

THE HIGH COURT

[2020 No.3342 P]

BETWEEN

THE DAVY PLATFORM ICAV

APPLICANT

AND

GERARD O'SULLIVAN & FIONA O'BRIEN

RESPONDENTS

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 2nd day of June, 2020

1. Introduction

1.1 This is an application for injunctive relief. The Applicant is an asset management vehicle. Its business includes refurbishing premises for the use of the State in its social housing programme. It claims that the Respondents have trespassed in an apartment in Rosebank Place, Clondalkin and it seeks various orders, including orders directing the Respondents to vacate the property and restraining them from interfering with the Applicant's access to the property.

1.2 The first named Respondent is a fitter foreman and he appeared as a litigant in person. He and his wife bought the Rosemount apartment in 2006. They have separated since these events and his wife has never claimed any interest in this property as against this Applicant.

He claims he is the true owner of the apartment and that his niece, the second named Respondent, rents the premises from him. Rather than asserting this claim in proceedings against an entity he claims has defrauded him, he has instead gained access to the apartment without the owner's knowledge or permission, has installed his niece there as a tenant and has threatened to set his German Shepherd on anyone who seeks to gain entry to the apartment on the Applicant's behalf.

2. The Land Register

2.1 If property rights are uncertain or unclear, the security of every citizen who owns or rents property is damaged. Property rights are rendered certain in Ireland, as elsewhere, by the provision and maintenance by the State of a land register where the owners of land are listed by name beside a description of the property, including a map. The Register was created in 1964, and it is maintained by the Property Registration Authority.

2.2 For those who have never examined the Register, an entry describing a parcel of land, called a folio, shows each registered owner of that property. As the property changes hands, a line is drawn through that owner's name and the name of the next owner is entered, with the date on which ownership transferred to her. Therefore, in respect of registered land, one can read at a glance the names of the previous owners, now with a line striking through their details, and the name of the current owner simply by looking at the relevant folio. There is a section in each folio which describes the burdens on the land, a very common burden in respect of residential property being a mortgage. Here, the name of the entity (usually a bank) is listed and the nature of the burden (the amount of the mortgage, for instance) is set out.

3. The Facts

- 3.1 On the 12th of October 2018, the Applicant purchased the Rosebank apartment from a third party, Promontoria (Oyster) DAC [Designated Activity Company], which entity is not involved in these proceedings. This transfer of land was registered in the Land Register which duly shows the first named Respondent and his wife's names (as previous joint owners), with both names struck through with a line as their title has now passed to this Applicant, which name appears as the current owner of the property. The Applicant was registered as the full owner on the 16th of November, 2018. In the section listing the burdens and notices of burdens, appear the names of the entities which owned charges on the land, namely the bank with which the Respondent agreed a mortgage and two other entities, each of which acquired this charge in turn.
- 3.2 The Rosebank apartment was inspected in May of 2018 and found to be unoccupied, unfurnished and secure. This was confirmed in October when the purchase was completed. The Applicant received notice in April of 2020 that a woman, namely the second named Respondent, had dumped a bed in the bin sheds beside Rosebank Place. This is how the Applicant discovered that someone was now living in the vacant premises it had purchased. The Applicant discovered the name of the trespasser and her connection to the first named Respondent, and letters, dated 22nd April 2020, were written to both Respondents asking them to vacate the property. The letters contained copies of the folio, which made the issue of ownership in respect of the Rosebank apartment perfectly clear.
- 3.3 It is accepted that the letter to the first named Respondent was received and he has confirmed the identity of the second named Respondent, his niece, and that she remains at the Rosebank apartment. The pleadings were served on the second named Respondent at that address, but she did not enter an appearance or offer any defence in these proceedings. She moved into the apartment the subject matter of this action in late March or April of 2020. In other words, she took up residence in the property during the current pandemic and at a time when most people are confined to their homes.
- 3.4 The case was listed for hearing on the 21st of May but was adjourned in order to allow the first named Respondent to obtain legal advice. At the outset, this Respondent told the Court that while he felt overwhelmed, he was not asking the Court to adjourn the case again. This Respondent accepted that he had notice of this case from the 24th of April, at the very latest. He must accept this, indeed, as he wrote a letter in response to the Applicant's solicitor's letter on that date. In this letter, he responded to the Applicant's assertion of title to the apartment by claiming that he was the lawful owner. He made reference to having a German Shepherd, adding: "*so I will deal with any illegal entry your client may try to instigate.*" He requested information as to the Applicant's purchase of the property, despite the fact that a copy of the Folio was enclosed in the letter. He stated that he had moved into the property and that he intends to remain there and treat it as his family home, rather than the house at Heather Grove in Palmerstown, which appears as his address in his affidavit. At Heather Grove, tenants greeted the solicitor who tried to serve documents there. The solicitor was directed by

the tenants to a third address in Kenilworth Road, which is where this Respondent was found.

