

THE HIGH COURT

[2016 No. 512 SP]

BETWEEN

PROMONTORIA (ARAN) LIMITED

PLAINTIFF

AND

PATRICK O'REILLY & BREDA O'REILLY

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 29th day of November, 2019

**Orders sought**

1. The special summons in these proceedings seeks a declaration that: -
  - (i) A facility letter dated 19th February, 2007, ("the facility letter") from Ulster Bank Ireland Limited ("Ulster") addressed to the defendants and a Cormac O'Reilly together with,
  - (ii) Two undertakings dated 6th April, 2006, and 20th June, 2006, ("the undertakings") from solicitors purportedly acting on behalf of both defendants to hold the title deeds to an apartment and car parking space in the vicinity of Herbert Park, Dublin ("the apartment") comprised in folio 86556L, County Dublin ("the folio") to the order of Ulster, created and acknowledged an equitable interest in the apartment.
2. By letter of demand dated 21st September, 2016, ("the letter of demand") the plaintiff, as the transferee of Ulster's interest in the debts allegedly owed by the defendants to Ulster, demanded payment of €1,441,990.84 ("the alleged debt") pursuant to the terms of the facility letter. The plaintiff also seeks an order directing the sale of the apartment in default of payment of the alleged debt.
3. The plaintiff, in the alternative, sought a receiver to be appointed but it did not pursue that relief at the hearing of this application.
4. Orders for taking an account and directing an enquiry as to persons interested in the apartment are sought as consequential to the declaration if it is granted.

**Special summons procedure**

5. The special summons procedure envisages the disposal of matters summarily by affidavit. Plenary proceedings are preferable where there are complex factual and legal issues because there will be pleadings and oral evidence. Order 3 of the Rules of the Superior Courts ("RSC") which provides for the issue of a special summons is permissive. On the other hand, O. 72A RSC specifies applications which "*shall*" be commenced by special summons. A plenary hearing may be directed in cases which are commenced by special summons.
6. The defendants submit that if the Court is not minded to dismiss the application, the Court should adjourn the matter to plenary hearing under O. 38, r. 9 RSC, having regard to the significant facts in dispute that, they argue, can only be determined by way of oral evidence.

### Relevant affidavits

7. The following thirteen affidavits taken from the 21 affidavits in the “booklet of pleadings” and the supplementary booklet are most relevant to this application: -
- (i) The grounding affidavit of a “*senior asset manager*” of Capita Asset Services (Ireland) Limited (“Capita”), which was an agent of the plaintiff, sworn on 13th December, 2016;
  - (ii) The first replying affidavit of the first named defendant sworn on 23rd March, 2017;
  - (iii) The affidavit of Mr. Prendville, a director of the plaintiff sworn on 30th June, 2017, which explained *inter alia* the purchase of Ulster’s alleged loans to the defendants by the plaintiff and the review in 2008 by Ulster of its loans to the first named defendant;
  - (iv) The second replying affidavit of the first named defendant sworn on 18th October, 2017;
  - (v) The replying affidavit of the second named defendant sworn on 19th October, 2017;
  - (vi) The second affidavit of Mr. Prendville sworn on 9th March, 2018, in reply to the second affidavit of the first named defendant and in which he acknowledged that the plaintiff was only incorporated on 19th December, 2014. He clarified that the debt due by the defendants was ascertained by him from records available to him in his capacity as a director of the plaintiff;
  - (vii) The third affidavit of Mr. Prendville sworn on 15th May, 2018, which sought to highlight an alleged inconsistent approach taken by the second named defendant when denying her ownership of the apartment or debt with her non-cooperation with the plaintiff’s offer to realise proceeds from a disposal of the apartment;
  - (viii) The affidavit of a solicitor for the second named defendant sworn on 9th July, 2018, concerning potential capital gains tax and legal costs for the second named defendant in disposing of her alleged interest in the apartment;
  - (ix) The affidavit of a solicitor for the plaintiff sworn on 13th July, 2018, which exhibited open correspondence between solicitors for the parties seeking to overcome the allegations of forged ownership and mortgage documents in respect of the apartment made on behalf of the second named defendant;
  - (x) The affidavit of a Mr. O’Sullivan, a director of the plaintiff sworn on 15th February, 2019, averring to the outstanding balance due pursuant to the facility letter in the sum of €1,523,218.46 as of 13th February, 2019;
  - (xi) The third affidavit of the first named defendant sworn on 26th February, 2019, which explained and exhibited letters from two consultant physicians dated 24th

