

THE HIGH COURT

[2022] IEHC 203

[Record No. 2020 7347 P]

BETWEEN

**DOMINIC ELLICKSON, NOELEN ELLICKSON, ORNA HOBAN AND
FERGUS HOBAN**

PLAINTIFFS

AND

SEAMUS WALSH AND INVISIBLE STRUCTURES LIMITED

DEFENDANTS

AND

STEPHEN TENNANT

THIRD PARTY

JUDGMENT of Ms. Justice Stack delivered on the 16th day of March, 2022.

Introduction

1. This is the defendants' motion to compel replies to particulars and for discovery.
2. The proceedings arise out of what is, in effect, a boundary dispute. The second named defendant, on the nomination of the first defendant, purchased from the third party, acting as receiver of the first and second plaintiff ("the Receiver"), certain land at Oaklands, Ballinakill, Waterford. The Receiver was selling on foot of a Mortgage Deed dated 6 January, 2006 ("the 2006 Mortgage Deed").
3. The land is unregistered and, unfortunately for all concerned, there was no map attached to the 2006 Mortgage Deed and the mortgaged property as defined in the Mortgage Deed was stated to be as follows:

"ALL THAT AND THOSE the lands at Oaklands, Ballinakill, Waterford, County Waterford, comprising 8.3 acres or thereabouts held in fee simple."

There was no map attached to the Mortgage Deed, and the Mortgaged Lands formed part of a larger holding, some of which was to be retained by the first and second plaintiffs and comprises their family home. I will refer to the lands which were to be the subject of the 2006 Mortgage Deed as "the Mortgaged Lands" and the lands which were to be excluded from it as "the Retained Lands".

4. The first and second plaintiffs acquired lands at Oaklands, Ballinakill, County Waterford, in two lots. By Conveyance made 20 January, 1978, between Mary Patricia Goss as vendor, Harry Boyle and Margaret Boyle as purchasers and the first and second plaintiffs as sub-purchasers of the third part, Harry Boyle and Margaret Boyle acquired the lands described in the first part of the schedule as "ALL THAT AND THOSE that part of the lands of Ballinakill or Ballynakill containing 4 acres and 3 roods or thereabouts statute measure situate in the barony of Gaultier and County of Waterford and which said lands more particularly delineated and described on the map annexed hereto and thereon coloured red."
5. By virtue of the same 1978 Conveyance, the first and second named plaintiffs acquired the fee simple in "ALL THAT AND THOSE that part of the lands of Ballinakill or Ballynakill

containing 11 acres or thereabouts statute measure situate in the barony of Gaultier and County of Waterford and which are more particularly delineated and described on the map annexed hereto and thereon coloured blue.”

6. By Deed of Conveyance made 10 April, 1979, between Harry Boyle and Margaret Boyle of the one part and the first plaintiff of the other part, the first plaintiff acquired the lands coloured red on the map attached to the 1978 Conveyance.
7. The map to the 1978 conveyance does not appear to be available. In any event, as a result of the 1978 and the 1979 conveyances, the first and second plaintiffs between them own all of the lands coloured blue and red on the map annexed to the 1978 conveyance, which would appear to have contained in total 15 acres and 3 roods.
8. Over the years, and prior to 2005, the first and second plaintiff sold parcels of land which came to be known as Kingswood and Hunter’s Wood which appear to be in the nature of small residential dwellings abutting the first and second plaintiff’s dwelling house and lands to the northeast and southeast.
9. The dispute arises out of the fact that when the Receiver sold the Mortgaged Lands, the map attached to the contract for sale and to the ultimate deed of conveyance to the second defendant included the entranceway to the first and second plaintiff’s house. Although there may be some dispute about this, the defendants say that the first and second plaintiffs have access to the public road without the entranceway which they say has been sold to the second defendant. That matter is not before me for determination, but I note that the alternative routes mentioned in submissions at the hearing of these motions do not appear to be in the ownership of the first and second named plaintiffs. In any event, the issue may well have arisen because the Mortgaged Lands appear, on the plaintiffs’ case, to lie on either side of the driveway. There may have been a simple mapping error at the time of the sale from the Receiver to the defendants, but that is a matter to be explored at trial.
10. The third and fourth plaintiffs are the trustees of a trust to whom the first and second plaintiffs conveyed the Retained Lands in 2018 or 2019. (The “8” in the original date of 2018 has been struck through and replaced with a “9”, so the date is unclear). It is variously pleaded that the first and second plaintiffs have a right to maintenance and residence out of the lands or that they have a life estate. More importantly, the Statement of Claim sets out that, after selling various parcels of land between 1978 and 2005, the lands known as “Oaklands” comprised approximately 10.6 acres statute measure by the end of 2005. However, the mortgage only related to 8.3 acres, with 2.3 acres being retained.
11. It is a central part of the plaintiffs’ case that this 2.3 acres included not just the dwelling house of the first and second plaintiffs and the lands surrounding it, but also the entranceway to it which consists of a driveway and a splayed entrance leading out onto a public road known as Riversdale Island Lane. The plaintiffs, in essence, say that, because

