason to believe by the date of the first transfer in February 1998 that she might seek damages against him in respect of sexual abuse which she alleged he had perpetrated against her during the 1980s when she was a teenager, and about which she had first made complaint to An Garda Síochána in August 1993, because he was interviewed by the Gardaí about those matters immediately following her complaint being made.

3. A number of findings of fact were made by the trial judge before reaching her conclusion that the two transfers of land to his wife without consideration other than "natural love and affection" were fraudulent transactions, and therefore void, within the meaning of s. 10 of the Act of 1634, and that they should be set aside. Counsel for the appellants does not ask this Court to set aside any findings of fact, but rather bases the appeal on the legal ground that a person who seeks to set aside a transfer on the basis that it is void under s. 10 of the Act of 1634 must, at the date of that transfer already be a creditor of the disponer, and not just someone such as the plaintiff who may become his creditor in the future.

4. As found by the trial judge, the first named defendant was aware by 1991 that the plaintiff was claiming that she had been sexually abused by him, and that in August 1993 she had made her first complaint to the Gardaí, immediately following which the first defendant was interviewed by them. She found also as a fact that in February 1998, both defendants met the plaintiff at an All-Ireland dancing competition in Ennis, on which occasion the plaintiff said to the second named defendant in a sarcastic tone "bet you are delighted to see me". She found also that on 26th February 1998 the second defendant became registered as the sole owner of lands at Meenagowan, Co. Donegal on foot of a transfer made in consideration of natural love and affection – in other words a voluntary transfer, and that in January 1999 the first defendant was arrested and charged with 24 counts of indecent assault upon the plaintiff, and further that on 21st March 2000 the second defendant became registered as the sole owner of the family home at Barnhill Park, Letterkenny, again on foot of a voluntary transfer. The trial judge was not persuaded as to the truthfulness of each of the explanations (set out at paragraph 29 of the judgment) that were proffered by the second defendant for these voluntary transfers. The trial judge concluded that the plaintiff had established that on the dates of these transfers, the first defendant had committed repeated tortious wrongs upon her, and that by divesting himself of all of his property for no valuable consideration he had deprived the plaintiff of the benefit of the property in respect of any award or compensation that she might have been granted in the future, and further that the natural and probable consequence of these transfers was to delay or defeat the plaintiff as a creditor.

5. I would add one other undisputed fact which provides a context for the remark made by the plaintiff to the second defendant when

they met at a dancing competition in Ennis in February 1998. It is that in January 1994 – that is, some five months after first making her complaint to the Gardaí – the plaintiff left Ireland and moved to Texas, USA, and that in late 1997 or early 1998 she and her husband returned to live in Ireland. It was very shortly after her return that the meeting at the dance competition in Ennis occurred.

6. There is no doubt that by the dates of these two voluntary transfers, the plaintiff had not yet become an actual creditor, as by that date not only had she received no award of damages but she had not even commenced her proceedings claiming damages, nor even written a letter signalling an intention to claim damages. This is a matter heavily relied upon by the appellants in support of their submission that the plaintiff is not a creditor within the meaning of the Act of 1634.

7. The plaintiff's proceedings were commenced in December 2007 following an authorization being made by the Personal Injuries Assessment Board. The case was heard by Ryan J. (as he then was) and in his judgment delivered on the 5th July 2011 he made an award of damages in the sum of €400,000, and the costs of the proceedings in favour of the plaintiff. The appellants submit that it was only at that date that the plaintiff assumed the mantle of creditor, and that the transfers predated that date by some eleven and thirteen years respectively, and ought not to be considered fraudulent under the section.

8. A net issue arises for determination on this appeal, namely whether the plaintiff must be an actual creditor at the dates of the transfers in order to avail of the provisions of s. 10 of the Act of 1634, or whether it is sufficient that on those dates she is a potential creditor so as to come within the phrase "creditors and others" in s. 10 .

