

THE HIGH COURT

[2020/3698 P]

BETWEEN

AIB MORTGAGE BANK AND ALLIED IRISH BANKS PLC

PLAINTIFFS

AND

GERARD BURKE, TERESA BURKE AND CAROLINE BURKE

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on 10th March, 2023

Introduction

1. This is an application by the Defendants for an order:
 - (1) dismissing the Plaintiffs' claim for want of prosecution on the grounds of inordinate and undue delay and/or pursuant to Order 122 Rule 11 of the Rules of the Superior Courts; and/or
 - (2) an order striking out the pleadings of fraud and/or conspiracy on the grounds that they do not disclose a reasonable cause of action and are frivolous and vexatious and/or on the grounds that they are unnecessary and are included to prejudice and embarrass the fair trial of the action.
2. Both applications are without merit.

Background

3. The application is grounded on the affidavit of Mr. Gerard Burke, the first named Defendant, sworn on 7th July, 2022.

4. However a fuller description of the background is set out in the affidavit of Mr. David Coleman sworn on behalf of the Plaintiffs in this matter.

5. The first and second Defendants borrowed significant sums from the Plaintiffs over a period of years. The said Defendants defaulted on their loans. The Plaintiffs appointed a receiver in 2014 and the receiver took control of a portfolio of properties owned by the first and second named Defendants.

6. On 20th July, 2015, the Plaintiffs obtained judgment – on consent – against the first and second Defendants in the amount of €9.5 million against the first Defendant, and €8.9 million against the second Defendant. The said judgments remained unsatisfied.

7. Some three years later - in or about November, 2018 - the Plaintiffs first became aware that the first Defendant had transferred certain lands to the third named Defendant, his daughter. This transaction apparently occurred on 22nd May, 2018.

8. Subsequently, the Plaintiffs discovered a second conveyance which was made on or about 11th April, 2019 in which the first and second Defendants transferred other property to their daughter.

9. On or about 9th March, 2020 the Plaintiffs became aware of a third property transferred by the first Defendant to his daughter, the third Defendant.

10. The Plaintiffs then issued these proceedings against the Defendants claiming that all three property transfers were done at an undervalue and were made with the intention of defrauding the Plaintiffs as creditors of the first and second named Defendants at a time when they were significantly indebted to the Plaintiffs. The Plaintiffs seek orders in these proceedings to set aside the transfers set out above.

The chronology of pleadings in this case

11. On 8th May, 2020 the Plaintiffs' solicitors wrote to each of the Defendants setting out the Plaintiffs' claim and calling on the Defendants to set aside the three conveyances of land.

12. On 22nd May, 2020 the Plaintiffs' solicitors issued the plenary summons and served this plenary summons on all three Defendants on 4th June, 2020. The Defendants failed to enter an appearance. The Plaintiff served a statement of claim on the Defendants on 1st July, 2020. On 10th August, 2020, as the Defendants had not entered an appearance, the Plaintiffs brought a motion for judgment in default of appearance.

13. The second named Defendant unfortunately passed away on 20th November, 2020.

14. The motion for judgment in default of appearance came before the High Court on 14th December, 2020 (Twomey J.). The first and third Defendants sought an adjournment but also enclosed appearances dated 13th December, 2020.

15. The first and third Defendants then delivered their defences in or about 26th January, 2021.

16. On 29th November, 2021 the Plaintiff sought voluntary discovery from the first and third Defendants. The Defendants did not reply to this letter. A reminder was sent to the first and third Defendants on 26th January, 2022. There was no reply to this letter either. On 7th February, 2022 further reminder letters were sent from the Plaintiffs to the first named Defendant. There was no reply to this third letter either. On 8th April, 2022 the Plaintiffs' solicitors again sent voluntary discovery letters to the Defendants. These letters were drafted in somewhat broader terms than the earlier request for discovery. Again, the Defendants did not reply to this letter.

17. On 7th July, 2022 the Defendants appointed Lawlor Kiernan LLP as their solicitors. However rather than attend to the request for voluntary discovery the first and third Defendants saw fit to issue this motion on 11th July, 2022. This motion first came before the Court on 22nd July, 2022.