the mortgage did not relate to this entranceway, the receiver had no title to sell it to the defendants, and it remains in the ownership of the first and second plaintiffs.

Motion for Particulars

12. By Notice for Particulars dated 11 March, 2021, the defendants sought particulars arising out of the statement of claim. Replies were furnished on 25 March, 2021 and rejoinders were delivered on 15 April, 2021.
13. The reply to the rejoinders was apparently contained in a letter of 31 May, 2021. However, there appears to be some uncertainty as to whether it was ever sent.
14. Much of the original notice for particulars consisted of a request for documents, which has been dealt with under the motion for discovery and no longer arises under this heading. This is certainly the case in relation to paras. 1, 2, 3 and 4 of the notice for particulars. Paragraph 5 requests that the plaintiffs identify on a map or maps the property at Oaklands which they say is the 10.6 acres referred to at para. 8 of the statement of claim. Paragraph 13 of the notice for particulars similarly seeks that the plaintiffs would identify on a map "*the extent of the residual 2.3 acres of the lands comprising Oaklands that allegedly never form part of the subject matter of the [2006 mortgage].*"
15. Counsel for the plaintiffs says that particulars should not be used to require him to create a map. I disagree. It is quite routine in cases involving property to annex maps to pleadings in order to identify precisely what has been claimed. Of course, the first and second plaintiffs appear to have instructed Mr. Reilly, at the time they conveyed the lands to the Ellickson family trust, as to the nature and extent of the Retained Lands. They may well wish to use this map in order to identify what they now say was the 2.3 acres which was retained out of the Oaklands property when the 2006 mortgage deed was signed by them. That is entirely up to them. They can use an existing map if it is adequate and they can create a new map if that is necessary, but either way, they should identify what they are claiming.
16. However, all that is being sought here is that the plaintiffs would identify the lands the subject of their claim. I think it is a reasonable one, and the mere fact that all the maps would be in evidence does not mean that the plaintiff is creating or disclosing evidence, but simply that they are identifying precisely what they are saying in their statement of claim, which is a matter for particulars. It could be said that, in a property dispute such as this, there is no better way to particularise a claim than by identifying the lands the subject of a claim on a map.
17. I would therefore make an order compelling the first and second plaintiffs to reply to the particulars at para. 5 and 13 of the notice for particulars.
18. Paragraph 6, as I understood it, was pursued by way of discovery. Counsel for the defendants fairly conceded at the hearing of the motion that para. 7, as to the reasons why no map was attached to the 2006 Mortgage Deed, was probably a question for cross

examination. Insofar as this is being pursued at all, I do not propose to make any order compelling reply to it. Paras. 8 to 11 were not pursued at hearing.

19. As regards para. 12 of the notice of particulars, which has nine sub paragraphs, only five of these are being pursued, i.e., sub paras. (a), (b), (c), (d) and (h). These all relate to the sale by the receiver and the preparation of a map for the receiver served by Messrs. Denis McCague & Associates dated 1 July, 2019, by reference to which apparently the ultimate conveyance to the second defendant was prepared. These particulars ask whether the plaintiffs saw the receiver putting physical markings on the property and whether they took any steps to prevent the receiver from selling the lands.
20. In my view, these matters are all plainly matters of evidence, and not appropriate for particulars.
21. Paragraph 14 of the notice for particulars was perhaps the most contentious. This request is in the following terms:

"In circumstances where no Map was ever appended to the Mortgage identifying the lands the subject matter of the Mortgage, please provide particulars of the material facts forming the basis of the plea in para. 11 of the Statement of Claim that the residual 2.3 acres of the lands at Oaklands comprising the dwelling house, surrounding lands and the entrance way thereto."

