

THE HIGH COURT

[2022] IEHC 479

[2021 3716 P]

BETWEEN

ATLANTIS DEVELOPMENTS LIMITED (IN RECEIVERSHIP)

LAZARUS INVESTMENTS LIMITED

PLAINTIFFS

AND

PAUL COHEN AND JILLIAN COHEN

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 28th day of July, 2022

1. This is the application of the defendants for a number of reliefs, as set out in the notice of motion as follows:

1. An order pursuant to O. 19 r. 28 of the Rules of the Superior Courts dismissing the plaintiff's claim herein on the ground that it discloses no reasonable cause of action and is frivolous and vexatious.
2. In the alternative an order pursuant to the inherent jurisdiction of this honourable court striking out the plaintiff's claim herein on the ground that it constitutes an abuse of process, is frivolous and vexatious and/or is bound to fail.

3. An order pursuant to s. 123 (a) (ii) of the Land and Conveyancing Law Reform Act, 2009 as amended vacating the lis pendens registered by the plaintiffs herein on Folio 40482F and Folio 61401F of the Register of County Clare.

2. A further relief is sought to the effect that the cost of these proceedings should be paid personally by a John Flanagan of Balleyvara House, Doolin, County Clare in the event that proceedings are struck out. I will deal with that relief at the conclusion of this judgement.

3. The claim made by the plaintiffs (who were unrepresented at the hearing of this motion) is set out in the Statement of Claim originally dated the 16th June, 2021. I will come to the nature of the claim in a moment. Before I do so, I should record the fact that, while there was no appearance by or on behalf of the plaintiffs at the hearing of the motion issued by the defendants, there were two (virtually identical) affidavits of John Declan Flanagan delivered on behalf of the plaintiff in April and May of 2022. To be precise, the first affidavit is dated the 7th April, 2022 and the second affidavit (which is a revision of the first) is sworn on the 31st May, 2022. I have considered the contents of both affidavits carefully for the purpose of deciding the motion.

4. To return to the claim made by the plaintiffs in these proceedings, it seeks (in its amended form) the following reliefs:

A. A declaration that the defendants and each of them are not entitled to be registered as owners of the property.

B. A declaration that the purported transfer of the Properties ... from Promontoria (Arrow) Ltd to the Defendant is void.

C. A declaration that the first and second named plaintiffs are between them entitled to the full legal and beneficial interest in the Properties ...

D. A mandatory injunction commanding the Defendants to restore the Property to the condition they were in prior to their trespass thereon.”

5. The original Statement of Claim (dated the 16th June, 2021) was amended by a pleading delivered on the 24th June, 2021. The amended reliefs are those sought at B and C of the claims.

6. Put simply, the plaintiff’s claim is that the first plaintiff acquired an interest in the properties by a contract dated the 29th October, 2005, that the interests of the first plaintiff in the 2005 contract was transferred by it to the second plaintiff by an agreement of the 8th June, 2012, and that notwithstanding these transactions there is an ongoing dispute between the first defendant and the vendors of the properties. In proceedings arising from this latter dispute, the first plaintiff seeks rescission of the 2005 contract, together with damages. This separate dispute is not of central relevance to the issue of the factors decided in this motion.

7. The plaintiffs further plead that the first plaintiff “purportedly mortgaged its interests in the Properties ...” to Anglo Irish Bank Corporation Plc by mortgage dated the 5th November, 2007 and by mortgage dated the 9th January, 2009. Critically, at para. 11 of the amended Statement of Claim, the plaintiffs plead:

“11. However, the Purported Mortgages are invalid in circumstances where the deeds do not contain the true signatures of the directors of Bespoke Developments Ltd and the first named plaintiff and did not constitute valid mortgage deeds”.

8. In fact, it is pleaded (at para. 1 of the amended Statement of Claim) that Bespoke Developments Ltd is itself the first plaintiff. The change of name having occurred on the 20th November, 2007.

9. In his affidavits, to which I have referred, Mr. Flanagan avers that the “issue with the signatures ...” on the two deeds of mortgage “is not the only issue with the deeds that render them invalid.” Notwithstanding this Delphic averment, nowhere does Mr. Flanagan elaborate on any other reason why the relevant mortgages (or either of them) are without legal effect.

