

THE HIGH COURT

2019 No. 50 SP

BETWEEN

KEN FENNELL

PLAINTIFF

AND

DARREN COLLINS

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 26 July 2019.

INTRODUCTION

1. This judgment is delivered in respect of an application to vacate a *lis pendens* registered against certain lands in Co. Galway. The application is brought before the court by a person who has been appointed as receiver over those lands pursuant to a deed of mortgage and charge ("*the mortgage*"). The mortgage had been entered into between the registered owner of the lands and Ulster Bank Ltd.

2. The receiver has explained on affidavit that he wishes to exercise the power of sale under the mortgage, but that this has been frustrated by the existence of the *lis pendens*.

3. The *lis pendens* has been registered by a nephew of the owner of the lands. The nephew instituted proceedings in May 2017 which claim an interest over the mortgaged lands. The precise basis for this claim has not been set out in the pleadings but the nephew, who appeared as a litigant in person before the court, has since explained that the claim arises out of an alleged promise on the part of his uncle to provide him with an interest in the mortgaged lands in circumstances where the nephew is said to have worked the uncle's farm for a number of years. The nephew explained that the alleged promise was made approximately twelve years ago. The nephew would have been twenty years old at that time. Relevantly, the timing of the alleged promise *postdates* the creation of the mortgage by several years and thus the mortgage would have priority over any claim for a beneficial interest.

4. For the reasons set out herein, I am satisfied that the *lis pendens* should be vacated in circumstances where the nephew has been unable to provide any reasonable explanation as to why it is that proceedings instituted in May 2017 have not been progressed beyond the service of the plenary summons.

BACKGROUND

5. The plaintiff, Mr Ken Fennell, has explained in his affidavit dated 30 January 2019 that he has been appointed receiver over certain lands in Co. Galway. The deed of appointment is dated 9 October 2017, and has been exhibited as part of Mr Fennell's affidavit. The deed of appointment records that the appointment is made pursuant to a mortgage and charge dated 17 November 1998 made between Mr Sean Murphy and Ulster Bank Ltd. It seems that Promontoria (Oyster) DAC has since succeeded to Ulster Bank Ltd.'s interest in the mortgage. This change has been noted on the Land Registry folio.

6. There is a separate set of proceedings relating to the ownership of the mortgaged lands. Those proceedings were instituted in May 2017 by Mr Darren Collins, who is seemingly a nephew of the registered owner, Mr Sean Murphy. Those proceedings are entitled "*Darren Collins, Plaintiff, and Sean Murphy, Defendant*", and bear the High Court Record Number 2017 No. 3986 P. I will refer to those proceedings as "*the nephew's proceedings*" to distinguish them from the proceedings issued by the receiver ("*the receiver's proceedings*").

7. The precise nature of the claim made in the nephew's proceedings is unclear in circumstances where no statement of claim has yet been delivered.

8. The plenary summons seeks almost twenty individual reliefs. The first three of which read as follows.

"An Order that the Plaintiff is the beneficial owner of all the lands/property contained in Folio GY22173F (containing 19.13 hectares) all of County Galway.

A Declaration that the Plaintiff has put substantial amounts of money and time into the improvement and upkeep of all the lands/property contained in Folio GY22173F (containing 19.13 hectares) all of County Galway.

A Declaration that the Defendant has intentionally and deliberately encroached on the Plaintiff's property to his own advantage and enrichment."

9. The next relief seeks to "rescind" all mortgages on the folio.

"An Order of Rescission of any and all mortgage charges lodged by or on behalf of the Defendant on Folio GY22173F (containing 19.13 hectares) all of County Galway."

10. The balance of the reliefs sought are directed to restraining any dealings in the lands, including the sale of the lands. Relevantly, these reliefs are directed to third parties as well as to the defendant.

11. On the same date as the nephew's proceedings were issued, an application was made to the Central Office of the High Court requesting that particulars of a *lis pendens* be registered in accordance with Section 121 of the Land and Conveyancing Law Reform Act 2009. The nephew subsequently applied to the Property Registration Authority requesting that particulars of the *lis pendens* be registered on the folio. The *lis pendens* was duly registered on Folio 22173F of the Register County Galway on 16 February 2018.

12. Other than serving the plenary summons, no steps have been taken to progress the nephew's proceedings. No appearance has been entered by the defendant.

