

THE HIGH COURT

[2023] IEHC 200

[Record No. 2022/242 CA]

BETWEEN

PROMONTORIA (PLUTO) LIMITED

PLAINTIFF

AND

PATIENCE NOLAN

DEFENDANT

JUDGMENT of Ms Justice Bolger delivered on the 24th day of April 2023

1. This is an appeal from a decision of the Circuit Court refusing the plaintiff's application, pursuant to Order 65 Rule 1 of the Circuit Court Rules, to amend a Civil Bill for possession of property comprised in a folio of County Wexford, to include unregistered land described in an earlier Deed of Conveyance of 15 September 1998. For the reasons outlined below I am refusing this application and upholding the decision of the Circuit Court.

2. The Civil Bill for Possession issued on 21 October 2019 described the property as "a plot of ground being part of the Townland of TULLYCANNA and Barony of BARGY containing 10.2410 Hectares shown as Plan(s) 15 edged RED on the Registry Map (OS MAP Ref(s) 41/14) more particularly contained and described in Folio 21271 of the Register of Ownership of Freehold Land, County Wexford". The plaintiff states that this description should be amended to reflect how the property was described in the Deed of Transfer and Conveyance dated 15 September 1998; "ALL THAT part of the lands of Tullycanna (otherwise Tullecanna) now called Springwood situate in the Barony of Bargy and County of Wexford being more particularly described on the map annexed hereto and outlined in red". The plaintiff contends that failure to rectify this omission would prejudice the plaintiff as it would not be able to realise the full security given by the defendant in respect of the mortgage.

Background

3. By deed and transfer of conveyance dated 15 September 1998, the defendant purchased some 53 acres of registered and unregistered land which included a house on the unregistered land. The unregistered land was described in the schedule "all that part of the lands of Tullycanna (otherwise Tullecanna) now called Springwood situate in the Barony of Bargy and County of Wexford being more particularly described on the map annexed hereto and outlined in red". The registered land was described as "all that the lands contingent folio 21271 of the Register of County Wexford". In September 2000, the plaintiff's predecessor offered the defendant a mortgage. Facility letters of 6 September 2000 and 12 September 2000 described the property as "Springwood, Ballymitty, County Wexford". That is the address of both the unregistered and the registered land.

4. The mortgage deed was executed on 26 September 2000 over the property described in the schedule as "All that and those the hereditaments and premises known as "Springwood", Ballymitty in the County of Wexford part of which property is comprised in Folio 21271 County Wexford". A Mr. John Nolan was a co-mortgagee with the defendant. He and the defendant later married in July 2001. Mr. Nolan has passed away since that time.

The pleadings

5. The defendant fell into arrears in her mortgage repayments and by Civil Bill for Possession issued on 21 October 2019, the plaintiff sought possession of "the mortgaged property" which is described in the schedule to the Civil Bill as " a plot of ground being part of the Townland of TULLYCANNA and Barony of BARGY containing 10.2410 Hectares shown as Plan(s) 15 edged RED on the Registry Map (OS MAP Ref(s) 41/14) more particularly contained and described in Folio 21271 of the Register of Ownership of Freehold Land, County Wexford". The Civil Bill pleads, at paragraph 10, that the mortgage deed of 26 September 2000 was over "the mortgaged property" and at paragraph 14, that the plaintiff has been registered on the Folio 21271 as the owner of the charge since 3 November 2016, i.e., over the registered lands.

6. The description of the property in the schedule refers to an area of 10.241 hectares, which converts to approximately 25 acres. This is significantly less than the totality of the registered and unregistered land which comes to approximately 53 acres.

7. The affidavit grounding the Civil Bill for Possession refers, at paragraph 4, to the "property the subject of these proceedings which comprise an unregistered land and registered land situate at "Springwood", Ballymitty, County Wexford (as described in the Schedule to the Civil Bill for Possession) (the "Property")". The plaintiff's deponent refers to the Deed of Transfer of 15 September 1998. At paragraph 11, the deponent states that he was "advised that no consent to the giving of security was required for the purpose of section 3 of the Family Home Protection Act 1976 or section 28 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010" and, further, at paragraph 22, they state they are unaware if the property contains a family home within the meaning of s. 2 of the Family Home Protection Act 1976.