10. The amended statement of claim goes on to plead that Mr. Ken Fennell of Deloitte was “purportedly” appointed Receiver in respect of the first plaintiff on foot of the 2007-2009 mortgages on the 11th December, 2015. It is further pleaded on the 4th February, 2016 Promontoria (Arrow) Ltd became the registered owner of the 2007 and 2009 mortgages. The plaintiffs further plead that the Cohens (the defendants to these proceedings) were at all relevant times expressly put on notice of the invalidity of the “purported mortgages”, the litigation in which rescission and damages were sought from the vendors of the properties to the first plaintiff in 2005, and the alleged invalidity of the appointment of Mr. Fennell as receiver on foot of the “purported mortgages”.

11. Finally, it is pleaded on behalf of the plaintiffs that in February 2021 the Cohens took a “purported conveyance and/or transfer” of the properties from Promontoria (Arrow) Ltd, and the Cohens have since “wrongfully” entered into occupation of the properties and have allegedly slandered the title of the first plaintiff to the properties.

12. The grounding affidavit for the motion before me (of Peter Morrissey, solicitor for the Cohens) helpfully sets out what transpires to be an uncontroversial account of the factual background, and of the dealings with the Property Registration Authority. The factual background is as follows:

- i. *The Properties were originally purchased by the first named Plaintiff (under its former name Bespoke Developments Limited) pursuant to a Contract for Sale dated the 29th October 2005 (hereinafter “the 2005 Contract”).*
- ii. *The 2005 Contract was completed on the 22nd December 2005 when the Properties were transferred to the first name Plaintiff.*
- iii. *The first named Plaintiff mortgaged its interest in the Properties to Anglo Irish Bank Corporation Plc (“Anglo Irish Bank”) as security for certain loans advanced to it pursuant to the following deeds:*
 - a. *Mortgage dated 5th November 2007, between Bespoke Developments Limited of the one part and Anglo Irish Bank Corporation Plc of the other part;*
 - b. *Mortgage dated 9th January 2009, between Atlantis Developments Limited of one part and Anglo Irish Bank Corporation Plc of the other part**The above mortgage deeds are hereinafter referred to respectively as the “2007 Mortgage Deed” and the “2009 Mortgage Deed”.*
- iv. *On the 2nd February, 2009 the 2009 Mortgage Deed was registered in the Registry of Deeds.*
- v. *On the 17th February, 2009 the first named Plaintiff under its former name of Bespoke Developments Limited was registered as full owner of that part of the Properties contained in Folio 40482F*
- vi. *On the 17th February Anglo Irish Bank was registered in Folio 40482F as the owner of two charges for present and future advances repayable with interest*
- vii. *The 2009 Mortgage Deed was registered in the Registry of Deeds on the 2nd February, 2009.*

- viii. *On the 11th December 2015 the charges were transferred to Promontoria (Arrow) Limited (“Promontoria”), and in addition the right, title, benefit and obligations under the 2009 deed were assured to Promontoria.*
- ix. *On 11th December 2015, Ken Fennell of Deloitte, Earlsfort Terrace Dublin 2 was appointed by Promontoria as Receiver in respect of the first named Plaintiff on foot of the Mortgages.*
- x. *On the 4th February, 2016 Promontoria was registered in Folio 40482F as owners of the charges registered on foot of the said Mortgages.*
- xi. *On the 15th November, 2018 the Defendants entered into a Contract with the receiver to purchase the Properties.*
- xii. *The purchase of the Properties was completed on the 17th February, 2021 when the Properties were transferred and assured by Promontoria to the Defendants.*

13. The dealings of the Property Registration Authority are set out at para. 10 to para. 16 inclusive of the affidavit of Mr. Morrissey. This section of the affidavit reads as follows:

- 10. On the 18th February 2021 an application was made to the Property Registration Authority (“PRA”) for the registration of the Defendants as owners of the lands contained in Folio CE40482F under dealing number D2021LR024327M*
- 11. On the 4th March 2021 an application was made to the PRA for the registration of the Defendants as owners of the unregistered part of the Properties under dealing number D2021LR032124W.*
- 12. By letter of the 16th March, 2021 Messrs Hallissey Solicitors of Bandon, Co. Cork acting on behalf of John Flanagan who is a director of the first named Plaintiff*

company lodged an objection to the Defendants' application in respect of Folio CE40482 and advised the PRA that their client was in the process of initiating legal proceedings in that regard. I beg to refer to the said dated the 16th March, 2021, which is places at Tab 3 of Booklet II.