The Defendants' application to dismiss the Plaintiffs' claim on grounds of delay

18. Counsel for the Defendants submitted that they made no complaint about the manner in which the Plaintiffs prosecuted the within proceedings since the issue of the plenary summons. It is clear from the above that they could not do so. Indeed any delay in these proceedings has been caused by them. Instead, the period of delay about which they complained was the period of time between the date on which the Plaintiffs obtained judgment against the first and second Defendant (i.e. July 2015) and the time at which the Plaintiffs instituted these proceedings by way of plenary summons on 22nd May, 2020 (i.e. a period of almost five years.)

19. The first ground of the Defendant's application is Order 122 Rule 11. This rule provides that:

“In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the Defendant may apply to the Court to dismiss the same for want of prosecution, ...”

20. However Order 122 Rule 11 has no application to the facts of this case.

21. This motion was issued on 11th July, 2022. However in the previous two years the statement of claim had been filed on 10th August, 2020; the Defendants entered their appearances on 13th December, 2020; a motion for judgment in default of appearance and defence issued on 10th August, 2020 and the Defendants delivered their defences on 26th January 2021.

22. It is clear from the chronology of events set out above that this requirement has not been met and therefore any application under Order 122 Rule 11 is bound to fail.

23. The second basis upon which the Defendants seek to dismiss the Plaintiffs' claim is on the grounds of inordinate and inexcusable delay. Again, it is difficult to see on what basis this argument could be maintained.

- 24.** As set out above, the Plaintiffs obtained judgment on consent against the first and second Defendants in July 2015.
- 25.** The Defendants complain that the Plaintiffs did not institute these proceedings at any time between July 2015 and May 2020 even though it had its judgment.
- 26.** However it is clear from the chronology of events that the first of the three impugned transactions was dated 22nd May, 2018. This cause of action therefore only accrued in May 2018. The Plaintiffs only became aware of that transaction in November 2018. Therefore the earliest date in which they could have instituted these proceedings was November 2018. The earliest date in which they could have instituted proceedings in respect of the second transaction was April 2019 and the earliest date on which they could have instituted proceedings in respect of the third transaction was March 2020.
- 27.** The plenary summons was issued on the 22nd May, 2020 i.e. within a period of approximately eighteen months of the Plaintiffs first becoming aware of the first impugned transaction, within a period of thirteen months of the second transaction and within a period of two months of the third transaction. Thereafter the statement of claim was delivered six weeks later on 1st July, 2020.
- 28.** The Plaintiffs have issued the plenary summons in respect of the three impugned transactions in a timely manner – indeed in a rapid response to the Defendants’ impugned actions and well within the six year period permitted to them to institute such proceedings.
- 29.** It is clear from the above chronology of events that no argument whatsoever could be made that the Plaintiffs have been guilty of inordinate or inexcusable delay in the manner in which they have prosecuted the proceedings.
- 30.** These proceedings simply could not be brought until the matter giving rise to the proceedings had occurred i.e. the impugned transactions in 2018, 2019 and 2020.

31. The error at the heart of this application is the assumption that the cause or matter which is the basis of the within proceedings is the same cause or matter as the proceedings in which the Plaintiffs obtained judgment on consent against the first and/or second Defendants. It is not. It is an entirely separate and distinct cause of action arising out of what the Plaintiffs allege are three fraudulent transactions in May 2018, April 2019 and March 2020.

32. One of the other misconceptions of the Defendants is that these proceedings are taken to execute upon the judgment. They are not – at least not directly. They are proceedings taken in fraud against all Defendants in respect of three impugned conveyances from the first and second Defendant to their daughter. It is alleged that these transfers were made for no consideration or for inadequate consideration.

33. Moreover counsel for the Plaintiffs submitted that under the statute of limitations they have a period of twelve years within which to execute upon such a judgment. Under Order 42 Rule 23, execution may issue at any time within six years from the recovery of the judgment or the date of the order. After six years, the party may apply to court for leave to issue execution.