- 3.6 This Respondent has made various claims in respect of the manner in which his title to the Rosebank apartment transferred to a third party. He claims that the transfer of the property out of his (and presumably his wife's) name was a fraud. He specifically accepted in court that he does not claim, nor can he, that the Applicant knew or could possibly have known of this alleged fraud. It is important to note that the claims made in this regard, insofar as they affect others not before the Court, were not supported by any evidence and remain assertions in the first named Respondent's affidavit and submissions.
- 3.7 The solicitor for the Applicant avers that the first named Respondent has claimed that he has legal proceedings in being in the High Court against his bank and this Respondent did not comment on this claim, either to confirm or deny it. However, no such proceedings are recorded in the Central Office of the High Court.

4. Folio in the Land Register as Proof of Ownership

- 4.1 The substance of the defence to this injunction is that the Respondent still owns the apartment, despite what is contained in the Folio in the Land Register. The first named Respondent accepted before this Court that he has no quarrel with the Applicant and all of his arguments centre on a putative claim against a third party, none of which claims has been substantiated. This case is a relatively straightforward one, therefore.
- 4.2 The Land Register is conclusive evidence as to ownership of land, as set out in Section 31 of the Registration of Title Act of 1964. The Applicant herein has relied upon the Register, which now lists the Applicant as the owner. It is clear from the Act and from the detailed judgment of Mr. Justice Owens on this issue, in *O'Riordan and O'Shea v SLGI Holdings, ADT Limited and the PRA*, [2019] IEHC 247, that any error or fraud which results in unreliable information being recorded in the Register can be corrected by the High Court. If the first named Respondent had produced any evidence that he was the current owner of the land, this Court might have been in a position to remedy the situation, but he has no proof that he remains the owner. If he has any evidence of such fraud, he may decide to take his own action, but he has no legal entitlement to the Rosebank apartment and must surrender vacant possession to the Applicant immediately.
- 4.3 Any injustice which may be done by treating the Register as conclusive proof of title is cured by ensuring that the victim has a remedy against the true wrongdoer, if there is one, in an action for damages and/or to correct the Register. Until such time as the first named Respondent succeeds in such an action, if that day ever comes, he must render possession of the Rosebank apartment to the Applicant, which entity bought it in 2018 and is the registered owner. Any other result is an affront to common sense.
- 4.4 Looking next at the possible target of any complaint which the first named Respondent may have, section 21(2) of the Conveyancing Act of 1881 reads:-

“Where a conveyance is made in professed exercise of a power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

4.5 This section was repealed but then reinstated by the Land and Conveyancing Law Reform Act of 2013, insofar as mortgages created before 2009 are concerned, and therefore applies in this case. According to Section 21 of the 1881 Act, this Respondent’s remedy, if he has been wronged, lies against the seller. In other words, if there was a fraud perpetrated in respect of the transfer of property and the property is now in the hands of an innocent third party such as this Applicant, the law provides that the person so wronged (“the person damnified”) must pursue the seller or alleged fraudster (the person who exercised the power in an improper manner) and not the purchaser. It is important to repeat that this Court has yet to see any evidence of fraud in this case on the part of anyone other than, arguably, the first named Respondent himself. He dealt with the property as if it was his own, including renting it to another party, when he must have known that at the very most, he might have an action against a third party, but not against this Applicant. On top of this, he threatened to set his dog on any person who sought to enforce the Applicant’s right to the property which, as he now appears to accept, is a legitimate right.

5. Conclusion

- 5.1 It is clear that the Respondents have no quarrel with the Applicant. Indeed, the second named Respondent did not appear at all and the first named Respondent appeared to unequivocally accept this at hearing on having the meaning of section 31 of the Registration of Title Act, combined with section 21(2) of the Conveyancing Act, explained to him.
- 5.2 It is equally clear that if the Respondents have any quarrel in respect of this property, it is with the person or entity who purported to exercise the power to sell when it did not have that power. This is the unmitigable effect of the law as it has been set out above. Any constitutional rights of the Respondents, specifically their property rights in respect of this apartment, if any, may be vindicated only by an action against those who interfered with those property rights, if they were not entitled to do so.
- 5.3 It is beyond the power of any court to permit these Respondents to continue in residence in the property in the circumstances. The Applicant owns the Rosebank apartment and the Respondents must vacate the property immediately. The Court will make the orders sought by the Applicant, directing that the Respondents vacate the premises and restraining the Respondents from interfering further with the Applicant’s access to the premises or from dealing with or damaging the premises in any way. The relief sought is necessary not just for this Applicant, but to reassure any person sitting at home, whether that is a rented dwelling or a home bought outright or with the benefit of a mortgage, that she will not be disturbed or uprooted by a disaffected former owner who, either in

ignorance of his rights or deliberately and for gain, seeks to bully his way back into the building. The law will actively vindicate the rights of lawful owners of property.