22. The end of this paragraph, which sought particulars of the range of evidence that the plaintiffs would adduce at trial, was correctly abandoned as being outside the proper remit of particulars.
23. The particulars sought at para. 14, insofar as they seek the material facts forming the basis of the plea that the residual lands of 2.3 acres included the entranceway, as opposed to any kind of description of the evidence which will be adduced at trial, seems to me to fall in the category of appropriate particulars and not in the category of evidence. The plaintiffs must have some basis for this plea. There is nothing on the face of the 2006 Mortgage Deed which identifies the lands the subject of the mortgage, or the lands excluded from it. The first and second plaintiffs have been living in the property for over 40 years. It may be that the 2006 Mortgage Deed was simply drawn up on a careless assumption that everybody knew what was being discussed. The first and second plaintiffs must have some understanding of why the house and its curtilage, including the disputed entranceway, were excluded from the mortgage deed. There may have been a natural boundary on the ground, or a fence in place at the time, on the basis of which the parties to the 2006 Mortgage Deed were clear on what was being mortgaged, but this was not somehow transmitted to the professionals who drafted the deed. Alternatively, the professionals may have been clear about what was being done but might have failed to take care to have a map drawn up because the lands were to be retained in common ownership. In any event, at trial, the plaintiffs will need to propound a basis for their interpretation of the 2006 Mortgage Deed and consequently, they need to identify that

basis, whether it relates to the existence of a natural boundary, or other extrinsic means of identifying the Mortgaged Lands and the Retained Lands.

24. I would therefore order the first and second plaintiffs to reply to this particular, but strictly subject to the understanding that they do not have to disclose the evidence they will rely on at trial. They merely have to disclose, in a general way, their basis for saying that the entranceway was an identifiable part of the lands excluded from the 2006 Mortgage Deed, whether by reason of a boundary, a natural boundary, or otherwise.
25. At para. 15, the defendants seek the correct date of the deed of conveyance to Thomas Hoban and the third plaintiff, already referred to. It is not clear on the copies furnished whether that is dated 18 December, 2018 or 18 December, 2019. However, I do not think this is a matter for particulars.
26. Counsel for the defendants, as I understand it, conceded that the particulars at para. 16 improperly sought evidence and, while he pursued that at para. 17, I do not see that this is any different. In any event, the valuation produced at the time of the transfer of the Oaklands property to the trust will be the subject of an order for discovery.
27. That leaves a claim for particulars of the plea of slander of title at para. 26 of the statement of claim, the claim to aggravated and/or exemplary damages at para. 27 of the statement of claim, and full particulars of the plaintiff's claim for special damages as set out in the statement of claim.
28. As regards para. 18, and the request for particulars of the alleged slander of title, while this is pleaded in a very general way, I am satisfied that it is not necessary to compel replies to particulars. It is clear that the first defendant is claiming ownership on behalf of the second defendant, and that he has done so including for the purposes of pursuing a planning application in relation to the lands purchased from the receiver. The numerous details in the defence and counterclaim itself set out the defendant's actions in relation to his alleged ownership of the lands the subject matter of the proceedings. I think it is clear that the plaintiff put in a general plea, knowing that the defendant was claiming ownership, and the defendant is well aware that his claims to ownership are continuous over a period of time: it is not feasible for the plaintiffs to give individual dates.
29. As regards para. 19, all of the particulars sought in relation to aggravated and exemplary damages are sought "*insofar as particulars have not already been pleaded in the statement of claim.*" However, if the particulars were already pleaded in the statement of claim, then the notice, and certainly the motion, is entirely unnecessary. In any event, para. 27 of the statement of claim quite clearly relates this claim to the alleged actions of the first defendant on 17 October, 2020, at the lands themselves. In my view, no further particulars are required. Further details would be a matter of evidence.
30. Finally, in relation to para. 20, which seeks particulars of special damages, the statement of claim contains a heading "particulars of special damages" and the only content of this section of the statement of claim is: "to be advised".

31. In my view, the plaintiffs should now particularise their claim for special damages, if they are pursuing it. Alternatively, they should confirm that they are not pursuing it. It appears from the letter of 31 May, 2021, that a schedule of special damages was prepared for inclusion with that letter, but it is not clear whether that letter was ever sent. Accordingly, the schedule can simply be reproduced now.

