

THE HIGH COURT

[2023] IEHC 428

2022 No. 5951P

BETWEEN

CHARLES WILLIAM ALLEN and MARGARET FAHY

PLAINTIFFS

AND

BANK OF IRELAND GROUP PUBLIC LIABILITY COMPANY, BANK OF
IRELAND MORTGAGE BANK UNLIMITED COMPANY, LINK ASI ASSET
SERVICES, MYLES O'GRADY, HARRY LORTON and ANTOINETTE DUNNE.

DEFENDANTS

Judgment of Ms. Justice Eileen Roberts delivered on 14 July 2023

Introduction

1. This is an application on behalf of the first, second, fourth and fifth named defendants (who I will collectively refer to as the “**BOI defendants**”), to strike out the plaintiffs’ proceedings either (1) pursuant to the inherent jurisdiction of this court on the basis that they constitute an abuse of process or, alternatively, (2) pursuant to Order 19, rule 28 of the Rules of the Superior Courts on the grounds that they disclose no reasonable cause of action against the BOI defendants, are frivolous or vexatious or unsustainable and/or are bound to fail. Relief is also sought on the basis that the matters the subject of these proceedings should be dismissed pursuant to the doctrine of *res judicata*. The matter was heard on 12 July 2023.

The parties and the background to this dispute

2. The second named plaintiff (“**Ms Fahy**”) is the registered owner of a property comprised in Folio 3804L, Co Galway (the “**Property**”). The Property was subject to a mortgage entered into between Ms Fahy and the second named defendant’s predecessor in title (the Governor and Company of the Bank of Ireland). In 2017, the second named defendant issued proceedings against Ms Fahy in Galway Circuit Court (under record number 2017/343) seeking possession of the Property due to Ms Fahy’s alleged default under that mortgage.
3. An order for possession, with a stay for a period of six months was made by the Circuit Court (Fergus J) on 28 November 2017 on foot of those proceedings (the “**Order for Possession**”).
4. Ms Fahy sought to extend the time for service and lodgement of an appeal against the Order for Possession by motion dated 9 February 2018. In her grounding affidavit sworn on 9 February 2018 in support of that motion Ms Fahy alleged that the second named defendant had failed to substantiate their right of claim against her “*private Trust property*” the subject of the proceedings (para 9). She alleged that the Property and her “*equitable interests thereof are placed in a private irrevocable contract Trust*” (para 17). She complained that she had not had sight of “*the entire suite of the original executed Financial and Security Documents*” including a detailed list of documents set out at paragraph 22 of that affidavit. She also confirmed in para 71 that she was seeking sight of the full suite of original executed security documents. She raised issues regarding the applicable interest rates charged. She complained that her constitutional

rights had been breached and that the appropriate proofs had not been provided to support the Order for Possession. She averred at para 38 of her affidavit that

“I say that [the second named defendant] has made no admission as to being the lawful owner of the legal charge/security instrument, so therefore, the Appellant seeks to know as to who is the lawful owner of same, in the subject of the within entitled proceedings”.

5. Ms Fahy also averred at paragraph 64 of her affidavit that

“...no one is entitled to interfere in the Appellant’s private affairs and private Trust dwelling and lands without the Appellants’ and that of the Trusts’ implied or express consent. That makes the [second named defendant,] its servants, agents and assigns thereof, all trespassers and liable absolute (sic) in the within entitled proceedings”.

6. Ms Fahy was granted an extension of time within which to appeal the Order for Possession to the High Court.
7. The High Court refused the appeal (Record No. 2018/44 CA) and Mr Justice Noonan delivered his judgment on 15 May 2019 – *Bank of Ireland Mortgage Bank v Fahy* [2019] IEHC 341. That judgment is of particular relevance to the present application, and it is useful therefore to consider it in some detail.
8. Mr Justice Noonan stated at para 5 of his judgment that he was *“satisfied...that the proofs that are before the court in respect of the matter are in order.”* Referring specifically to the averments by Ms Fahy that the Property is now held in what she described as a private irrevocable trust, Mr Justice Noonan noted at para 8 of his judgment that

“These affidavits are obviously and transparently drafted by third parties on behalf (sic) unfortunate defendants like Ms Fahy who turn to these unqualified, agenda - driven persons and groups for assistance and I am quite sure in return for reward and payment on the part of the litigants who seek their assistance”.

Noonan J went on to say at paragraph 13 that

“the effect of their unlawful activity and abuse of process on unwitting litigants like Ms Fahy is to greatly increase their exposure to the costs of pursuing what are futile and groundless appeals to higher courts”.