34. The grounds upon which a party may seek to strike out on the grounds of delay pursuant to the inherent jurisdiction of the Court, was recently considered by the Court of Appeal in *Cave Projects Ltd v Kelly* [2022] IECA 245. Both parties sought to rely on this case in their submissions before the Court.

35. I have considered the principles set out in that case. It is clear from the analysis by Collins J that, as he states:

“The onus is on the Defendant to establish all three limbs of the Primor test i.e. that there has been inordinate delay in the prosecution of the claim, that such delay is inexcusable and that the balance of justice weighs in favour of dismissing the claim.”

36. On the facts of this case I am quite satisfied that there has been no delay – let alone an inordinate or inexcusable delay – in the prosecution of the claim.

37. In my view, therefore the application to strike out the proceedings for inordinate and inexcusable delay is misconceived.

The second application – the application to strike out the pleadings of fraud

38. The second application which the Defendants make is an order pursuant to Order 19 Rule 27 to strike out the pleadings of fraud and conspiracy “which are unnecessary and scandalous and which are included to prejudice and embarrass the fair trial of the action” and/or an order pursuant to Order 19 Rule 28 of the Rules of the Superior Courts to strike out the claims of conspiracy and fraud as they do not disclose a reasonable cause of action and are frivolous or vexatious.

39. In order to consider this motion it is necessary to consider the reasons why fraud is pleaded in these proceedings.

40. As set out above, the Plaintiffs obtained a judgment on consent against the Defendants in the sum of €9.5 million against the first Defendant and €8.99 million against the second Defendants. It is clear that neither Defendant made any attempt to satisfy these judgments and, according to the affidavit of Mr. Coleman, the amounts outstanding as at the delivery of the statement of claim were €10.87 million from the first Defendant and €10.15 million from the second Defendant.

41. It is clear that the first and second Defendants have completely failed to pay the debt (or any amount of the debt) and the debt has simply increased with interest added over a period of years.

42. Despite the fact that the Defendants have failed to pay the debt, the Plaintiffs have discovered what they say are three conveyances of land made by the first and/or second Defendant to the third Defendant – who is their daughter – for an undervalue.

43. At paragraph 15 of the statement of claim, the Plaintiffs plead that the first Defendant transferred his interest in the first disputed transaction to the third Defendant. At paragraph 16, the Plaintiffs plead that the first and second Defendants transferred their interest in the second property to their daughter. At paragraph 17, the Plaintiffs plead that the first Defendant transferred his interest in the third property to his daughter.

44. At paragraph 20 the Plaintiffs plead:

“The first, second and third transfers set out above (to include if necessary all lands set out in the first to fifth schedules hereto) were transferred with the intention of defrauding creditors of the first and second named Defendants to include the first and second named Plaintiffs”.

45. At paragraph 21 it is pleaded that:

“At the time of the said transfers the first and second Defendants were indebted to their first and second named Plaintiffs and did not have any other sufficient means of satisfying this debt (and have not satisfied this debt).”

46. At paragraph 22, it is pleaded that:

“The said transfer or transfers by the first and second named Defendants of the lands set out in the first to fifth schedules hereto were executed without good consideration and for the purpose of delaying, hindering, defrauding and defeating the claim, rights and entitlements of the Plaintiffs as creditors of the first and second named Defendants”.

47. At paragraph 23 it is pleaded that the *“necessary or probable result of the transfer or transfers was the delay, hindering, defrauding and defeating the claim, rights and entitlements of the Plaintiffs as creditors of the first and second named Defendants”.*

48. At paragraph 25 the Plaintiff pleads that the transfers are void or voidable whether pursuant to the provisions of s. 74 (3) of the Land and Conveyancing Reform Act, 2009 or otherwise.

49. At paragraph 26, the Plaintiffs plead that the Defendants intended by their aforesaid actions to cause loss to the Plaintiffs and the particulars of intention are set out therein.

50. At paragraph 27, the Plaintiffs plead that the Defendants conspired and combined together to delay, hinder, defraud and defeat the claim, rights and entitlements of the Plaintiffs as creditors of the first and second named Defendants and set out further particulars of that conspiracy and combination in that paragraph.