THE RECEIVER'S PROCEEDINGS

13. The within proceedings, i.e. the receiver's proceedings, were instituted by way of special summons. The principal relief sought is an order pursuant to Section 123 of the Land and Conveyancing Law Reform Act 2009 setting aside the *lis pendens*. The defendant to the receiver's proceedings is Mr Collins, i.e. the landowner's nephew who is the plaintiff in the proceedings claiming a beneficial interest in the mortgaged lands.

14. The procedure adopted by the receiver in this regard, whereby the receiver has instituted his own proceedings seeking orders setting aside the *lis pendens* (rather than issuing a motion in the nephew's proceedings) is consistent with the approach endorsed by the High Court (Humphreys J.) in *Harrington v. O'Brien* [2017] IEHC 506.

RESPONSE TO THE APPLICATION TO SET ASIDE THE *LIS PENDENS*

15. It is evident both from the terms of the special summons itself and from the verifying affidavit of Mr Fennell that the gravamen of the complaint made in the receiver's proceedings is that there has been an unreasonable delay in prosecuting the proceedings in respect of which the *lis pendens* has been registered, i.e. the nephew's proceedings. Notwithstanding that this is clearly the central issue in the within proceedings, Mr Collins has signally failed to address same in his affidavits. Instead the two affidavits which he has filed in the proceedings seek to advance an argument that he is immune from court orders.

16. The argument is predicated on the procedural history of an entirely unrelated set of proceedings entitled "*Eugene Cafferkey, Plaintiff, and the Director of Public Prosecutions, Defendant*" and bearing the High Court Record Number 2006 No. 1114 P. I will refer to those proceedings as "*the Cafferkey proceedings*".

17. The argument based on the *Cafferkey* proceedings appears to run as follows: (i) it is alleged that the Director of Public Prosecutions failed to comply with an order made in those proceedings directing the delivery of a defence; (ii) it is next alleged that the failure to punish the then Director for contempt of court indicates that he was being treated as immune from having to comply with court orders; and (iii) it is said to follow that, if the Director is immune, then all citizens are immune from having to comply with court orders on the basis of the guarantee of equality under Article 40.1 of the Constitution of Ireland.

18. The argument is summarised as follows in Mr Collins's affidavit sworn on 17 May 2019.

"I say that Supreme Court Case Law No. 334/2007, combined with Article 40.1 of the Constitution, implies that every citizen is immune to any Court Order. Under Article 40.1 of the Constitution, every Citizen is Guaranteed Equality with the DPP who ignored High Court Order No. 2006/1114P Exhibit 1."

19. This argument is simply preposterous. First, the allegation that the Director was treated as immune from court orders in the *Cafferkey* proceedings is not borne out by the orders exhibited by Mr Collins in his two affidavits. Rather, what emerges is that the proceedings taken by Mr Cafferkey in 2006 were dismissed on the grounds that they disclosed no reasonable cause of action. The order of the High Court (Lavan J.) of 13 November 2007 dismissing the proceedings was subsequently upheld by the Supreme Court by order dated 28 October 2011 (Supreme Court Appeal No. 334/07). In circumstances where the proceedings were dismissed, there could have been no obligation on the Director to deliver a defence in the proceedings.

20. Secondly, there is no suggestion that any complaint of an alleged contempt was ever made against the Director of Public Prosecutions in respect of the proceedings by Mr Cafferkey, still less that the Director was found to have been in contempt of court.

21. Thirdly, and perhaps more importantly, even if it had been demonstrated that the Director had breached a *procedural* order in a single case some twelve years ago—and I repeat that this has not been demonstrated—this could not conceivably give rise to the collapse of the entire court system as contended for by Mr Collins, whereby all individuals would thereafter be immune from ever complying with court orders. The argument is based on a hopeless misconception of the meaning and effect of the guarantee of equality under Article 40.1 of the Constitution of Ireland. There is no comparison between Mr Collins' position and the position of then Director of Public Prosecutions in the *Cafferkey* proceedings. Mr Collins has expressly invoked the jurisdiction of the High Court in his own proceedings, and seeks orders restraining his uncle and all third parties with notice of those orders from dealing with the mortgaged lands. Yet when called upon to account for his failure to progress his own proceedings, Mr Collins—without any sense of irony—baldly asserts that all citizens are immune from court orders. Mr Collins thus seeks to approbate and reprobate the High Court's jurisdiction. This inconsistency of approach highlights the outlandish nature of the argument put forward by Mr Collins. The true legal position is, of course, that just as Mr Collins is entitled to invoke the High Court's jurisdiction against other individuals, so too is Mr Collins amenable to the court's jurisdiction himself.