9. At para 11 of his judgment Noonan J quotes from a letter exhibited regarding a private irrevocable trust dated 13 December 2016 from an unidentified individual. Ms Fahy was asked about this document by Noonan J and he notes at para 12 that *“she was unable to tell me anything about it or who the person was by whom it was issued which is somewhat surprising given that one of her principal defences in the affidavit sworn by her relies on this trust”.*
10. As the High Court affirmed the Order for Possession on appeal, the issues raised are now clearly *res judicata*.
11. On 27 March 2020 the second named defendant transferred its interest in the charges secured on the Property (with the benefit of the Order for Possession) to Link ASI Limited. That entity may be, or be related to, the third named defendant in these proceedings but is not a party to any application before this court. Folio 3804L now records Link ASI Limited as *“the owner”* of these charges.

The present proceedings

12. There are two plaintiffs in these proceedings. The second named plaintiff, Ms Fahy, is the same party who was the sole plaintiff in the previous Circuit Court proceedings. She did not appear at the hearing of this application before the court but no request for an adjournment was advanced on her behalf. The first named plaintiff (“**Mr Allen**”) was not a party to any of the mortgage arrangements regarding the Property nor was he a party to the previous proceedings. When questioned by the court as to the basis of his standing as a plaintiff in these proceedings, Mr Allen confirmed that he was the trustee of a private irrevocable trust for the Property. He confirmed that this was the “Trust” referenced in the statement of claim in the following terms “*In 2013, [Ms Fahy] placed her equitable interest in her private property...in a private Irrevocable Family Trust of which the honourable Charles William Allen is trustee in order to facilitate the successional planning of her estate*”.
13. When asked if he could produce a copy of this “Trust” to the court, he confirmed that he would not do so and that this was a private matter he did not have to disclose to the court. When questioned further by the court as to whether he had received any payment in respect of this Trust, Mr Allen said he would not answer that question as it was a private matter. The court notes that Mr Allen did not deny receiving payment for this “Trust”. He acknowledged that neither his nor the Trust’s interest in the Property was registered but said that as it extended only to “*the equitable interest*” in the Property, it did not need to be registered.
14. Given the virtually incomprehensible nature of the plenary summons issued in this case (which Mr Allen confirmed he had drafted along with the statement of claim), the court invited Mr Allen to identify what claim was being advanced in these proceedings and, in particular, to identify what aspects of these proceedings were different to the previous proceedings regarding the Property. Having heard his response it does not

appear to this court that there are in fact any differences. Mr Allen confirmed that the “*motivation*” for the present proceedings was to identify who owns the charge(s) over the Property so that the plaintiffs know who to deal with in relation to settling matters. He said they had been looking for a “*Letter of Redemption*” for some time, unsuccessfully. He said their correspondence was being ignored by all defendants. While the plenary summons refers to a “*Formal Letter of Redemption*”, it is unclear as to what that means. Mr Allen acknowledged that it did not mean a redemption figure. He said that the requested Letter of Redemption would declare all contractual obligations of the defendants and would set out under what authority they were holding “*absolute beneficial title*” to the Property.

15. Mr Allen said that in order to establish precisely what legal entity holds absolute title to the charge(s) on the Property, the plaintiffs were seeking all of the documentation set out in the statement of claim, much of which is a repeat of the documents set out in Ms Fahy’s earlier affidavit seeking to extend the time to appeal the Order for Possession.
16. It was explained to Mr Allen that the BOI defendants were not now claiming to hold any interest whatsoever in any charges over the Property as they had confirmed on affidavit that their interests had been transferred to Link ASI Limited. There was no claim by the BOI defendants that they should be paid any settlement by the plaintiffs. Mr Allen said that the designation on the Folio of Link ASI Limited as “*the owner*” of the charge did not mean that the BOI defendants had no interest in the charge. Nor did he accept that they had transferred their interest in the charge(s). He said the BOI defendants would have to “*prove*” all the title to the Property and that this was what the proceedings sought to achieve.
17. In relation to his claim for damages regarding “*their malicious claim*”, he confirmed to the court that what was referred to there was the behaviour of the BOI defendants in not

providing the requested Formal Letter of Redemption. He also confirmed that the reference in his affidavit to the “*malicious institution of civil proceedings taken against both Ms Fahy and myself*” (para 5 of Mr Allen’s affidavit sworn 4 July 2023) in fact refers to the bringing of this motion to strike out these proceedings.

18. In response to a question as to why he had sued the fourth and fifth named defendants, he replied that it was because they were senior individuals within Bank of Ireland. In that regard the fourth named defendant is the CEO of Bank of Ireland Group and the fifth named defendant is Chair of Bank of Ireland Mortgage Bank. It is not alleged that either individual did anything in their personal capacity which would require that they be personally joined as parties to these proceedings.

