THE HIGH COURT

[2025] IEHC 755
Record No.: 2020 3698 P

AIB MORTGAGE BANK UC

AND

AIB PLC

PLAINTIFFS

AND

GERARD [OTHERWISE MICHAEL GERARD] BURKE

AND

TERESA BURKE

AND

CAROLINE BURKE

AND

JOHN SHIELS

DEFENDANTS

JUDGMENT *ex tempore* of Mr. Justice Cregan given on 3rd December 2024

INTRODUCTION

1. This is a plenary action in which the plaintiffs are seeking to set aside three conveyances of properties by the first and second defendants to the third defendant, their daughter, at a time when the first and second defendants were significantly in debt to the plaintiffs.

2. The second named defendant has unfortunately passed away. The fourth named defendant, Mr. John Shiels, was joined to these proceedings by the plaintiffs because he was, apparently, a participant in the said conveyances. He appears to have purchased the said property, or some of them, from the first and/or second named defendants, and then sold them on to the third named defendant. However, it is not in fact known if the fourth defendant actually exists. The plaintiffs have no address for him. The first and third defendants have failed to provide any address for him despite court orders to do so. The plaintiffs have retained a private investigator to try to track him down and/or

to ascertain whether such an individual exists, without any success. As a result, the plaintiffs have, for obvious reasons, been unable to effect service on the fourth named defendant. However, the plaintiffs are not seeking any orders against him today.

BACKGROUND

3. The background to these proceedings was set out in a judgment which I gave earlier in these proceedings on 10th March 2023. It is not necessary for me to repeat all these matters in this judgment; a brief summary will suffice. The first and second named defendants borrowed significant sums of money from the plaintiffs over a period of years. The first and second defendants then defaulted on these loans, and the plaintiffs appointed a receiver over a portfolio of properties owned by the first and second named defendants. On 20th July 2015, the plaintiffs obtained judgment on consent in the sum of €9.5 million, (approximately) against the first named defendant, and in the sum of €8.9 million, (approximately) against the second named defendant. Those judgments are still unsatisfied.

4. Some years later, in November 2018, the plaintiffs became aware that the first defendant had transferred land to his daughter, the third defendant, on or about 22nd May 2018. The plaintiffs then discovered a second conveyance made on or about 11th April 2019, in which the first and second defendants transferred property to the third defendant. On 9th March 2020, the plaintiffs became aware of a third property transferred by the first defendant to the third defendant.

5. The plaintiffs then issued these proceedings against all three defendants, claiming that all three property transfers were done at an undervalue and made with the intention of defrauding the plaintiffs as creditors of the first and second named defendants. The plaintiffs also seek orders in these proceedings setting aside these transfers.

6. On 8th May 2020, the plaintiffs' solicitors wrote to each of the defendants calling on them to set aside the transfers. On 22nd May 2020, the plaintiffs issued a plenary summons in this matter. There was no appearance. On 1st July 2020, the plaintiffs issued the statement of claim. In August 2020, the plaintiffs brought a motion against the defendants for judgment in default of appearance. On 20th November 2020, the

second defendant unfortunately passed away. On 13th December 2020, the first and third named defendants entered appearances. On 26th January 2021, the first and third named defendants filed defences.

7. On 29th November 2021, the plaintiffs sought voluntary discovery against the defendants.

8. On 11th July 2022, the first and third defendants issued a motion to strike out the plaintiffs' claim on grounds of delay and/or to strike out the pleadings of fraud in this case. On 22nd July 2022, this motion came before the Court. It was adjourned on a number of occasions, and it was eventually heard by me. On 10th March 2023, I gave a written judgment in this matter in which I refused the application to strike out the plaintiffs' claim and also refused the application to strike out the allegations of fraud in these proceedings.

9. Subsequently, the first and third defendants discharged their solicitor and counsel, and have in substance, taken no further part in these proceedings. The Court made an order for discovery against the first and third defendants; both defendants failed to comply with this order. The Court also made an order to compel replies to particulars, but the defendants again failed to comply with this court order. The Court then made an order on foot of the plaintiffs' application to strike out the defendants' defence for failure to comply with court orders for discovery. I made an order striking out their defences, but allowing them further time to comply with the orders of discovery. However, it is clear, as counsel for the plaintiffs have put it, that they are "thumbing their noses at the proceedings." The only interaction the defendants have had in this case is for the first defendant to file some medical certificates, but the third defendant has played no further role in these proceedings at all.

10. Therefore, as of today's date, or on the date in October when the plenary proceedings were called on, the defendants' defences have been struck out. On each and every occasion in which this matter has been before the Court, since October 2024, there has been no appearance by either the first and/or the third defendant. I am satisfied, on each and every occasion, that the plaintiffs properly served the first and third defendants. On a number of occasions, the first defendant applied for adjournments, but the third named defendant has never so applied.

