

Neutral Citation No: [2021] NICH 8	Ref: HUM11534
<i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i>	Delivered: 28/05/2021

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

ULSTER BANK IRELAND DAC
ULSTER BANK LIMITED

Plaintiffs

and

LIAM MCGAVIGAN

Defendant

Maria Mulholland (instructed by Diamond Heron) for the Plaintiffs
The Defendant represented himself

HUMPHREYS J

Introduction

- [1] The defendant brought two applications to the court:
- (i) An application to set aside the order of McBride J dated 21 November 2019 ('the set aside application');
 - (ii) An application to compel the plaintiffs to provide an equity of redemption statement ('the redemption application').

[2] The set aside application was issued on 12 October 2020, some 11 months after McBride J had made a final order in this litigation. This order required the defendant to pay the sum of €225,402.53 to the first named plaintiff, the sum of £232,509.44 to the second named plaintiff and to deliver up possession of 9 properties in Strabane, Co. Tyrone to the plaintiffs.

[3] The set aside application was grounded on the alleged fraud of the plaintiffs.

[4] McBride J reviewed the set aside application on 20 January 2021 and made the following directions:

- (i) The plaintiffs to file a skeleton argument by 23 April;
- (ii) The defendant to reply by 7 May;
- (iii) A core bundle to be furnished by the plaintiffs by 14 May;
- (iv) Application listed for hearing on 21 May.

[5] When the matter came on for hearing, the defendant asserted that he had not received the plaintiffs' skeleton argument and the core bundle had only arrived at his address 2 days previously. As a result, he claimed that he was not prepared to deal with the set aside application but did wish to move his redemption application.

[6] An email from the plaintiffs' solicitors of 23 April, attaching the skeleton argument, was sent to the email address used by the defendant to communicate both with the court and the plaintiffs. Equally, the core bundle was sent electronically on 7 May as well as being posted on that date to the defendant. It should be noted that the core bundle consisted largely of the documents generated by the defendant and relied upon by him in support of his application.

The Litigation History

[7] In order to place these applications in context, it is necessary to recite a history of the events in this litigation. On 20 March 2017 the plaintiffs commenced Order 88 proceedings seeking possession of various properties owned by the defendant and over which the plaintiffs claimed to have security. On 14 July 2017 the defendant issued a Writ of Summons claiming rescission of various charges and mortgages alleged to be void by reason of misrepresentation and deceit. In his Statement of Claim in the Writ action, the defendant alleged that two banks could not be stated on the same mortgage or charge documents, that two separate 'contracts' are required and the documents signed by him were void *ab initio*. It was also alleged that the first page of the purported deeds had been procured after the documents had been signed by him.

[8] By order dated 6 December 2018, the Order 88 proceedings were converted to a Writ action. The Statement of Claim then served in that action, and dated 8 February 2019, sets out in detail the plaintiffs' case. It is claimed that advances were made by the first plaintiff to the defendant and his business partner to assist in the purchase of Donegal properties, such advances being renewed and restructured under a facility letter dated 27 November 2013 and signed by the defendant on 31 December 2013.

[9] The pleaded case on behalf of the second plaintiff is that it advanced monies to the defendant on various occasions, *inter alia*, to purchase property in Strabane, Derry and Spain. The defendant provided the plaintiffs with security in the form of

all monies charges or mortgages in respect of 9 properties in Strabane which were all executed between 2009 and 2012. This security covered all indebtedness of the defendant to the plaintiffs. The loans were called in on 12 February 2016.

[10] In his Defence to the plaintiffs' claims, the defendant pleaded that an official of the second plaintiff had made a fraudulent representation to attempt to secure the registration of a first legal charge over sites in the Republic of Ireland. It was also claimed that the tort of deceit was committed when the charges were executed and/or registered as two institutions cannot be joint charge holders.

[11] During the course of the litigation, the plaintiffs furnished a Further Amended List of Documents dated 12 April 2019. This enumerated some 194 documents, including facility letters, deeds of charge and internal documentation.

[12] The proceedings were listed for hearing before McBride J on 22 November 2019. On 19 November, the defendant served a 'Notice of Withdrawal of Memorandum of Appearance', claiming that the Appearance had previously been entered erroneously and seeking leave to withdraw same under Order 21 rule 1 of the Rules of the Court of Judicature. This repeated the claim that an employee of the second plaintiff committed fraud by creating a joint first legal charge. It also included allegations that lawyers engaged on the part of the plaintiffs had sought to compound this fraud by engaging in a fraud upon the court.

