

THE HIGH COURT

[2015 No. 4115 P]

BETWEEN

PAUL MOORE AND LESLIE MOORE

PLAINTIFFS

AND

STEPHEN TENNANT, DANSKE BANK SA T\A DANSKE BANK AND FINSBURY CIRCLE NOMINEE LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 8th day of July, 2016

Introduction

1. This application has caused the Court to consider s. 72 (1) (j) of the Registration of Title Act 1964 ("**the 1964 Act**") and s. 108(5) of the Land and Conveyancing Law Reform Act 2009 ("**the 2009 Act**") in addition to the application of the long established principles relevant to an application to strike out pursuant to O. 19(28) of the Rules of the Superior Courts and the inherent jurisdiction of the court.

2. The Court emphasises that this judgment does not :

(a) determine whether the potential right to redeem a mortgage as alleged by the plaintiffs is a right which falls within s. 72(1) of the 1964 Act;

(b) decide how and the extent to which the third named defendant purchaser of land is entitled to rely upon s.108(5) of the 2009 Act. S.108 (5) of the 2009 Act provides that a person (like the third named defendant) which pays money to a receiver, (such as the first named defendant) is not required to enquire whether the receiver is authorised to act in the sale of lands on premises.

3. This is a summary type application to strike out the claims of the plaintiffs on the grounds that the claims are bound to fail and I set out the long established principles which the Court must apply later. At this stage the Court will set out the facts as they have been disclosed by way of affidavit and exhibits without any cross examination and it is stressed that the Court is not making any finding as to fact which could bind another Court.

Chronological summary

4. The following are facts which are accepted purely for the purposes of this motion issued by the third named defendant to strike out the claim of the plaintiff against the third named defendant:-

- 2002: The plaintiffs acquired 10 Meadowlands Lane, otherwise known as and in this judgement called "**Broomfield**" in Midleton, Co. Cork, comprised within folio 98213F Co. Cork.
- 2006: National Irish Bank advanced €650,000 to the plaintiffs secured by way of a charge on Broomfield on foot of a facility requiring the payment of interest only and for a period of some twenty years.
- 2007: The second named defendant acquired the rights and obligations of National Irish Bank
- April, 2010: The plaintiffs were permitted by the second named defendant to make reduced repayments for six to twelve months following the vacating of
- Letters which have not been disclosed to the Court for the purposes of this application were exchanged between solicitors for the plaintiffs and the second named defendant on 20th October, 2011 and 16th November, 2011.
- The second named plaintiff resumed providing crèche facilities and has done so there until the end of June, 2016.
- At some stage after the period for reduced payments, the plaintiffs recommenced the full repayments due to the second named defendant.

5. As of 24th February, 2014 the balance due by the plaintiffs on foot of the facility stood at €574,740.25.

6. By letter dated 24th February, 2014, the second named defendant wrote to the plaintiffs, the contents of which were not available to the court for the purposes of this application.

7. Under cover of letter dated 5th March, 2014 (undisclosed to the court) the plaintiffs were given a copy of the deed of appointment of the first named defendant as receiver which lead to the letter from the plaintiffs' solicitor on 10th March, 2014. That letter threatened the first named defendant with an application by way of injunction to restrain the first named defendant from exercising any right over Broomfield on account of the plaintiffs' contention that the first named defendant's appointment and alleged exercise of powers under that agreement were invalid.

8. By contract dated 27th May, 2014 the first named defendant as one of a number of vendor receivers agreed to sell a multitude of properties called "Tranche 2 Project Circle" to Finsbury Circle Limited ("**FCL**"). Included in those properties was "Broomfield". This contract effectively agreed to sell the properties "as is". Special condition 4.11, for example, provided that the vendor gave "no warranty as to possession of any property, whether or not the subject of a letting agreement and shall not be required to deliver a vacant possession on completion. General condition 21 stands deleted".

9. By novation agreement dated 15th July, 2014 FCL novated its interest in the said contract of 27th May, 2014 to the third named defendant.

10. On 8th September, 2014 the third named defendant was registered by the Property Registration Authority ("PRA") as owner of Broomfield following the completion of the sale of Broomfield by the first named defendant in July, 2014.