THE FIRST NAMED DEFENDANT'S APPLICATIONS FOR ADJOURNMENTS

11. The first named defendant applied for an adjournment on Wednesday 9th October 2024 when the plenary action was listed for hearing before me. There was an affidavit of Dr. Denis Higgins, a GP, who attends on the first defendant. He said that the first defendant had a number of ongoing complex medical issues. He said that he – the first defendant – presented at the doctor's clinic in September 2024 in a distressed state, and he issued a medical certificate to say that he was unfit to engage in the proceedings for a period of six months. However, I would note that a similar letter was written by the same GP on 14th November 2023, saying that the first defendant would be unfit for a period of six months. Another letter was also written on the 1st March 2024, saying that the first defendant was unwell and would be so for another period of four to six months. A further letter was written on the 11th of June 2024 to say that the first defendant was unwell for at least three months. So therefore, there have been four letters in all, all saying the same thing, and all indicating that the defendant was unwell for a period of three to six months.

12. In considering the defendant's application for adjournments, I have had regard to the decision of the Supreme Court in *Tracey v. McDowell* [2021] IESC, in which Clarke J. (as he then was) stated in his judgment, at paragraph 6.1;

> *"I should start by saying that the Courts have always acknowledged that it is much better that doctors spend their time looking after the health of their patients rather than attending court. A Court will always be happy to see if the requirement for the attendance of a doctor can be avoided. Even if attendance is unavoidable, Courts have traditionally facilitated doctors in the timing and sequencing of the giving of their evidence, so as to minimise interference with the important work of doctors in treating patients."*

13. At paragraph 6.3, Clarke J. stated as follows:

> *"While it is important to emphasise that the role of the Court in such circumstances differs significantly from the role of the doctor, the doctor's only concern, quite legitimately is with the health of their patient."*

14. At paragraph 6.4, Clarke J. stated as follows:

> *"But it is most important that all concerned, be they parties or doctors, realise that the role of the Court is different. The Court is required to take into account the rights and interests of all parties."*

15. And in paragraph 6.5, Clarke J. stated as follows:

> *"But it is clear that it is important that there be some assessment of the timeframe within which it may be realistic to consider that there may be a resolution of the problem which is said to justify a postponement or delay in the case. There may well be cases where that timeframe may turn out to be decisive."*

16. I have also had regard to the decision of the High Court in *Geary and Anor v. The Property Registration Authority and Ors* [2018] IEHC 727, a judgment of Ms. Justice Ní Raifeartaigh, delivered on 19th November 2018, in which Ms. Justice Ní Raifeartaigh stated that,

> *"A considerable amount of leeway is afforded to litigants in person, but they are not entitled simply to disregard court imposed deadlines nor to hold up proceedings which are legitimately brought by instituting their own set of proceedings which may be misconceived in law, no matter how genuinely they believe them to be valid or have been advised behind the scenes that this is so."*

17. In any event, I am satisfied that, as of today's date, it is clear that the first named defendant has not appeared today and he has not provided any medical certificate which would indicate a reason as to why he could not take part in the proceedings today. I am also of the view that the first named defendant has now engaged in a pattern of not engaging with the court, of disregarding court orders and of filing medical certificates at the last moment seeking a reprieve from the litigation going forward. I am also satisfied that the plaintiffs have served the first and third defendants with letters notifying them of the adjournment of court dates to today's date and what they were expected to do on today's date. I would also note, again, that there is not today – and there never has been – any application by the third named defendant for the proceedings

to be adjourned, whether on medical grounds or otherwise.

THE EVIDENCE OF THE PLAINTIFFS

18. The plaintiffs went into evidence at the hearing of this matter in October. Their first witness was Ms. Grace Gleeson. Ms. Gleeson is a case manager in the legal recovery team in AIB and was very familiar with this case. She gave evidence about the loans to the first and second defendants, and the High Court judgment in the sum of €9.592 million against the first defendant (in respect of 17 loan agreements) obtained by the bank in June 2015, which has not been discharged. She also gave evidence about three properties in question. These three properties are as follows.

1. Property GY122934F (carved out of two other folios) That folio says that the third defendant is the owner of the property, and that it was transferred to her on 22nd May 2018 by the first defendant, three years after judgment was entered against him. It was sold, apparently, by the first and second defendants to Mr. John Shiels, the fourth named defendant, in 2014 for a sum of €50,000. Mr. John Shiels apparently then sold it in July 2014 for the same price (i.e. €50,000) to the third defendant. The value of the land at the time was €465,000.