[13] The following day the defendant served a document entitled "Official Notice to the Court and Chancery Court Voiding Proceedings on the grounds of Fraud upon the Court". This alleged that:

- (i) The solicitor representing the plaintiffs had committed a crime by impersonating the defendant in that he had 'unlawfully by way of misrepresentation set cases down for hearing';
- (ii) Masters of the High Court were corrupt;
- (iii) McBride J had been corrupted or influenced by officers of the court and ought to recuse herself;
- (iv) The cases should be stayed for an indefinite period to permit a criminal investigation to proceed.

[14] The defendant did not appear at the hearing on 21 November 2019 and McBride J made the order referred to at paragraph [2] above. There was no appeal from this decision.

The Redemption Application

[15] Although this was issued 7 months after the set aside application, I nonetheless agreed to deal with this first. Given that the defendant is a customer indebted to the plaintiff Banks, I inquired as to any impediment to the production of a redemption statement. It was indicated by Counsel for the plaintiffs that there was none, and a figure could be provided. In fact, redemption figures had been provided to the defendant in January 2021 (over a year after the order of McBride J) setting out the level of indebtedness at that time. There was therefore no need for any court order in this regard and the application was dismissed.

The Set Aside Application

[16] The plaintiffs contended that this application was fatally flawed both on procedural and substantive grounds.

[17] The court had made a final and binding determination of the issues in this litigation when it made the order of 21 November 2019 and this was never appealed to the Court of Appeal.

[18] The Supreme Court Practice (1999) ('the White Book') states at paragraph 20/11/8:

"If a judgment or order has been obtained by fraud a fresh action will lie to impeach the original judgment, but a High Court Judge has no jurisdiction to set aside an order of another High Court Judge on the basis that fresh evidence has been obtained, since only the Court of Appeal has jurisdiction to do so."

[19] This commentary reflects the authorities, including the dictum of Lord Slynn in *Kuwait Airways Corp v Iraqi Airways* [2001] 1 WLR 429:

"There is well established authority that where a final decision has been made by a court a challenge to the decision on the basis that it has been obtained by fraud must be made by a fresh action alleging and proving the fraud."

[20] This legal principle is sufficient to dispose of the set aside application. This court has no jurisdiction to hear any application to set aside the decision of McBride J.

[21] However, it may be of some assistance to the parties if I comment on the material put forward by the defendant in support of the set aside application. This consists of a sworn statutory declaration dated 22 September 2020 and its associated

exhibits. In this the defendant declares that the charges and mortgages *'do not exist in law'* and that the order of the court is *'null and void.'* In essence, the case advanced is exactly the same one which appeared in the defendant's pleadings, namely that an official of the second named plaintiff committed some act of fraud or misrepresentation and thereby caused the deeds to be materially altered resulting in them being in the joint names of the plaintiffs.

[22] The allegations that solicitors committed fraud on the court and perjury are repeated as was the allegation of bias against McBride J. Insofar as there is any 'new' material referred to, this appears to consist of a letter from the second plaintiff dated 20 July 2020 and an email from the plaintiffs' solicitor dated 17 April 2019. The former states:

"We do not hold any records of BTL mortgages on our systems for you."

The latter contains confirmation that there are no *"letters of offer"* since the lending was secured by way of equitable deposit of title deeds prior to the execution of the deeds of mortgage or charge.

[23] The contents of the solicitor's email manifestly predates the court order and could never constitute 'new' evidence or evidence of fraud. The letter of 20 July 2020 does not give rise to any sustainable case that the order of 21 November 2019 was procured by fraud, particularly in a case where the court has admitted in evidence the 9 deeds signed by the defendant. When pressed on the deeds, the defendant suggested for the first time that his signatures may have been forged but presented no evidence to corroborate this. The court does note that each of his signatures was witnessed by a solicitor on the deed.

[24] It is noteworthy that the defendant's case in the proceedings was grounded on fraud of the same species as has been alleged in the instant application.

[25] Even if the application were properly before the court, the evidence presented does not even begin to meet the threshold to establish that the existing court Order was procured by fraud.

[26] Regrettably, when asked about the basis for the application, the defendant chose to absent himself from court and declined to participate further. The hearing concluded in his absence. The defendant's claims that the plaintiffs had failed to comply with court directions were manifestly groundless. A delay of some 7 months had already occurred between the application being lodged and the hearing date. There was no basis to countenance any further delay.

Conclusion

[27] Both applications are without foundation and must be dismissed. I direct that the plaintiffs are entitled to add the costs of these applications to the sums secured.