6. Costs

- 6.1 The costs of this action to date must be awarded against both Respondents given the very clear principles of law which apply here. In any action, the successful party is usually entitled to have his costs paid, in full, by the losing party. The law in relation to ownership of property is so clear that it is not credible that the Respondents did not know, or could not have easily discovered, that they had no right to be on the property and no right to treat it as their property. The very fact that they did not seek to assert any such right in 2018 or 2019, added to the uncontradicted evidence that the locks at the doors in this apartment had been changed, strongly supports the conclusion that the first named Respondent did know that he and his niece were not entitled to be there. Given his reliance for all his claims on what he describes as legal advice, the Court can only suggest that this Respondent should obtain legal advice from a different quarter.
- 6.2 Further, it is obvious, again from the very well-established principles of law set out above, that the Respondents had no action whatsoever against this innocent Applicant, which entity bought the property in question and was the legal owner from October, 2018. The legal owner of any property is entitled to take action, including legal action, to eject a trespasser from the property. If an owner is forced to go to court to vindicate her rights, the court must not only uphold those legal rights but must award her the costs of the action.
- 6.3 The first named Respondent put forward a defence which is demonstrably irrelevant to this action to prevent a continuing trespass to property and he has gone so far as to acknowledge in open court that he had no action against the Applicant, suggesting that he had been advised by a lawyer to continue these proceedings and to appeal them if he lost in this Court. This being the case, he might consider if his real cause of action is against his advisors. There must and will be financial consequences for the first named Respondent if he is determined to drag this Applicant through the courts when the law is so clear: The Applicant is the lawful owner of the Rosebank apartment and these Respondents have no defence to its action.
- 6.4 This Respondent has made claims in court which may, if true, exonerate the second named Respondent, but the fact remains that the action against her has not been defended. The first named Respondent has averred that she is the legitimate tenant of the Rosebank apartment, which is patently incorrect as he no longer owns that property. There is no further evidence before the Court as to what, if anything, the second named Respondent knows of the background to these proceedings. If he is concerned as to any injustice in this regard, there is a very simple remedy: the first named Respondent can offer to bear the costs himself rather than permit the second named Respondent bear her share of this burden. It is immaterial to the Applicant which of the Respondents pays this bill. If she contends that she was an innocent dupe, she has not done so to this Court and her remedy, if her uncle does not relieve her of this burden, lies against the first named Respondent and no other person or entity. The second named Respondent was afforded

every opportunity to attend but has entered no appearance and adduced no evidence in this regard.

- 6.5 The first named Respondent requested that a stay might be put on any order directing that the property be vacated. The sole ground put forward for such an order was his assertion that the second named Respondent was recovering from a serious illness. While there was no evidence put forward to this effect, there is no reason to doubt it and the Applicant did not dispute it. If it is so, the recent illness of his niece makes it all the more extraordinary that the first named Respondent would subject her to the stress of these proceedings and that he would allow and encourage her to remain in a property when it is perfectly clear that, at the very height of his case, he has a dispute against an entity who acquired a charge on the premises. This Respondent, who appears to enjoy access to two other properties, put his niece at risk, either knowing that his own entitlement to this property was non-existent or, to say the least, very much in dispute. That dispute can be determined easily: he has no entitlement to the property. Further, he has exposed her to this order for costs by his actions before and in response to these proceedings. If he wishes to act in ease of her situation, he should advise her to quit the premises immediately, he should pay her portion of the costs awarded to the Applicant today and he should relinquish his intention to appeal or further contest these proceedings, thereby reassuring her that there will be no additional adverse effects for her as a result of his ill-advised actions to date.
- 6.6 The Respondents have purported to exercise rights which, if they once enjoyed them, are no longer theirs. If there is or was an injustice in the case, it was not meted out to them by this Applicant. If there was a past fraud which has resulted in an infringement of the first named Respondent's rights, it will be fully vindicated by the first named Respondent taking action against the person or entity by whom he claims to have been defrauded before the property was transferred, as it now has been, to this Applicant. It would be wholly unfair to order the Applicant to pay any part of the costs of this application and the principles are so clear that for any reasonable party, this application would end these proceedings. Needless to say, the Respondents face a much larger bill of costs if they continue to contest this action or if either of them takes a case that is not well-founded against a third party. But that is a matter for them.