May, 2018, and 29th July, 2018, respectively, about the risk of further stroke and a vascular cognitive impairment on the part of the first named defendant;

(xii) The fourth affidavit of the first named defendant sworn on 8th November, 2019, which explained his struggle to recall matters that had occurred many years ago. He also mentioned and exhibited a letter from Ulster dated 24th August, 2012, confirming that Ulster does not hold a charge over the apartment and Ulster's agreement to release its rights to the apartment upon receipt of the proceeds from the sale of the apartment;

(xiii) The second affidavit of the solicitor for the second named defendant sworn on 11th November, 2019, which exhibited, following receipt of a reply to his request to the Property Registration Authority, instruments and an affidavit of discovery sworn by an attorney purportedly on behalf of the second named defendant in 1996.

#### **Undisputed facts for this application**

8. The second named defendant was born in the United States of America and left Ireland permanently in 1994. The first named defendant is the father of the second named defendant and separated from her mother some 20 years ago. The second named defendant avers that she never applied for a mortgage in Ireland, never "banked" with Ulster and never instructed the solicitor who purportedly gave an undertaking with her authorisation. She did not know that she was a registered owner of the apartment until these proceedings were served in July 2017.
9. The first named defendant does not deny: -
  - (i) His ownership of the apartment;
  - (ii) The terms of the facility letter;
  - (iii) His authorisation to the solicitors to give an undertaking in respect of the apartment.
10. The advanced years and cognitive impairment of the first named defendant are not disputed by the plaintiff at this stage.

#### **Issues between the parties**

##### *Affidavit evidence debate*

11. The first named defendant "baldly" asserts at para. 23 of his first replying affidavit that he repaid all debt due to Ulster without exhibiting documents in support of his averments, according to counsel for the plaintiff. It is submitted on behalf of the plaintiff that the first named defendant should not be allowed to defend on the basis of a mere assertion.
12. Counsel on behalf of the first named defendant submitted that the plaintiff fails to comply with Order 40 of the RSC because the plaintiff was not in existence at the relevant times. In reply, counsel for the plaintiff cited paras. 46, 56, 57 and 58 of the judgment delivered by Barniville J. in *Promontoria (Arrow) Limited v. Burke* [2018] IEHC 773 (unreported,

High Court, 19th December, 2018) to support the submission that the affidavits of the two directors of the plaintiff can be taken by the Court as evidence.

*Is the claim statute barred?*

13. The Court appreciates the candour of counsel for the first named defendant in regard to this potential defence. The absence of a challenge to the terms of the facility letter and to the date of the letter of demand in 2016 means that this is not the strongest point of defence for a plenary hearing. Nevertheless, the sum sought to be charged is disputed including the calculation of principal and interest.

*Delay*

14. The delay on the part of the plaintiff, Ulster's successor, to recover the alleged debt by way of only seeking repayment in 2016 may be explicable. If this was a plenary hearing, pleadings would have been exchanged in which particulars of delay and the effects thereof would have been delivered and answered by now. The cognition deficit and medical status of the plaintiff leave factual issues to be determined with the benefit of oral evidence if delay is pursued as a defence.