8. Those averments were despite the fact that the defendant and Mr. Nolan, who were married in July 2001, may have resided in the house on the property thereby potentially rendering it a family home within the meaning of the Family Home Protection Act 1976. These averments seems to support the defendant's claim that the mortgage was never intended to cover her unregistered land which included her home, as does the fact that the schedule to the Civil Bill refers to an area of 10 hectares, significantly less than the total acreage of the registered and unregistered land.

9. Whether the Civil Bill related to the registered land alone or the registered and unregistered land seems to have been put beyond doubt by the plaintiff in its affidavit grounding the within application to amend the proceedings, where they say at paragraph 2 referring to the Civil Bill for Possession, that the "proceedings relate to a property known as Springwood, Ballymitty, County Wexford comprised in Folio 21271 of County Wexford (the "Folio") ("the Mortgaged Property") and described in the scheduled to the Special Indorsement of Claim". That affidavit also sought to explain at paragraph 4 why the plaintiff considers it is necessary to amend the pleadings to include the unregistered land, namely that a review of the title documents took place which the deponent claims confirmed that the mortgage deed of 2000 included the unregistered property described in the Deed of Transfer and Conveyance dated 15 September 1988. There is no explanation how the mortgage included the unregistered land or why that land was not included in the original proceedings. The plaintiff's deponent goes on to say, at paragraph 6 that "failure to rectify this information would prejudice the Plaintiff as it would not be able to realise the full security given by the Defendant in respect of the said loan". Self evidently that could only be so if the mortgage deed did include the unregistered land.

10. The defendant swore an affidavit disputing that the mortgage ever included or was intended to include her unregistered land. In response, the plaintiff filed a further affidavit exhibiting a letter furnished by the defendant at the time she took out the mortgage in which she had said that the security for the mortgage facility will be her "property at Springwood, Ballymitty that is valued at €1.6 million". The affidavit also exhibits a report furnished by the defendant at that time which valued the house and surrounding 64 acres of farmland at €1.5 million. The report includes a description of the house and refers to some of the land having road frontage. It also refers to the high quality of the land and its site development potential, outline permission for two dwellings and describes the property's wide appeal as a single entity or individual lots between the house and the land with site development potential. The valuer describes the property as representing "excellent security for the bank".

11. The plaintiff has not exhibited any documentation showing a mortgage over the unregistered land, and whilst the plaintiff's counsel did say that the plaintiff believes such a document does exist, she was unable to offer any explanation for this omission. Neither was there any evidence of the plaintiff having possession of the title deeds, although it was suggested that they do. Whilst counsel for the plaintiff fairly accepted that there may be an issue with the plaintiff's proofs, she argued that this will be a matter for the Circuit Court hearing the substantive claim for possession and does not go to this Court's jurisdiction to allow the proceedings to be amended.

12. The defendant has disputed, on affidavit, that the mortgage she took out with the plaintiff's predecessor was ever intended to cover her unregistered land or her home and she emphasises the significant value of the registered land comprising of good agricultural land with road frontage and planning permission for some sites. Her counsel submitted that the Civil Bill cannot carry the proposed amendments as possession proceedings in relation to unregistered land would require actual evidence of the mortgage thereon, which has not been made available. She emphasised that this goes to jurisdiction and renders any claim for possession of the unregistered land bound to fail. She says that had the plaintiff wanted to include the unregistered lands in the mortgage as well as the registered land, it should have lifted the entire schedule from the 1998 deed to expressly include the unregistered land and that their decision not to do so reflects the defendant's sworn assertion that the mortgage was only ever over the registered land.

