

THE HIGH COURT

[2022] IEHC 471

[Record No. 2020/230 S]

BETWEEN:

PAT MEAGHER AND LAURA MEAGHER

PLAINTIFFS

AND

SAP HOLDINGS LTD

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered *extempore* on 20th July, 2022.

1. The plaintiffs are husband and wife and are the registered owners of folios 8752, 22834, 41412 F and 64117 F of the Register of Freeholders for County Tipperary. They purchased these lands from a Mr. Jerry O'Reilly in July 2017. They were registered as full owners of the folios on 28th March, 2018 and 24th May, 2018.

2. The defendant is a company, which was tenant of certain lands in the folios of which the plaintiffs are now the registered owners. The defendant held the lands pursuant to a lease dated 4th January, 2002, under which it held the lands for 20 years, at an initial rent of €28,060 per annum from Mr. O'Reilly as landlord.

3. Mr. Jerry O'Reilly was one of the founders of the defendant company, which was incorporated in 1972. He was a director of the company from its incorporation until 2010. During that period, he also held 50% of the shares in the company. He parted with his 50%

shareholding in the company as part of a separation agreement with his ex-wife, which was concluded in 2010.

4. The proceedings herein were commenced by summary summons issued by the plaintiffs on 25th August, 2020. In these proceedings the plaintiff's claim the sum of €101,016 as arrears of rent from the defendant for the period 1st August, 2017 to 31st July, 2020.

5. In this application, the plaintiff seeks summary judgment against the defendant, on the basis that it has no bona fide defence to the plaintiffs' claim in these proceedings.

6. In response, a number of affidavits have been filed on behalf of the defendant, in which it alleges that notwithstanding the fact that the plaintiffs were registered as the owners of all the lands contained in the folios, which folios include the lands held by the defendant pursuant to the lease; by virtue of a side agreement between the plaintiffs and Mr. Jerry O'Reilly, it was agreed that while ostensibly the entire lands contained in the folios were transferred to the plaintiffs for the sum of €1.225 m in 2017 and notwithstanding that they became registered as full owners of the folios in 2018, it had been agreed between the plaintiffs and Mr. O'Reilly that the plaintiffs would hold portion of the lands, being the parcels of land known as "the SAP lands", "the O'Connor farmhouse" and "the convent building" in trust for Mr. O'Reilly, and further, that after 6 months/1 year from transfer of all the lands to the plaintiffs, they would transferred these parcels of land back to Mr. O'Reilly, and that it was further agreed that in the interim, he would remain entitled to receive rent from the defendant in respect of the SAP lands.

7. In these circumstances, it was submitted that Mr. O'Reilly retained the entitlement to receive the rent under the lease and therefore the plaintiffs were not entitled to the arrears of rent as claimed in their summary summons. The defendant submitted that in the circumstances, it had raised an arguable defence to the plaintiffs' claim and that the matter should be remitted to

plenary hearing.

The Alleged Trust Agreement.

8. The case made by Mr. O'Reilly on behalf of the defendant was set out in the following way at paragraph 28 of the affidavit sworn by him on 11th May, 2021:

“In or about late April to early May 2017, to facilitate me in my dealings with Cerberus, I asked the First Named Plaintiff that as part of the Sale Agreement would he hold the SAP land, the O'Connor Farm-House and the Convent building, in trust for me, or my nominee if I transferred the said property to him as well, to be transferred back to me or my nominee within 6 – 12 months of the transfer of the said property. Mr. Tom Walsh was my nominee discussed, as we had agreed to the SAP Property Agreement. By transferring the Entire Property to the First Named Plaintiff, I could ensure that Cerberus released all the charges they had over the constituent lands. The First Named Plaintiff was happy to co-operate and facilitate this, and he agreed. In return, I offered the first named plaintiff a reduction in the initial contract sale price. We agreed to a reduction in the agreed contract sale price from €1.3 m to €1.225 m, with the €75,000 difference to be paid at a later date, in exchange for the First Named Plaintiff and/or his nominee holding the SAP land, the O'Connor farmhouse and the convent building in trust for me or my nominee (the "Trust Agreement"). We also agreed as part of the trust agreement at that that although the SAP land would be transferred to the First Named Plaintiff and/or his nominee, rent would continue to be paid to me as the beneficial owner.”