2. The second property was folio GY21439F. The third defendant is the registered owner of this folio. The property was apparently transferred to her by the first defendant on 11th April 2019, four years after the plaintiffs obtained judgment against the first named defendant. It is apparently a family home, and there is a burden registered on the folio which gives the right to the first defendant to reside in the house for his lifetime, and also the right to the second defendant to reside in the house for her lifetime. Therefore, the first defendant and second defendants transferred the family home to the third defendant, but retained a right of residence for life in the said property. The property was sold to their daughter for €60,000, which apparently was only about 10% of its market value at the time, which was €600,000.

3. The third property is folio GY126519F. This was land which the first defendant transferred to the third defendant for a sum of €5000 in February 2020, five years after the judgment, and the third defendant is now registered as the owner of that portfolio.

4. Ms. Gleeson also gave evidence that the first named defendant currently owes AIB the sum of €7.8 million and his wife owes a similar amount. She gave evidence that some assets had been seized and sold and applied to the debt.

19. Mr. Tony Wallace also gave evidence on behalf of the plaintiffs. He is a property expert and a consultant in real estate. He prepared a valuation report for the Court and he set out in his report, and for the Court, his valuation methodology in respect of the three relevant properties.

20. In respect of the first property, GY122934F, his evidence was that, as at the date on which he gave evidence, October 2024, the current valuation of that property was €1.2 million. He said that the value at the time of the transfer by the first defendant to the third defendant in July 2014 was €465,000. He gave evidence that the transfer by the first defendant to the third defendant in July of 2014 was for a sum of €50,000, and he gave it as his expert opinion that this valuation and sale price was grossly under market value.

21. In respect of the second property, GY21439F, Mr. Wallace gave evidence that this property was a family home. Its current value, as of the date on which he gave evidence, was €850,000. He said that the value at the time the first and second defendants transferred it to the third defendant in 2020 was €560,000. In fact, it is clear from his evidence, and the evidence of Ms. Gleeson, that the first and second defendants sold it to the third defendant for a price of €60,000 in 2020. Mr. Wallace gave evidence that, in his expert opinion, this was a sale at a gross undervalue.

22. In respect of the third property, GY126519F, Mr. Wallace said that, in his opinion, the current value of this property was €112,000 and he said, that at the time it was sold by the first defendant to the third defendant in February 2020, it was sold at a value of €5000 which he said was a gross undervalue.

THE LEGAL PRINCIPLES AND THE LEGAL SUBMISSIONS IN RESPECT OF THIS MATTER

23. It is clear that the case which is made by the plaintiffs is that the conveyances made by the first named and second named defendants to the third defendant were fraudulent conveyances. The relevant legal principles which govern this matter were set out in the plaintiffs' legal submissions.

24. The first issue to be considered is section 43 (3) of the Land and Conveyancing Law Reform Act 2009 which provides as follows.

> *"Subject to subsection 4, any conveyance of property made with the intention of defrauding a creditor or other person is voidable by any person thereby prejudiced."*

25. Section 74(4)(a) provides for a defence that subsection (3) does not apply to any estate or interest in property conveyed for valuable consideration to any person in good faith, not having at the time of the conveyance, notice of the fraudulent intention.

26. Thus, the necessary proofs which a plaintiff must satisfy a Court of in respect of section 74 (3) as follows:

(i) there must be a conveyance or disposition of property;
(ii) the conveyance must be made with the intention of defrauding creditors of the grantors; and
(iii) the person challenging the conveyance must have been prejudiced by it.

27. It is clear from the pleadings in this matter, both from the statement of claim and the defendants' replies to particulars, that all three properties have been conveyed from the first and/or second defendants to the third defendant. In certain cases, they have been conveyed directly; in other cases they have been apparently conveyed to Mr. John Shiels, who, in turn, has apparently conveyed them to the third defendant.

28. Section 74 (3) replaces section 10 of the Conveyancing Act (Ireland), 1634, which contained a lengthy definition which has been replaced by the word "defraud" in section 74. The question then to be considered is what is meant by "an intent to defraud"?

29. The leading Irish authority on what constitutes intent to delay, hinder or defraud creditors within the meaning of section 10 of the 1634 Act, is *Re Moroney* (1887) 21 LR Ir 27. This was the decision of the former Court of Appeal in Ireland. On the interpretation of section 10, Palles C.B. stated, as follows:

> *"Therefore to bring a conveyance within the statute, first, it must be fraudulent; secondly, the class of fraud must be an intent to delay, hinder, or defraud creditors. Whether a particular conveyance be within this description may depend upon an infinite variety of circumstances and considerations. One conveyance, for instance, may be executed with the express intent and object in the mind of the party to defeat and delay his creditors, and from such an intent the law presumes the conveyance to be fraudulent, and does not require or allow such fraud to be deduced as an inference of fact. In other cases, no such intention actually exists in the mind of the grantor, but the necessary or probable result of his denuding himself of the property included in the conveyance, for the consideration, and under the circumstances actually existing, is to defeat or delay his creditors, and in such a case, as stated by Mellish, L.J., in* Re Wood *(1), the intent is, as matter of law, assumed from the. necessary or probable consequences of the act done; and in this case, also, the conveyance, in point of law, and without any inference of fact being drawn, is fraudulent within the statute. In every case, however, no matter what its nature, before the conveyance can be avoided, fraud, whether expressly proved as a fact, or as an inference of law from other facts proved, must exist."*