51. At paragraph 28, the Plaintiffs plead that the Defendants did certain overt acts in pursuance of the said conspiracy and plead that the first Defendant and/or the first and second Defendants voluntarily transferred the land to the third Defendant set out in the first to fifth schedule thereto.

52. In the prayer the Plaintiffs seek various reliefs including:

1. *A declaration that the transfers were made with the intention of defrauding creditors of the first and second Defendant including the Plaintiffs.*
2. *An order pursuant to s. 74 (3) of the Land and Conveyancing Reform Act setting aside, voiding and/or annulling the said transfers various ancillary declarations injunctions and/or damages.*

53. Having considered the pleadings set out in the statement of claim I am of the view that the pleadings set out therein are clear, measured and appropriate for a case in which the Plaintiffs make allegations of this nature. Whether they succeed in those allegations is a matter for the trial of the action.

54. It is also noteworthy that the Defendants, although they have filed defences, have failed to raise any further particulars of the allegations of fraud in the statement of claim.

When asked why they had not done so, counsel for the Defendants accepted he had no answer to this point. If the Defendants really believe that there is a want of particularity about the pleadings and the statement of claim their remedy is to request further and better particulars. They have not done so in this case. This is a procedural step which of course remains open to them.

55. The Plaintiffs have pleaded their case with particularity. They pleaded that the first and second Defendants have transferred particular properties to their daughter for no consideration (or no proper consideration) and that these transactions were done fraudulently and with a view to evading their creditors namely the Plaintiffs. This is not an unnecessary or scandalous plea. This plea is the essence of the case which the Plaintiffs are making against the Defendants.

56. I do not accept that these pleas are included to prejudice or embarrass the fair trial of the action. They are the essence of the action which the Plaintiffs are bringing against the Defendants.

57. The Defendants also seek an order pursuant to Order 19 Rule 28 striking out the claims of conspiracy and fraud as they do not disclose a reasonable cause of action and are frivolous or vexatious. I am of the view that the pleadings set out in the statement of claim are clearly not frivolous or vexatious, and they disclose a reasonable cause of action against the Defendants.

58. I have also reviewed the defences of the first and third named Defendants in these proceedings which are drafted by them personally. Both these defences deny the allegations made against them. Both defences could be described as either traverse defences of all allegations made against them or a rejection of the allegations of fraud made against them.

59. Counsel for the Defendants has indicated that applications will be brought, if this application is refused, for leave to file amended defences. Those applications will be heard in due course.

60. It is no part of the Court's function at this stage of the proceedings to decide on the strength or otherwise of the allegations being made by the Plaintiffs against the Defendants. All the Court has to consider at this stage – in the light of the application brought by the Defendants – is whether or not the Plaintiffs' claims are frivolous and vexatious and/or are bound to fail and/or are unnecessary and scandalous.

61. As Clarke J (as he then was) stated in *Ryanair Ltd v Bravofly Ltd* [2009] IEHC 41:
“Allegations are not scandalous where they would be admissible in evidence to show the truth of any allegation in the pleadings which is material to the reliefs claimed... The courts should not lightly exclude matters from pleadings where there is at least some reasonable possibility that the material pleaded could be relevant. Matters should only be excluded where it is clear that such pleading is irrelevant”.

62. It is clear that pleas of fraud and conspiracy are entirely appropriate and necessary in a case where the central issue is whether the first and second Defendants have conveyed property to their daughter the third Defendant with the intention of defrauding the Plaintiffs.

63. I am of the view for the reasons set out above that the Plaintiffs' claims are fully and properly pleaded and that the applications to strike out the pleadings of fraud at this interlocutory stage should be rejected.

Complaints about the receiver

64. The essence of many of the Defendants' complaints in their affidavits is that, although they defaulted on their debts to the bank and the Plaintiffs obtained judgment by consent in 2015, the Plaintiffs, allegedly, took no steps to realise value from the properties over which they appointed a receiver.