The applicable law

13. In my decision of *P.C. [A Minor] v Doran* [2022] IEHC 367, I summarised the law on an application to amend pleadings, at paragraph 18 thereof, as follows:

“I am satisfied that the amended defence sought to be made arises from the same set of facts, raises legal consequences from those facts already raised, and can be said to be necessary for the purpose of determining the real questions in controversy between the parties. The reasons why the pleas are not included in the original defence are credible and sufficient... [T]he prejudice identified by the plaintiff is not of any sufficient magnitude (if it is a prejudice at all), given the relatively early stage in the litigation at which the fourth named defendant identified its need to amend its defence. I am therefore going to allow the fourth named defendant's application to deliver its amended defence in the terms as exhibited.”

That *dicta* reflects the decision of the Supreme Court in *Croke v. Waterford Crystal Ltd* [2004] IESC 97; [2005] 2 I.R. 383, confirming that the primary consideration must be whether the amendments are necessary to determine the real questions of controversy in the litigation. The outcome of that case and its relevance to the law was succinctly summarised by Stack J. in *English v. Promontoria* [2021] IEHC 338, at paras. 14 and 15 as follows;

“The Supreme Court found that this was an entirely new claim, not previously pleaded against the second defendant in the statement of claim (notwithstanding some reference to it in the prayer and in the plenary summons). The introduction of a fraud claim was therefore found by the Supreme Court to radically alter the case against the second defendant, and these amendments were not permitted.

That outcome is, I think, instructive to the approach to the amendments in this case, given that the Supreme Court stated (at paragraph 25) “the primary consideration of the court must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation.” The starting point therefore must be to consider whether the proposed amendments are necessary for the purpose of determining the real questions of controversy in the litigation, and the approach of the Supreme Court in *Croke* itself would suggest that this Court should look at the pleadings as they stand at present so as to consider whether the proposed amendments consist of clarification and perhaps

expansion of the existing issues, or whether they consist of a radically different case and, if so, whether they are pleaded on an identifiable factual basis.”

Decision

14. A party is entitled to amend its pleadings where the court is satisfied that the amendments are necessary to determine the real issues in controversy between the parties, but they cannot be permitted to assert an entirely new claim or radically alter their case.

15. The plaintiff’s proceedings are for possession of the property over which it secured a mortgage in September 2000 and which the defendant demised and charged as continuing security to its predecessor. The question for this Court is whether the plaintiff’s attempt to include the unregistered land is part of its case or is an attempt to craft a new case. That, in turn, depends on whether the mortgage deed, on which the plaintiff seeks to rely, did include the unregistered land.

16. The plaintiff highlights the words “part of which property is comprised in Folio 217211 in the County of Wexford” in contending that the description of the mortgaged property includes the unregistered land. However, that contention is undermined by their Civil Bill for Possession which identifies the mortgaged property as the land registered as Folio 21271 (at paras. 10, 11 and 14). In addition the schedule to the Civil Bill refers to an area of approximately 10 hectares, whereas the area of the registered and unregistered land comes to some 53 hectares.

17. The plaintiff’s affidavit grounding this application expressly pleads (at paragraph 2) that the proceedings relate to the property comprised in folio 21271 of County Wexford. The basis for including the unregistered land is pleaded, at paragraph 4 of the affidavit, as the claimed fact that the mortgage included the unregistered land described in the 1998 deed. Undoubtedly, the 1998 deed includes the unregistered land. However, that does not mean that the unregistered land is also included in the mortgage deed. Indeed, the converse may be so given that the mortgage deed does not copy the schedule in the deed.

18. Even if there was an error by the plaintiff’s predecessor when the mortgage documentation was drawn up in 2000, that does not render the mortgage deed into something it is not. The mortgage deed is acknowledged by the plaintiff’s pleadings to be a mortgage over the registered land only.