*Promontoria (Oyster) DAC v. Hannon*

15. The Chief Justice in *Promontoria (Oyster) DAC v. Hannon* [2019] IESC 49 (unreported, Supreme Court, 4th June, 2019), at para. 8.2 expressed "*the view that the proper construction of [s. 73 of the Registration of Deeds and Title Act 2006 ("2006 Act")] is such that it must be taken to have been the statutory intention to bring, by the expiry of the relevant three year period, a complete end to the system of lien by deposit of a land certificate in respect of registered land.*" In that case the defendants were successful in their appeal from the High Court decision that the plaintiff had the benefit of a lien by deposit.
16. This Court has had detailed submissions about the effect of the facility letter combined with the undertaking from the solicitors and the retention of title documents to the order of Ulster. The Court recognises that s. 73(2) of the 2006 Act provides for the cessation of the effect of deposits of land certificates and certificates of charge. The plaintiff contends that the facility letter coupled with the undertaking from a long since retired solicitor is not captured by s. 73(2) of the 2006 Act. The defendants, and particularly the first named defendant, submit that the 2006 Act was designed to ensure that mortgages were registered.

**The law – summary process**

17. Counsel for the plaintiff cited the judgment of Laffoy J. in *ACC Bank Plc v. Malocco* [2000] IEHC 13; [2000] 3 I.R. 191 at p. 204 in supporting the claim that the facility letter with the undertakings created an equitable mortgage. However, it is worth quoting the following remarks from that judgment: -

*"... the court has to look at the whole situation ... looking at the whole situation must involve an assessment of the cogency of the evidence adduced by the plaintiff in relation to the given situation which is to be the basis of the defence."* (p. 201).

*"The existence of an equitable mortgage is in no way contingent upon the court making a "well-charging" declaration."* (p. 204).

*"... but the claim for any interest in respect of any period more than six years prior to [specified date] is statute barred."* (p. 204).

*"... I do not think it would be proper to give summary judgment to the plaintiff ... I will adjourn both matters to plenary hearing ...."* (p. 205).

18. The synthesis of twelve principles to be applied when deciding upon a summary judgment application as undertaken by McKechnie J. in *Harrisgrange Ltd v. Duncan* [2002] IEHC 14; [2003] 4 I.R. 1 at pp. 7-8 is further appropriate to the determination of this application under the various headings of defence.

### **Decision**

#### *Second named defendant*

19. This Court on the affidavit evidence adduced is not satisfied that the second named defendant does not have an arguable defence based on her averment that she does not have an interest in the apartment or alleged equitable mortgage. The second named defendant maintains that she has no obligation to the plaintiff or its predecessor (Ulster). The plaintiff's appeal to the second named defendant and this Court to use some form of pragmatism does not enable this Court to act in the way proposed belatedly on behalf of the plaintiff and more particularly offered in the open letter from the plaintiff's solicitors to her solicitors on the eve of the resumed hearing of this application on 14th November, 2019.

#### *First named defendant*

20. This Court exercises its summary judgment powers with "*discernible caution*". Counsel for the first named defendant limited the issues of potential defence when resisting this application. I am persuaded by the complexity and antiquity of those limited issues summarised above, together with the apparently genuine beliefs expressed by the first named defendant in the autumn of his life to determine that his constitutional right to respond to the plaintiff's claims should be accommodated. The allegations of the second named defendant relating to the authority of the long since retired solicitor to give the undertakings now relied upon by the plaintiff complicate matters further for the claim which is the subject of these proceedings.
21. I have not been satisfied that the first named defendant does not have an arguable defence. In making this determination the Court does no more than accept that both defendants have alleged facts which could undermine what the plaintiff may have thought

to have been a simple matter when issuing these proceedings nearly three years ago now.

22. The above list of relevant affidavits discloses a certain resolve on the part of the plaintiff to avoid a plenary hearing. There comes a stage when the summary process ought to be recognised as not appropriate in view of the established law.
23. Pleadings and other interlocutory applications prior to a plenary trial are merited. I will hear counsel about giving directions and potential case management to minimise the time and effort to be expended by the parties and the Court in resolving the live issues of dispute between the parties. The Court also notes that these proceedings were commenced before the introduction of SI No. 13/2018 Rules of the Superior Courts (Mediation) 2018 and will therefore give the parties liberty to apply to this Court, upon notice to the solicitors for the other parties, pursuant to those rules.
24. The application for summary relief is refused.