65. At paragraph 6 of his affidavit Mr. Burke complains that when the Plaintiffs appointed receivers over numerous properties owned by himself and his wife, the houses were occupied by tenants at that time but that the Plaintiffs and/or the receivers removed the tenants and allowed the houses to remain empty, to fall into disrepair and to become vandalised. He says that the houses have been unoccupied since 7th February, 2014. He also says that other houses were sold at below market value. He also complains that there has been a loss of rental income in the amount of over €1 million.

66. However even if all these matters were true (and they are denied by the Plaintiffs), the fact is that the Defendant's remedy is to issue proceedings against the receiver and the bank in respect of these matters. It is certainly not a justification for striking out these proceedings.

Failure to register judgement

67. The Defendants also complain that the Plaintiffs did not register the judgment as a judgment mortgage against the properties and that the Plaintiffs waited for five years to take any steps to enforce the judgment against the properties. If that is so, that might prejudice the Plaintiffs' ability to recover its debt from the Defendants. However, it is no reason to strike out the within proceedings on the grounds of inexcusable or inordinate delay.

The affidavit evidence on the alleged fraudulent conveyances

68. Although it is not necessary for the purposes of this judgment, I will, for completeness, deal with some of the issues raised by the affidavit evidence before the Court.

69. In his grounding affidavit Mr. Burke, the first Defendant, says in respect of the impugned property transactions that:

“These properties were mortgaged to Ulster Bank. The second named Defendant and I were indebted to Ulster Bank. By agreement with Ulster Bank, four of the properties were sold to a third party and the proceeds of the sale were applied to reduce the indebtedness. The third party sold the properties for consideration to the third named

Defendant. One of the properties was the family home of the second named Defendant and I.A valuation was obtained for the property and the property was conveyed to the third named Defendant for a valuable consideration. At the time of the sale the second named Defendant and I were in poor health, the property was conveyed with a life interest for the second named Defendant and I and the purchase price reflected this. On the 2nd November, 2020 my wife, the second named Defendant passed away”.

(emphasis added)

70. However the Plaintiffs submit that they are not satisfied by this purported explanation. Firstly they say that these matters were not pleaded in the defences; secondly they say that the facts set out by Mr. Burke raise further concerns as to how it arose that this alleged “third party” sold the properties back to Mr. Burkes daughter; thirdly they say the transfer of the family home with a life interest for the first Defendant raises further questions particularly as the first Defendant states on affidavit that the purchase price reflected this life interest.

71. In relation to the issues of fraud, Mr. Burke, the first Defendant, states to the Plaintiffs that the Plaintiffs “*are mistaken, the conveyance was for valuable consideration*” and that “*the Plaintiffs are mistaken in their claim that there was a voluntary conveyance and are mistaken in their claim that there was a conspiracy and fraud*”. However the issue of whether the Plaintiffs are “mistaken” or not are matters for the trial of the action. They certainly are not matters which would justify the striking out of the proceedings at this stage.

72. The first Defendant submits that he has suffered prejudice by the passage of time because “*up until 2020 I believe that the Plaintiff had lost its appetite to prosecute a claim. I am now faced with the prospect of a plenary hearing when nothing has been done for so long.*” He also says at paragraph 22 that “*I say that the within proceedings have been hanging over us since 2015. Nothing of consequence has happened since then. The passage of time has weakened me considerably. Not only am I not as physically strong but I believe*

that I do not possess the same mental fortitude or emotional stamina to face significant proceedings such as these”.

73. However, whilst the Court has sympathy with the position in which Mr. Burke finds himself, the fact is he borrowed money from the bank, he was unable to repay, he consented to judgment in the sum of approximately €9 million, he failed to repay a euro of that amount in the intervening five years and the sum now stands at over €10 million. Although he says he believed the Plaintiff had lost its appetite to prosecute its claim he gives no grounds for that belief. Once he and his wife had consented to judgment, it was, in substance, a court order which directed them to pay the outstanding amount. It is clear that the first Defendant has completely failed to comply with the court order for judgment.