30. This decision in *Re Moroney* was followed by Costello P. in *McQuillan v. Maguire* [1996] 1 ILRM 394 in which Costello P. stated as follows:

> *"The court need not find that the agreement was motivated by actual fraud. If it can be shown that the necessary or probable result of the agreement was to defeat or delay creditors, then it could be avoided"*

31. Likewise, in *MIBI v. Stanbridge* [2008] IEHC 389, Laffoy J. considered the test to show an intent to defraud was to be considered as follows:

> *"The second question which arises on the application of s. 10 of the Act of 1634 is whether the disclaimers were executed with the intent to delay, hinder or defraud the Bureau. The leading Irish authority on what constitutes intent to delay, hinder or defraud creditors within the meaning of s. 10 is* In Re Moroney […]*"*

32. Laffoy J. then set out the quote set out above. She also adverted to the fact that Costello P. followed *Re Moroney* in *McQuillan v. Maguire*, and stated that:

> *"In this case, there is no evidence of the intent of the second defendant and the third defendant in executing the disclaimers, so that fraud has not been expressly proved as a fact. The question for the court, therefore, is whether an intention on the part of these defendants to delay, hinder or defraud the Bureau as a creditor has been proved as an inference of law from the evidence before the court. In this case, I am satisfied that the necessary or probable result of these defendants disclaiming their respective shares of the estate of the deceased on intestacy was to delay, hinder and defeat the payment of the debt due by them to the Bureau as the assignee of the deceased's judgment against them. Therefore, fraud has been proved."*

33. These principles, set out by Palles C.B. in *Moroney*, and Laffoy J. in *Stanbridge*, were also accepted as applying to section 74(3) of the 2009 Act by Finlay Geoghegan J., in *Keegan Quarries v. McGuinness* [2011] IEHC 453.

34. It is also clear that the Courts in their decisions have identified what have been called "badges" of fraud in different circumstances. These badges of fraud are drawn by inference from the prevailing circumstances of the case. Examples of such a badge of fraud are, for example, (i) a conveyance for undervalue as seen in *Lloyds Bank Ltd v. Marcan* [1973] 3 All ER 754; (ii) sham consideration as set out in *Murphy v. Abraham* (1864) 15 Ir Ch R 371; (iii) the grantor retaining some benefits such as the right of residence – see *Thompson v. Webster* (1859) 45 ER 233; (iv) the absence of conventional marketing of the property; (vi) personal connection between the vendor or grantor and the purchaser or grantee; and (vii) the use of fictitious or alternative names to cloak the transaction.

35. It is also clear that the timing of the transaction is also a key factor to be considered by the courts.

36. When one considers the above indicia of *"badges of fraud"* and applies them to this case, it is clear that there are certain *"badges of fraud"* which go to show that the necessary and probable consequences of the defendants' actions were to defraud the plaintiffs.

37. First and most importantly, the first and second defendants were significantly indebted to the plaintiffs, as set out above in my judgment; secondly, the timing of these conveyances – in which took place after the defendants had consented to judgment being sought by the plaintiffs; thirdly, the relationship between the first and second defendants and the third defendant, in that the first and second defendants are the parents of the third defendant; fourthly, the inability of the bank to locate Mr. John Shiels and the refusal by the first and third defendants to identify or give further particulars about Mr. John Shiels despite court orders to do so; fifthly, the fact that the properties were sold for a considerable undervalue; sixthly, the fact that the first and second defendants retained the right of residence in the property, in the family home, which was sold to the third defendant; seventhly, the failure to provide in any of the pleadings, or in the affidavit evidence, any reasonable explanation for the transactions.

CONCLUSION

38. I am satisfied, having heard all of the evidence in this case, that the three transfers of the properties by the first and second defendants to the third defendants, whether by means of a transfer to the fourth defendant, or by means of direct conveyances to the third defendant, were fraudulent conveyances. I am satisfied that the three properties were transferred by the first and second defendants to their daughter, the third named defendant, at a gross undervalue. I am also satisfied that the transfers were not done in a bona fide manner, but were done to evade the consequences of a court judgment in favour of the plaintiffs in the sum of €9.5 million(approximately) and €8.9 million against the first and second defendants respectively.

39. In the event, I would make an order setting aside the transfers of these three properties

to the third defendant on the grounds of fraud.