9. In reaching her conclusion that the plaintiff came within the meaning of "creditor" for the purpose of s. 10 of the Act of 1634, Donnelly J. stated:

> 13. In *MIBI v. Stanbridge*, Laffoy J. confirms that the 1634 Act and the earlier English statute, Fraudulent Conveyances Act 1571 (13 Eliz.1, c. 5) were merely declaratory of the common law. There is reliance by both parties on May on The Law on Fraudulent and Voluntary Conveyances (3rd. ed. Stevens and Haynes, 1908). May states that the statute is couched in very general but simplistic terms and its expansiveness has 'enabled the judges to bring within its scope, and extend its operation to almost every kind of transaction resorted to by debtors to the prejudice of their creditors'.
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> 14. Counsel for the plaintiff relies upon a number of cases to show that a creditor within the meaning of the 1634 Act is not required to have obtained a judgment in his or her favour. There is very clear authority from the case of *Barling v. Bishopp* (1865) 29 Beav. 417. In that case, the then Master of the Rolls stated with respect to the Elizabethan statute on which the Irish statute was based, that '[i]t is obvious that the statute is not, in terms, restricted to existing creditors alone, but that it extends to future creditors also'. Baron Fitzgerald in *Smith v. Tatton* (1879) 6 L.R. Ir. 32 stated at p. 41 with respect to the 1634 Act, that
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> > '[t]here can be no doubt that the statute makes no distinction between present and future creditors, and the fraudulent intent to defeat any creditor practically avoids the deeds against all'."

10. The trial judge went on to consider whether the defendants' argument (as to a future creditor not being within s. 10 of the Act of 1634) could be assisted by In *re Daniel Kelleher* [1911] 2 I.R. 1. However, she concluded, correctly in my view that it was decided on very different facts, and was distinguishable on that basis.

11. As to fraudulent intent, she concluded, on the basis of authority cited including the judgment of Laffoy J. in *MIBI v. Stanbridge* [2011] 2 I.R. 78, that the onus lay upon the plaintiff to demonstrate a fraudulent intent – either an express fraudulent intent or by way of an inference to be drawn from circumstances found to have existed.

12. She considered firstly whether there was evidence from which she could find an express intent on the part of the first defendant to defeat or delay his creditors. She drew no adverse inference as to his intention in that regard from the fact that he had not given evidence nor even sworn an affidavit., and she looked at two explanations for these transfers offered in evidence by the second defendant, and concluded that she was "not persuaded as to the truthfulness of each of the explanations that was offered by the second defendant". Having considered the remaining evidence she was satisfied that this onus had not been discharged by the plaintiff, though she added that if the onus had been on the defendants she would not have been satisfied that these were bona fide transactions made with no fraudulent intent.

13. Having reached that conclusion she went on to conclude that the natural and probable consequence of the transfers, looked at from an objective viewpoint, was in all the circumstances to delay or defeat the plaintiff as a creditor, so that a reasonable inference of an intention to defraud the plaintiff could be drawn. She so found in respect of each transfer, the reasons being slightly different in relation to each, but not in any way material to the particular ground being argued.

14. The appellants have submitted that there is no factual basis for a finding that the plaintiff was a creditor on the dates of these transfers of property. In particular they say that in 1998 she was not a creditor, nor a person likely to be prejudiced by the transfers since up to that time, including the date on which she made the sarcastic remark at the dance competition in Ennis referred to above, since the only intention evinced by her, namely by making a complaint to the Gardaí in 1993, was to have the first defendant charged with and convicted of offences which she was alleging were committed against her, and that she had not given the first defendant any reason to believe that she was intending to claim damages. In that regard it is noted that the first occasion on which such an intention was indicated was when her solicitor first wrote to the first defendant in 2005.

15. It has been submitted that in all the cases where a transfer was found to be void as fraudulent, there has been a particular set of facts from which an express intent to defraud was found to exist, or from which an inference of such intent could be drawn, and that in the absence of such concrete facts in this case the plaintiff cannot be considered to be a creditor for the purpose of the section. Counsel has referred to *In Re Moroney, a bankrupt, MIBI v. Stanbridge, and Keegan Quarries Ltd v. McGuinness* [2011] IEHC 453, *Barling v. Bishopp* 29 Beav. 689, as well as *Smith v. Tatton* [1879] 6 L.R. IR. 32 for the submission that in order for the plaintiff to be considered a future or potential creditor for the purpose of the section, there must be some clearly established fact showing that she was such a creditor, before any inference can be drawn that the transfers were effected with an intent to defraud the plaintiff or hinder her in recovery of damages not by that date sought. It is submitted that there were now contemporaneous facts established by 1998 to show that she was a creditor or someone who may become a creditor in the future. While it is accepted by the first defendant that he had been interviewed in August 1993 after the plaintiff had made her complaints, it is submitted that there was no evidence that he made any admissions in relation to the acts being alleged, and it is submitted that to now impute to him an intention to defraud the plaintiff by making the transfers in 1998 and 2000 is to look at events with the benefit of hindsight, and that in so far as the trial judge has done so, she has erred.