Application for Discovery

32. Some of the discovery has been agreed, but several categories remain in dispute. The first of these is category 2 which seeks all documentation evidencing, containing information relating to, concerning or otherwise touching on the sales of various parcels of land forming part of the lands at Oaklands, Ballinakill, Waterford by the first and second plaintiffs to third parties for value between 1978 and 2005. This was broken down further to refer to all documentation relating to the dates of each sale, all documentation touching upon the acreage or measure of each such parcel of land, maps in relation to those parcels of land, and the contracts of sale and documents of title relating to such parcels of land. (These subcategories are defined in a broader way than I have set out here, but that is the essence of what is sought).
33. Counsel for the plaintiffs says that the category sought is excessive and unnecessary, and certainly in the manner in which it is drafted, that is true. He makes the pertinent point that discovery in the terms sought would be unnecessarily expensive and onerous.
34. I think it is possible that, given that the lands in the 1978 and 1979 Conveyances were originally described by reference to their acreage, and the only description of the Mortgaged Land was by reference to acreage, that the area of these lands might well be material, ultimately, to the interpretation of the parcels in the Mortgage Deed. It might be possible that the relatively precise acreage given in the Mortgage Deed was in fact inaccurate, and this could be shown historically. That would have the effect, at trial, of lessening the weight which the court would attach to the acreage of the lands with or without the entranceway.
35. As previously stated, the land is unregistered, so the defendants cannot go to the Property Registration Authority and inspect or take up copies of the maps for these lands themselves. Counsel for the defendant says that the test is that set out in the Peruvian Guano case (*Compagnie Financière du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55, at 63) which is that anything which might advantage the defendants or disadvantage the plaintiffs in the case, or might lead to a line of inquiry for the purpose of advancing his clients' case or disadvantaging the plaintiffs' case, is amenable to discovery. This is a well-established test and there is no dispute between the parties as to the applicable principles.
36. There is no doubt that the discovery in the terms sought is excessive. However, the maps attached to any of these sales may well be material to an interpretation of the 2006 Mortgage Deed, and I do not think it is practical to expect the defendants to now survey these lands, given that they are occupied by a variety of householders. Furthermore, the

maps attached to them, if any, will not be ascertainable from searches in the Registry of Deeds.

37. I would therefore grant discovery of any deed of conveyance executed by the plaintiffs in relation to these parcels of land. While the documents are old, deeds will normally be retained by either a solicitor or a lending institution, and should be procurable, if necessary on accountable trust receipt.
38. The next category in dispute is category 7. This originally sought three categories of documentation, the first being the full 2006 Mortgage Deed. This was because only an incomplete copy had been exhibited in the plaintiffs' affidavits grounding their application for interlocutory relief. It has been agreed to furnish this to the defendants.
39. The remaining two categories are, first, all correspondence between the plaintiff, their agents or family member and the bank, meaning AIB Bank plc ("AIB"), the original mortgagee or its successor-in-title Everyday Finance DAC concerning the mortgage of the lands. The second category sought is all the correspondence between the plaintiffs, their agents and family members and Matheson Solicitors, as they were the solicitors who originally acted for AIB in connection with the 2006 mortgage.
40. Counsel for the plaintiff says that the discovery sought is far too wide ranging and would even include correspondence in relation to the first and second plaintiffs' financial situation. I agree that it is too wide ranging, but correspondence passing between the first and second plaintiffs and the representatives of AIB in connection with the preparation of the 2006 Mortgage Deed, could shed very important light on the correct interpretation of that deed, and in particular the parcels. A key issue at trial will be the correct interpretation of the 2006 Mortgage Deed and this may well turn on the intention of the parties to it at the time as to which lands were to be mortgaged and which lands were to remain unencumbered. Any documents that shed light on that will be important and should, in my view, be discovered.
41. As drafted, the discovery sought is too wide. However, I would grant an order for discovery in the following terms:
 - i. *All correspondence between the first and second plaintiffs, or either of them, or from their solicitors or other agents of the one part and the Bank (meaning AIB Bank plc and its successor in title Everyday Finance DAC and/or Matheson Solicitors (formerly known as Matheson Ormsby Prentice Solicitors), insofar as such correspondence touches on or concerns the description of the lands the subject of the 2006 mortgage or the description or identity of the lands forming part of Oaklands which were not to be the subject of the 2006 mortgage.*
 - ii. *Any maps or surveys prepared by or on behalf of the first or second plaintiffs or AIB Bank plc in connection with the preparation of the Mortgage Deed of 6 January, 2006, or any documents containing any reference to such maps or surveys, or to*

the need or absence of any need, to produce a map or survey of the lands to be mortgaged.