13. The within proceedings were duly instituted on behalf of the Plaintiff. As appears from the amended Statement of Claim (Tab 4 – Booklet I) the following reliefs are sought:

- a. A Declaration that the Defendants and each of them are not entitled to be registered as owners of the Properties*
- b. A Declaration that the purported transfer of the Properties in or about February 2021 from Promontoria to the Defendants is void;*
- c. A Declaration that the first and second named Plaintiffs are between them entitled to the full legal and beneficial interest in the Properties.*
- d. An injunction restraining the Defendants from entering onto any part of the Properties.*
- e. Damages for trespass.*

14. The Plaintiffs' principal objection to the PRA proceeding with the Defendants' applications was that their title was in dispute in the proceedings herein and that the application should await the outcome of the same.

15. Notwithstanding the objections raised, on the 30th of July 2021 the Defendants were registered as owners of the unregistered lands in Folio CE61401F and on the 13th August, 2021 they were registered as owners of the lands in Folio CE40482F. In this regard I beg to refer to the said print outs of the said Folios which are placed at Tabs 1 and of Booklet II respectively.

16. By letter of the 9th August, 2021 the PRA advised the Plaintiffs' solicitors that it would be bound by any Order of the Court in this matter pursuant to Section 21 of the Registration of Title Act, 1964 ("the 1964 Act"). I beg to refer to a copy of the said letter dated the 9th August 2021 which is placed at Tab 4 of Booklet II.

14. The decision of the Property Registration Authority was appealed pursuant to s. 19 (1) of the 1964 Act to the Circuit Court, South Western Circuit, County Clare. The appeal were taken by the two companies which are plaintiffs in these proceedings.

15. The notice of motion (which was the vehicle by which the appeal was prosecuted) sought the following material orders:

"1. An Order that the registration of the Respondents as the owners of the property comprised in Folio CE61401F of the Register, County Clare, completed by the Property Registration Authority on 30th July, 2021 be vacated

2. A Declaration that the action of the Property Registration Authority are an infringement on (sic) the private property rights enshrined into Article 43.1 and 43.1.2 of the Constitution ..."

16. An extension of time for bringing the appeal was also sought.

17. A similar originating notice of motion was issued in respect of the property contained in Folio CE40482F of the Register, County Clare, though that motion also sought an order removing the Cohens as the owners named on the Folio and the reinstatement of the first plaintiff (the first appellant in the Circuit Court proceedings) as the owner of the property comprised in that folio.

18. The nature of the application, and the outcome before the Circuit Court, is pithily set out by Mr. Morrissey at paras. 20 and 21 of his affidavit grounding the application before me:

20. As appears from the Notices of Motion and from what is deposed to by Mr.

Flanagan in his affidavits, the appeals have not been made on the ground that the PRA were in error in proceeding to register the defendants as owners of the properties while their title thereto was in dispute in extant Hight Court proceedings rather the appeals were grounded on the substantive matters the subject of those proceedings upon which the PRA did not adjudicate.

21. On the 1st February, 2022 the said Motions came on hearing before the

Circuit Court sitting in Ennis, Co. Clare when an application was made on behalf of the Plaintiffs for a stay on the appeals pending the outcome of the action herein. On behalf of the defendants an application was made that the appeals be dismissed as constituting an abuse of process. By Orders made on that date the Court refused to stay the appeals and dismissed the proceedings. I beg to refer to the said orders dated the 1st of February 2022 when produced which for the convenience I have placed behind Tab 5 of Booklet II.

19. The proceedings before the Property Registration Authority, and on appeal the proceedings before the Circuit Court, have led to the current situation. This is that the Cohens are the registered owners of the properties the subject matter of the proceedings before me. It is submitted to me, and I accept, that several of the reliefs now sought by the plaintiffs can only be achievable in the event that the plaintiff has satisfied the requirements of s. 31 of the Registration of Title Act, 1964. The relevant portions of that Act read as follows:

“31.—(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just.”

20. In these proceedings, there is no assertion of fraud or mistake in respect of the registration of the properties. It is well established that fraud must be clearly pleaded. There is no such plea here. While I have set out the plea at para. 11 of the amended statement of claim, even the plaintiffs do not draw (from the pleaded assertion of invalidity) the conclusion that there has been an action of fraud perpetrated against them or against anyone else. It is in consequence further submitted, and I accept, that where the relevant properties are ones in respect of which the Cohens are registered in the Property Registration Authority as owners, and where the plaintiffs have not even attempted to make out a case of entitlement to correct the register by reference to the requirements of s. 31 (1) of the 1964 Act, then the claim for a declaration at (A) of the amended statement of claim simply cannot succeed. In any event, the declaration at (A) is one sought prior to the registration of the Cohens as owners of the properties and is now completely overtaken by events subsequent to the issuing of these properties.