74. Ms. Caroline Burke, the third Defendant, also swore a replying affidavit in this matter. In relation to the impugned conveyances she states as follows at para. 6 of her affidavit:

“The conveyances at para. 4 (i) and paras. 4 (iii) were made between the first and second Defendants and a third party on the initiative of the lender Ulster Bank, who held the properties as security for loans in 2014. A partial discharge in respect of Folios 9512 and 64425F was made on or about 17th November, 2014. A memorandum of agreement was entered into by the first and second Defendants with the third party on or about 24th July, 2014 to purchase the properties in Folio GY64425F.”

75. At para. 7 she states:

“These conveyances were done with the intention of repaying the secured lender, the properties were sold and the proceeds of sale applied to the debt.”

76. Ms. Burke says at paragraph 9 *“the properties at para. 4 (ii) were transferred for market value in April 2014”*. However beyond this bald assertion at paragraph 9 above no further detail is given in relation to this property.

77. Mr. Coleman, in his replying affidavit on behalf of the Plaintiffs, pointedly noted that the third party to whom the properties were sold is not named nor is any value for the property given nor is this matter pleaded anywhere in the defence of the first and third Defendants. He also states that the Plaintiffs do not accept these assertions.

78. Counsel for the Plaintiffs also submitted that on 19th August, 2022 solicitors wrote to the Defendants' solicitors asking them to identify the third party to whom the properties were sold, the dates on which these conveyances occurred, the consideration allegedly paid for each property by the third party, the dates on which this third party allegedly sold the property to the third Defendant and the consideration paid for each, and to provide a copy of all relevant documentation. This letter was never answered.

79. Mr. Coleman for the Plaintiffs in his replying affidavit states *“there is no evidence of the conveyance itself or the price paid or any valuation obtained (other than a mere assertion) ... the failure of the Defendants to exhibit any documentation in support of these bare assertions is troubling and does not assuage the concerns held by the Plaintiffs as to these transactions”*.

80. Mr. Coleman also states in his affidavit in respect of one of the properties that *“the property price register suggests that this property was sold on or about 12th June, 2014 for €60,000 and thereafter sold again on 4th July, 2022 (three days before the issuance of the within motion) for €200,000. Despite the sale the third Defendant in her most recent affidavit sworn on 4th November, 2022 uses this address as her home address. The Defendants have failed to bring this to the attention of the court despite it clearly being extremely relevant to the within proceedings and suggestive of a further attempt to put these properties beyond the reach of their creditors, the Plaintiffs”*.

81. It is clear that the explanations put forward by the Defendants have failed to assuage the concerns of the Plaintiffs.

The issue of prejudice

82. Ms. Burke also raises the issue of prejudice. She states that *“the Defendants are prejudiced by the delay. The second Defendant is dead”*. She also states that *“the recollection of the parties has been dimmed by the passage of time and witnesses are unavailable”*.

83. However the events the subject matter of these proceedings only took place in May 2018, April 2019 and March 2020 and the plenary summons issued in May 2020. It is difficult therefore to accept this averment that the recollection of parties has been dimmed by the passage of time. These alleged fraudulent conveyances only took place a short time ago.

84. I am satisfied that the Defendants have not suffered any prejudice defending these proceedings due to any action on the part of the Plaintiffs. These proceedings arise out of the first Defendants’ own actions in transferring three properties to their daughter which the Plaintiffs allege are fraudulent conveyances. They are fresh causes of action which only accrued in 2018, 2019 and 2020.

85. I am also satisfied that the Defendants have suffered no prejudice by virtue of the manner in which the Plaintiffs have prosecuted these proceedings. Indeed any delay in the conduct of these proceedings has been caused entirely by the default of the Defendants.

Conclusion

86. In the circumstances, I would refuse the Defendants’ application to strike out the proceedings on grounds of delay. I am of the view that there has been no delay whatsoever in the bringing of these proceedings or indeed in the prosecution of these proceedings.

87. I would also refuse the Defendants’ application to strike out the pleadings of fraud and/or conspiracy. I am satisfied that the pleas of fraud and conspiracy are fully and properly pleaded. They are the essence of the case being made by the Plaintiffs against the Defendants, and they are entirely necessary in the context of these proceedings.