11. The plaintiffs learned of the sale of Broomfield on 30th October, 2014 on receipt of a letter from the second named defendant (undisclosed to the Court) which prompted a letter dated 30th October, 2014 from the plaintiffs' solicitors that referred to his letter of 16th October, 2014 (undisclosed to the Court) and his unanswered telephone messages to the solicitor for the second named defendant. He also mentioned that he found it "extremely difficult" to understand the sale and the application of the proceeds of the sale.

12. By letter of 6th November, 2014 the solicitors for the plaintiffs advised FCL of their intention to seek injunctive relief to protect their interests which was followed up with a reminder of 17th November, 2014 and 1st December, 2014.

These proceedings

13. Nothing appears to have been exchanged then until the plaintiffs issued the plenary summons herein on 25th May, 2015 followed by the delivery of a Statement of Claim on 22nd July, 2015 with the delivery of a Defence on 4th February, 2016. The notice of motion for this application was issued on 16th February, 2016 and the first named plaintiff swore a replying affidavit on 18th March, 2016. In the meantime, the plaintiffs continue to remain in possession of Broomfield. Neither the first named defendant nor the second named defendant were represented at the hearing of this application.

The defence of the third named defendant

14. The third named defendant pleads in its defence *inter alia* that no cause of action has been disclosed as against the third named defendant and that the third named defendant purchased Broomfield as a *bona fide* purchaser for value having no connection with the second named defendant bank.

15. On foot of those pleas the third named defendant applies for the pleadings of the plaintiffs to be struck out as disclosing no reasonable cause of action against the third named defendant while also relying on the "frivolous and vexatious" phrase in O. 19(28) of the Rules of the Superior Courts and the inherent jurisdiction of the court to dismiss a claim which is bound to fail.

Principles relevant to a strike out application

16. Cregan J. in *Irish Bank Resolution Corporation Limited v. Purcell and Ors.* [2014] IEHC 525 at para. 83 summarised the established principles as follows:-

- "1. The Court has jurisdiction pursuant to Order 19 Rule 28 and also pursuant to its inherent jurisdiction to strike out proceedings if they are bound to fail.
2. In considering an application to strike out proceedings pursuant to its inherent jurisdiction the Court is not limited to considering the pleadings of the parties but is free to consider evidence on affidavit relating to the issues in the case (per Costello J. in *Barry v. Buckley* [1981] IR 306).
3. This jurisdiction to strike out proceedings is one to be "exercised sparingly and only in clear cases". (See Costello J. in *Barry v. Buckley* [1981] IR 306).
4. Moreover as McCarthy J. stated in *Sun Fat Chan v. Osseous Ltd* [1992] 1 IR 425 "Generally the High Court should be slow to entertain an application of this kind".
5. In addition as was stated by Keane J. in *Lac Minerals v. Chevron Corporation* [1995] 1 I.L.R.M. 161 (High Court, 6th August, 1990) (and quoted with approval by the Supreme Court) in *Supermacs Ireland Ltd v. Katesan (Naas) Ltd* [2000] 4 I.R. 273 "a judge in considering an application to strike out or dismiss a claim must be confident that the plaintiff's claim cannot succeed no matter what might arise on discovery or at the trial of the action."
6. If the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed (see McCarthy J. in *Sun Fat Chan v. Osseous Ltd*).
7. The Court can only exercise a jurisdiction to strike out a claim on the basis that "on admitted facts it cannot succeed" (per McCarthy J. in *Sun Fat Chan v. Osseous Ltd*).
8. The Court in considering whether to strike out a claim "must treat the plaintiff's claim at its high water mark" (per Clarke J. in *McCourt v. Tiernan* [2005] IEHC 268).
9. The burden of proof lies on the defendant to establish that the plaintiff's claim is bound to fail. (See *Salthill Properties Ltd v. Royal Bank of Scotland* [2009] IEHC 207)
10. The Court should not require a plaintiff to be in a position to show a *prima facie* case, merely a stateable case, in an application to strike out. (See Clarke J. in *Salthill Properties Ltd v. Royal Bank of Scotland*.)"

Section 72

17. Section 72(1) of the Registration of Title Act 1964 provides as follows:-

"(1) Subject to subsection (2), all registered land shall be subject to such of the following burdens as for the time being affect the land, whether those burdens are or are not registered, namely—

...