21. With regard to the relief sought at (B) of the amended statement of claim, inasmuch as the plaintiffs seek to challenge the validity of a transaction of which they are not a party (and to which they have not joined a relevant party in the shape of Promontoria (Arrow) Ltd

and/or Mr. Fennell) then the proceedings cannot succeed in respect of this relief. In addition, the declaration is sought without any factual or legal basis to ground it being described in the statement of claim in either of its forms.

22. With regard to the relief sought at (C) this is also a relief sought without joining relevant parties to the action. The relevant parties would include some or all of the following:

- (a) The successors in title to Anglo Irish Bank, namely IBRC (in special liquidation);
- (b) The acquirer of the debt, namely Promontoria (Arrow) Ltd;
- (c) The receiver who, according to the pleadings of the plaintiffs themselves, has purported to sell on the properties to the Cohens.

23. In addition, as with the relief sought at (B), this relief is one in respect of which no factual or legal basis is advanced.

24. Finally, with regard to the relief sought at (D), such an order simply would not be made given the conclusions I have reached about the other orders sought by the plaintiffs in this action. The court will not make a mandatory order directing persons conclusively registered as the owners of properties to restore those properties to the condition they were in when the new owners acquired them.

25. It would seem that a number of the flaws in the current action arise in the non-joinder of relevant parties. It is possible that these flaws could (to some extent) be addressed by an amendment to the pleadings. However, it is not for the court (or for the defendants) to propose new pleadings might be amended when it is not suggested on behalf of the plaintiffs that such an amendment will be made. There may be many reasons why the plaintiffs would not wish to amend the pleadings by joining, for example, IBRC (in special liquidation),

Promontoria (Arrow) Ltd or Ken Fennell. At its simplest, it may be that the plaintiffs might not want to incur the further cost, expense or difficulty in making a claim against these entities. It could be that the plaintiffs may not wish to run the risk that an order for costs may ultimately be made in favour of these entities should they be joined, and the claims against them fail. This possibility is particularly relevant in circumstances where (as the action currently stands) the existing defendants are looking for orders for costs personally against Mr. Flanagan. Had the plaintiffs suggested to me that they did want to amend the proceedings in order to make claims against these other entities I would have considered such an effort to amend the proceedings in order to save them. However, no such application was made and, as I have observed, it is not the job of the court to carry out reconstructive surgery on proceedings in order to make them viable.

26. However, apart altogether from the non-joinder of appropriate parties this action is fatally flawed in that it seeks to challenge the conclusiveness of the rights of the Cohens as the registered owners of the relevant properties without meeting the statutory requirement for amendment or rectification of the register as set out in s. 31 (1) of the 1964 Act, or to mount claims which are without any legal or factual substratum. The pleading case cannot therefore succeed.

27. It should be recalled that the amended Statement of Claim was delivered after the Cohens applied for registration as owners of the relevant properties. It was also delivered after solicitors acting on behalf of Mr. Flanagan (as director of the plaintiff companies) had lodged an objection to Cohen's application in respect of Folio CE404A2. These proceedings were therefore launched at a time when the application by the Cohens to register themselves as owners of the relevant properties were well underway. In addition, the affidavit of Mr.

Morrissey grounding the current application was sworn on the 3rd March, 2022. At that point in time, the Cohens had been registered as owners of the properties with the PRA, and the appeals against these decisions of the PRA had been dismissed. It is also the case that Mr. Morrissey set out in some detail the legal basis for the current motion, including specific reference to the provisions of s. 31 (1) of the 1964 Act and the significance of a claim based on fault or mistake against the relevant parties. Notwithstanding all of this, at no time is an application made to vary the current claim in order to bring it within the provisions of s. 31 (1) or otherwise to vary it in any way.

28. I therefore find that the plaintiff's claims in these proceedings are bound to fail. I make an order under O.19 r.28 striking out the proceedings. I would also, if required, make an order pursuant to the inherent jurisdiction of the court striking out the proceedings as they cannot succeed and therefore constitute an abuse of process. In doing so I take at its height the claim made by the plaintiffs in their amended Statement of Claim. I have also, as is described earlier in this judgment, considered the possibility that an amendment to the statement of claim could be made such as would save the proceedings but I do not think that any such amendment is available to the plaintiffs. In any event the plaintiff has not sought to make any such change to the pleaded case.

29. I will list the matter for mention at 10a.m. on the 4th day of October 2022 to deal with the costs issue.