16. A finding that the natural and probable consequence of the two transfers of property by the first defendant was to delay or hinder his creditors is sufficient to fulfil the second limb of the test for a finding of fraudulent intent as propounded by Palles C.B. in *In Re Moroney*, a bankrupt [1887] 21 L.R.Ir. 27 to which the trial referred in her judgment. In that case the Chief Baron 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 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 … 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, however, 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."

17. These principles have been applied ever since, and most recently by Costello P. in *McQuillen v. Maguire* [1996] 1 ILRM 394, by Laffoy J. in *MIBI v. Stanbridge [supra],* and by Finlay Geoghegan J. in *Keegan Quarries Limited v. McGuinness* [2011] IEHC 453.

18. The finding of fraudulent intent made by the trial judge by way of inference for the purpose of the second limb of the test stated by Palles C.B in In *Re Moroney*, a bankrupt is in my view irresistible and correct on the facts of this case, and was correctly drawn by the trial judge. She applied the correct test in that regard. In so far as it has been submitted by the appellants that there must be facts from which the necessary inference as to intent can be drawn, I am satisfied that this is established by the fact that in 1993 the plaintiff made a complaint in 1993 to the Gardaí in relation to certain acts by the first defendant, and that thereafter he was interviewed about it.

19. I am satisfied also that even though the plaintiff's intention was that her complaints should lead to him being charged and convicted of criminal offences arising from those actions, those alleged actions were also tortious acts capable of giving rise to a claim in damages. Those tortious acts, and the complaints made in relation to same, and the interview of the first defendant, existed as facts at the date of the two transfers from which the necessary inference could be drawn for the purpose of the second limb of the Palles C.B's test in *In Re Moroney*, a bankrupt notwithstanding that the damages claim arising from them was not determined until 2011. The plaintiff was a creditor in the sense of a future creditor, and it is noteworthy also that section 10 refers not only to "creditors" but to "creditors and others" who may be delayed, hindered or defrauded by a fraudulent transfer of property.

20. As I have stated, the appellants' challenge is limited to the question of whether the trial judge was correct in concluding as a matter of law that the plaintiff was at the date of the two transfers a creditor within the contemplation of s. 10 of the Act of 1634. Her conclusion was that "although there may have been no debt prior to the judgement due to the fact that the damages were only ascertainable after an action at law, it is undoubtedly the case that the plaintiff was a creditor within the meaning of the 1634 Act".

21. In my view this conclusion is amply supported by authority and is correct on the facts as found by the trial judge. As far back as 1860 in *Barling v. Bishopp* 29 Beav. 689, Romilly MR on facts not dissimilar to the present case stated at p. 690, albeit to the equivalent provision in the Fraudulent Conveyances Act of 1571(13 Eliz 1, c. 5) which was in identical terms to s. 10 of the Act of 1634:

> "I am of opinion that the effect of the deed was to defeat persons who might become his creditors, and was executed in favour of his daughter, who it is clear would not allow her father to starve. It is not necessary to go into the question of whether he had other property or not, but if I took his schedule filed on his insolvency as proof, it would appear that he had no other property, and that he disposed of the whole. I am of opinion that it is a necessary inference to be drawn from the facts and dates, that the deed was executed with a view to defeating persons who might become his creditors in consequence of acts done by him."

22. These statements represent as correct an interpretation of the Act of 1634 today as they did when they were made, and establish that s. 10 of the Act of 1634 applied not just to existing creditors, but also to persons who by reason of facts existing at the date of transfer might become a creditor in the future. No authority to the contrary has been cited by the appellants. Where it has been found, in my view correctly, that the transfers in question have been made for no consideration, and a claim for damages by the plaintiff in the future by reason of tortious acts already committed was possible on the facts as found, the inference was correctly drawn as a matter of law that the first defendant intended that the property being transferred both in 1998 and in 2000 should be placed beyond recourse of the plaintiff as a future creditor should she be successful in her damages claim in the future. It is relevant to note that no evidence was given by the defendant of any other means available to him at the dates of transfer to meet a future award to the plaintiff. Also the explanations offered by the second named defendant for the transfers were rejected by the trial judge, and that the first defendant gave no explanation.

23. For these reasons I consider that the trial judge was entirely correct in her conclusions, and I would dismiss this appeal.