43. I am aware that there is no map attached to the 2006 Mortgage Deed, but there may well be correspondence or other documentation referring to the need or otherwise of preparing such a map or survey. For example, there may have been documents which stated the basis upon which it was thought unnecessary to prepare such a map and that, in turn, may give a valuable insight into what was understood by the parties to the 2006 Mortgage Deed at the time it was executed.
42. Some of category 8 is agreed, and that agreement extends to all correspondence between the plaintiff, their agents and/or family members and the Receiver, his servants or agents, concerning the lands at Oaklands generally and the sale of the lands at Oaklands insofar as it was intended to include the entranceway and the sale.
43. The balance of category 8, which is not agreed, seeks similar correspondence with the bank (meaning AIB Bank plc and its successor in title Everyday Finance DAC). As the receiver was handling the sale, it seems to me that further discovery under this category is not relevant or necessary to dispose of the issues between the parties.
44. As regards category 10, I understood counsel for the plaintiffs to request simply that this would be limited temporally. This seeks all correspondence between the plaintiffs, their agents and/or family members, together with other documentation (which is defined in an extremely broad way) relating to their dealings with Mr. Michael Reilly, engineer. Mr. Reilly prepared the map attached to a Deed of Conveyance made 18 December, 2019, between the first and second plaintiffs of the one part and Thomas Hoban and the third plaintiff of the other part, by which the Retained Lands were transferred to the Hoban Trust.
45. I agree that, as this deed appears to have been executed on 18 December, 2018 or 2019, instructions given to Mr. Reilly are material only insofar as they related to the preparation of the map for that deed. Clearly, this is what the first and second plaintiffs were instructing Mr. Reilly in their unencumbered ownership. I will therefore grant category 10 in the following amended form:

"All correspondence between the plaintiffs or any of them (either from the plaintiffs or any of them personally/directly or from the plaintiffs' solicitors, agents and/or family members) and their servants or agents and other documentation evidencing, containing information relating to, concerning or otherwise touching upon the course of dealings between the plaintiffs and Michael Reilly, engineer, concerning the preparation of the map to be annexed to an indenture of Conveyance made 18 December, 2018 or 2019 between Dominic Ellickson and Noeleen Ellickson of the one part and Orna Hoban and Thomas Hoban of the other part, which was registered in the registry of deeds on 6 May, 2020."

46. The next category is category 11 which relates to all valuations of the lands at Oaklands obtained by the plaintiffs in connection with any of their dealings with those lands. Counsel for the plaintiffs objects, saying that this potentially goes back to 1978, and I agree. It would appear that the only relevant valuation would be that in connection with the 2018/2019 deed. I will therefore give discovery in amended form as follows:

"All valuations of the lands at Oaklands, Ballinakill, Waterford obtained by the plaintiffs or either of them for the purposes of the conveyance of the said lands to the Ellickson family trust, and effected by indenture of conveyance made 18 December, 2018/2019, and registered in the Land Registry on 5 May, 2020."

47. The next category in dispute is category 13, which seeks all documentation evidencing, containing information relating to, concerning or otherwise touching on the alleged life estate and/or interest of the first and second plaintiffs in the dwelling house at Oaklands. Counsel for the plaintiffs say that this is a non-issue and does not relate to the dispute. I think he is correct in saying it does not relate to the substantive dispute between the parties, but all of the plaintiffs named in the proceedings seek the relief set out in the statement of claim, including damages for trespass and slander of title, and there is some uncertainty as to the ownership of the first and second plaintiffs, who variously claim either a right of maintenance, residence and support, or a life estate. I will grant discovery in amended terms as follows:

"The document(s) of title creating the life estate and/or other interest of the first and second plaintiffs in the dwelling house at Oaklands, Ballinakill, Waterford, as at the date of institution of the proceedings or subsequently."

Conclusion

48. I would be grateful if the parties would agree of a form of order to reflect the above judgment, together with the agreed particulars and categories of discovery, so as to assist the Registrar in drawing up the Order.
49. I will hear the parties on any ancillary issues and on the costs of the motions.