19. It is relevant that the plaintiff's averments in its affidavit grounding the Civil Bill for Possession states, at paragraph 11, that no consent was required under s. 3 of the Family Home Protection Act 1976 or s. 28 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 and at paragraph 22, that the deponent was unaware if the property contained a family home within the meaning of s. 2 of the Family Home Protection Act 1976. The house that is on the unregistered land is likely to have been a family home from the time the defendant married her now deceased spouse in July 2001. The apparent lack of interest by the plaintiff in whether the property may have included a family home is consistent with the defendant's averment that the mortgage was never over her unregistered land or her family home.

20. It is not sufficient for the plaintiff to claim that the unregistered land was included in the mortgage by simply asserting that the mortgage includes the unregistered land described in the 1998 deed – as paragraph 5 of the plaintiff's grounding affidavit seeks to do. The defendant has asserted that the mortgage she took out only covered the registered land, which included high quality agricultural land, road frontage and sites with planning permission, and did not cover the unregistered land which includes her family home. The plaintiff, by way of supplementary affidavit, sought to rely on a letter from her sent at the time of her application for a mortgage in which she stated that the security for the facility would be her property at Springwood, Ballymitty valued at €1.6 million and a copy of the valuation report over the entire property including the family home described by the valuer as "an attractive property that will represent excellent security for the bank". The address of the property the defendant identifies in her letter is the same for both the registered and the unregistered land. The valuation report describes the house, notes that the land includes road frontage, refers to the quality of the agricultural land, the planning permission for two sites and the area aid incentives on the land and concludes that the property could be attractive as a single entity or individual lots. The total valuation of €1.5 million was significantly greater than the amount of the mortgage that was drawn down on the basis of that report. I do not accept that that letter and valuation report could, on their own, constitute evidence of the mortgage including the unregistered land.

21. Counsel for the plaintiff urged the court to take the plaintiff's case at its highest in permitting the amendments and argued that the issues arising for the plaintiff from the absence of what seems to be an essential proof (i.e. a mortgage deed over the unregistered land or evidence of the title deeds having been deposited with it) should be left to the Circuit Court hearing the substantive case.

The high point of the case is not the appropriate test for an application to amend. That would be the test to be applied, for example, to an application to dismiss. The test for an application to amend the proceedings is whether the amendments are necessary to determine the real questions of controversy in the litigation. The case described by the plaintiff as its case at its highest, i.e., that the unregistered land was included in the mortgage, is actually a new case going beyond the parameters of the Civil Bill for Possession that the plaintiff issued in 2019. The plaintiff claims, without any basis that has been adequately identified to this court, that the mortgage deed, which it relied on in the proceedings and which it acknowledges in its grounding affidavit related to the registered property only, includes the unregistered land described in the 1998 deed. That claim is made despite the schedule to the 1998 deed differing from the schedule in the mortgage in expressly including the unregistered land.

22. The proposed amendments do not relate to the same facts and do not have the same legal consequences as the matters pleaded in the Civil Bill for Possession. There has been no adequate explanation why the amendments were not pleaded in the original Civil Bill. There is a prejudice to the defendant in permitting the amendments sought as they allow the plaintiff to make a new case, i.e. possession of the defendant's unregistered lands and her family home, that is not identified in the current proceedings and in relation to which there is insufficient evidence that the mortgage the defendant took out with the plaintiff's predecessor included her unregistered lands and her home.

23. The amendments sought by the plaintiff attempts to expand the case the plaintiff seeks to make in its Civil Bill for Possession rather than simply ensuring that the matters put at issue by that Civil Bill are properly and fully before the court. I therefore refuse the plaintiff's application to amend and I affirm the decision of the Circuit Court.

Indicative View on Costs

24. My indicative view on costs is that costs in accordance with Section 169 of the Legal Services Regulation Act 2015, both above and below, should follow the cause and that the defendant is entitled to her costs. I will put the matter in for mention on 11 May 2023 in order to allow any further submission on costs and the final orders that are required to be made. If either party wishes

to make written submissions they should be filed with the court at least 48 hours before the matter is back before me.

Counsel for the plaintiff, Fionola Martin BL

Counsel for the defendant, Helen McCarthy BL