Analysis

19. In coming to a determination on an application grounded on Order 19, rule 28, this court is confined to the matters as actually pleaded. As O’Higgins CJ stated in *McCabe v Harding* [1984] ILRM 105 “*vexation or frivolity must appear from the proceedings alone*”. However, where the court is exercising its inherent jurisdiction it is not confined to the pleadings and may engage with the facts asserted in affidavits, although the plaintiff’s case should be taken at its realistic factual height.
20. Whether the application to strike out is moved under Order 19, rule 28 or pursuant to the court’s inherent jurisdiction, it is a jurisdiction to be exercised sparingly and only in appropriate circumstances. The onus is on the moving party to establish that the pleadings do not disclose a stateable cause of action or that the case is bound to fail or that it is an abuse of process. The court must be satisfied not just that the plaintiff will not succeed but that he *cannot* succeed. In that regard the court must also be satisfied

that the plaintiff's case would not be improved by an appropriate amendment to the pleadings.

21. The pleadings in this case are entirely incoherent. Even taking into account the oral responses of Mr Allen to the court's questions, it appears to me that there is no stateable cause of action disclosed in the pleadings against the BOI defendants. The plaintiffs' overarching contention that parties relying on security over a property cannot do so where the owner later creates a "private irrevocable family trust of their equitable interest" in that property, is fundamentally misconceived. Even if I were to assume that such a trust exists (although no evidence of it whatsoever was provided to the court) there is simply no foundation in those facts for the claim made by the plaintiffs that such a trust would nullify the charges registered in favour of third parties or the Order for Possession. Indeed, Noonan J in the High Court appeal specifically referenced such a trust (albeit one alleged to have been created in 2016) and discounted its possible legal effect and severely criticised those parties seeking to persuade vulnerable litigants of its validity. Such an argument in my view does not and could not constitute a reasonable cause of action and has no legal foundation whatsoever. All the declarations regarding such alleged trust must fail.
22. Insofar as the other reliefs sought in the plenary summons are concerned, the declarations requiring the BOI defendants to prove they hold and held "*full beneficial title absolute*" to the charges on the Property and those which seek to prevent reliance on the Order for Possession are *res judicata*. These issues were determined in the previous proceedings and the Order of Possession was made and affirmed on appeal. Neither is there any legal basis for the declarations sought of "*the plaintiff's natural right to use a Promissory Note to discharge the alleged charges on the above referenced folios, or any other*" (relief No. 23).

23. There is no basis to claim damages against a party solely by reason of them having initiated permitted procedural applications, such as an application to strike out proceedings or an application to strike out affidavits alleged to be in breach of Order 40 of the Rules of the Superior Courts. The appropriate remedy, should a party successfully resist those types of applications, is for costs rather than damages.
24. Furthermore, it is abundantly clear that Mr Allen has no standing to bring the present or indeed any proceedings regarding the Property against the BOI defendants. Even if I were to accept that he had standing as an alleged trustee of the Property, his claim, like that of Ms Fahy, cannot succeed in circumstances where precisely the same issues were ventilated and decided by both the Circuit Court and the High Court on appeal in the previous proceedings. To allow the same arguments to be rerun, or to allow what is in essence a collateral attack on final Court Orders amounts to a clear abuse of process.
25. I do not believe that any of these issues can be addressed by an amendment of the pleadings or by any interlocutory steps such as the raising of interrogatories or discovery.
26. In all the circumstances I will grant the BOI defendants the relief sought in their notice of motion to strike out the plaintiffs' claim under Order 19, rule 28 and under the court's inherent jurisdiction on the grounds that the plaintiffs' claim as pleaded discloses no reasonable cause of action against the BOI defendants and that the proceedings are frivolous and vexatious and bound to fail. They are also clearly *res judicata* and an abuse of process. The continuation of these proceedings against the BOI defendants would in my view cause unnecessary hardship and expense to the BOI defendants who would have to take steps to defend a claim which cannot succeed against them. It is of concern to this court that what appears to be a template of hopelessly misconceived "*irrevocable private trusts*" offered by Mr Allen to

unrepresented litigants, apparently for reward, is a most unsatisfactory position and one that this court must disapprove of in the strongest terms.

27. As to costs, my provisional view is that the BOI defendants, having succeeded in their motion against the plaintiffs are entitled to recover their costs of the motion and the proceedings to date as against the plaintiffs. If the plaintiffs wish to contend for a different form of costs order, they should file and serve any written legal submissions on this point by 24 July. I will list this matter for mention on 27 July at 10.45am to give the parties an opportunity to address me on the question of costs and any other outstanding issues.