(j) the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where, upon enquiry made of such person, the rights are not disclosed"

The claim of the plaintiffs

18. The plaintiffs allege that their right to redeem their mortgage was unlawfully breached by the second named defendant bank which in turn affected the validity of the first named defendant's appointment as receiver. In turn, it is claimed that the third named defendant acquired Broomfield and procured registration of the transfer with a right falling within the meaning of s. 72(1)(j) of the 1964 Act due to the alleged absence of any enquiry by or on behalf of the third named defendant about the rights of the plaintiffs arising from the alleged breach of the purported redemption rights.

19. Counsel for the third named defendant questioned whether the plaintiffs have or ever had any right in Broomfield other than their legal ownership of same which could fall within the ambit of s. 72 (1) of the 1964 Act . A burden falling within s. 72 (1) (j) may relate to a tenancy and it was submitted that the plaintiffs do not allege such a tenancy here. Reference was also made to the analogous situation in unregistered land as considered in *Northern Bank Limited v. Henry* [1981] I.R. 1 in which Henchy J. of the Supreme Court explained that the test when considering constructive notice is that of the reasonable purchaser as opposed to a prudent purchaser.

20. Therefore, the question arises as to whether the plaintiffs have a stateable case relating to their position that a reasonable purchaser would have discovered the effect of their claim arising from the alleged breach of their rights including the right of redemption. Has the third named defendant established that the Plaintiffs are bound to fail in grounding their applications in the Statement of Claim against the third named defendant for:-

(a) An order directing the registrar of title to rectify the register to reflect any declaration which the court may make concerning the validity of the appointment of the second named defendant and the sale of Broomfield to the third named defendant, or

(b) An order restraining the third named defendant from seeking to obtain possession of Broomfield which order might be qualified as the case against all of the defendants might be determined?

The Court has taken the liberty of altering slightly the prayers in the Statement of Claim as pleaded as it reflects the Court's understanding of exchanges with Counsel which occurred at the hearing of this application two days ago.

21. The Court is conscious of the effect of any order which it may make that would undermine the integrity and conclusiveness of the registration of title by the PRA and the reliance which purchasers of land from receivers may have on s. 108(5) of the 2009 Act which provides:-

"A person paying money to the receiver is not required to inquire whether the receiver is authorised to act."

22. That provision replaced a similarly worded and intentioned s. 24(4) of the Conveyancing Act 1881.

23. However and despite the delays of the plaintiffs to seek the equitable reliefs as mentioned by counsel for the third named defendant and the potential effect on the conclusiveness of the register in relation to folio 98213F register of freeholders County of Cork, the relevant facts of the plaintiffs' case which may emerge at a plenary trial might not have been established for the court at this stage. There is a possibility of some claim which may affect the rights of the third named defendant in relation to Broomfield. The court finds it difficult to conceive that the plaintiffs are entitled to some relief as against the third named defendant with which it had no privity but it cannot predetermine such an issue on this type of application. The effect of the Plaintiffs' proposition is that the third named defendant must suffer the consequences of having agreed to purchase Broomfield without vacant possession or without a statutory declaration as to the non-existence of s. 72 rights. That appears to be the highest point of the plaintiffs' claim and the Court on an application like this cannot make a determination on facts which may emerge and are not disclosed to date and without having all of the arguments heard based on those facts.

Decision

24. In view of the rather limited disclosure of communications to date between the parties, the requirement to take the plaintiffs' claim at its highest, the imperative to be slow to entertain an application of this kind and that I must be confident that any claim against the third named defendant will not succeed no matter what might arise at trial, I refuse the third named defendant's application.

25. Nevertheless, the Court having regard to the thrust and imminent commencement of the additions to Orders 36 and 63 of the Rules of the Superior Court with effect from 1st October, 2016, directs the plaintiffs to issue a motion seeking directions returnable to this Court on Thursday, 28th July, 2016 at 10:30am on notice to each of the parties in these proceedings with a suggested timeline leading to a plenary trial in these proceedings. Counsel who are present now are asked to consider and agree a timeline for consideration by the other parties during the course of next week in advance of the 28th July 2016.