22. Finally, for the sake of completeness, it should be recorded that there is no question of the Director of Public Prosecutions being treated as immune from court orders. By way of example only, a survey of the Judicial Review List indicates that the Director is often named as a respondent to proceedings, and orders are regularly made against the Director in judicial review proceedings and are complied with.

23. For these reasons, there is simply no basis for Mr Collins's argument predicated upon the *Cafferkey* proceedings.

24. It should be noted that precisely the same preposterous argument as relied upon by Mr Collins in these proceedings had been advanced to me in entirely unrelated proceedings earlier this month. See *Bank of Ireland v. McCarthy* [2019] IEHC 497. It appears that unscrupulous individuals are encouraging litigants, who do not have the benefit of professional legal advice, to advance this argument, and supplying them with copies of documents from the *Cafferkey* proceedings.

25. This has the consequence that those litigants are diverted from advancing arguments which might actually assist in their defence of proceedings. In the present case, for example, Mr Collins confined his affidavits to this nonsensical argument rather than offering any explanation for the delay in the prosecution of his own proceedings. It is a cause of real concern for the court that lay litigants are being preyed upon by unscrupulous individuals in this manner. Any individual who advises a lay litigant to pursue what are preposterous arguments does them a considerable disservice.

26. Mr Collins was invited, at the hearing before me on 22 July 2019, to make submissions as to why there has been delay in prosecuting his proceedings. Mr Collins declined to do so, other than to make some reference to his brother having emigrated to Australia.

27. Mr Collins was also asked whether he was standing over the averments in his affidavit to the effect that he was immune from court orders. With some prompting from his *McKenzie* friend, Mr Collins confirmed that he was maintaining the position as stated in his affidavits.

DECISION

28. Section 123 of the Land and Conveyancing Reform Act 2009 provides as follows.

“123.— Subject to section 124 , a court may make an order to vacate a *lis pendens* on application by—

(a) the person on whose application it was registered, or

(b) any person affected by it, on notice to the person on whose application it was registered—

(i) where the action to which it relates has been discontinued or determined, or

(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted *bona fide*.”

29. The Court of Appeal addressed the jurisdiction under the section as follows in its judgment in *Carthy v. Harrington* [2018] IECA 321 [28] to [31] as follows.

“The court is entitled to make an order to vacate a *lis pendens* at the behest of a ‘person affected’ by, it inter alia, ‘(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action.’

The considerations as to what constitutes ‘unreasonable delay’ in this statutory context are, accordingly, quite distinct from the principles and the complex jurisprudence which has developed in regard to litigation delay where a party to litigation can seek to stay or dismiss proceedings on grounds of delay and for want of prosecution.

It must be emphasised that the vacating of a *lis pendens* pursuant to s. 123 of the 2009 Act does not affect the pleadings in this suit and they continue in being as between the parties thereto. It will be recalled that the pleadings in question in this appeal, bearing record number 2014 5978P, were instituted by the appellant Mr. Carthy on 9th July 2014. No appearance has been entered by or on behalf of the defendants or any of them. No step of any kind has yet been taken to progress the claim before the courts.

It behoves a litigant who asserts a beneficial interest in or over encumbered property and who institutes proceedings in relation to same to prosecute such a claim with reasonable expedition, particularly in circumstances where the registered legal owners of the property are substantially indebted and where the rights and interests of third parties including a chargeholder who has validly appointed a receiver stand to be adversely impacted by delays in litigation.”

30. Despite having been afforded an opportunity to do so by way of affidavit and/or by way of submission to the court, Mr Collins has failed to offer any reasonable explanation for his delay in prosecuting his proceedings. The most that has been offered to the court is a vague reference to his brother who, seemingly, had assisted in the drafting of the plenary summons in May 2017, having since emigrated to Australia.

31. I am satisfied that the delay in prosecuting the proceedings is “unreasonable” for the purposes of Section 123 (above).

32. Moreover, it can be inferred from (i) the unexplained delay in prosecuting the proceedings; (ii) the family relationship between the plaintiff and defendant; (iii) the manner in which the plenary summons has been drafted, with its disproportionate emphasis on restraining the sale of the lands; and (iv) the fact that the alleged promise of an interest in the lands *postdates* the creation of the mortgage, that the proceedings are not being prosecuted *bona fide*. Rather, the intent of the proceedings appears to be to frustrate the enforcement of the mortgage.

33. For both of these reasons, then, I propose to make an order vacating the *lis pendens*.