9. That assertion is hotly disputed by the plaintiffs. They maintain that their agreement all

along, was for the purchase of all the lands comprising approximately 100 acres, for which they paid €1.225m. Their response was set out in the following way in the affidavit sworn by the first named plaintiff on 12th October, 2021:

“I say that this Deponent did meet Jeremiah O'Reilly on 10th May [2017] at Duneske House. At this meeting, Jeremiah O'Reilly raised with this deponent that he would retain some of the lands and was frustrated that he had been forced to sell all of his property. He asked that this Deponent purchase the entire of the Duneske property and lands and after the sale was complete and the bank charges removed, to transfer the SAP lands back to him. This Deponent emphatically refused to agree to such an arrangement.”

10. Later in that affidavit, the plaintiff asserted that if Mr. O'Reilly was correct in what he alleged, he had been engaged in a stratagem designed to mislead Promontoria (Finn) Ltd. He stated as follows at paragraph 32 of that affidavit:

“If Jeremiah O'Reilly is correct, then Jeremiah O'Reilly sought to mislead Promontoria (Finn) Ltd that he was selling the entirety of his lands, including the lands the subject matter of the Lease and those other lands set out in the schedule to his Plenary Summons, where in fact he had secured an arrangement whereby this Deponent would transfer those lands back to him. I say that this Deponent would not countenance engaging in such subterfuge and put our investment of €1.225 million at risk together with our family home.”

11. That is but a very brief summary of the essential dispute between the plaintiffs and Mr. O'Reilly in relation to the existence of any agreement, whereby it was allegedly agreed that the plaintiffs would hold the three parcels of land in trust for Mr. O'Reilly. Before coming to the conclusion of the court in relation to this application, it is necessary to outline in brief terms,

some of the other relevant evidence which touches upon this application.

12. Firstly, it is necessary to note that Mr. O'Reilly has instituted his own High Court proceedings against the plaintiffs in which he seeks among other things, a declaration that he is the beneficial owner of the disputed parcels of land; together with an order that the defendants (being the plaintiffs herein) transfer the legal ownership of those lands to Mr. O'Reilly; together with a claim for the sum of €75,000, and damages and other reliefs. Those proceedings were commenced by issuance of a plenary summons in April or May 2021. A full defence was filed to those proceedings on behalf of the defendants on 18th October, 2021.

13. On 11th May, 2021, an affidavit was sworn by Mr. Eamon Shields, a chartered accountant employed by Mr. O'Reilly. In that affidavit, he stated that on or about 21st December, 2016, when Mr. O'Reilly was in negotiation with the plaintiffs in relation to the sale of certain of his properties, he sent a map to the plaintiffs outlining the properties that were going to be the subject matter of the contract for sale. That map covered approximately 20 acres comprising Duneske House, the gate lodge and Snugborough. Significantly, it did not include the SAP lands, the O'Connor farmhouse, or the convent building. Mr. Shields stated that the plaintiff subsequently sent him an email thanking him for providing the map. The plaintiff did not raise any issue in relation to the absence therefrom of the disputed parcels of land.

14. Mr. Shields outlined how in order to secure release of all the charges from all the lands, an agreement had been reached whereby the plaintiffs would hold the three disputed parcels of land in trust for Mr. O'Reilly. He stated that in order to document the trust agreement, in mid-June 2017, he prepared a declaration of trust, a deed of transfer and a family home declaration, which documents were to be signed by the plaintiffs. He stated that sometime after that, Mr. O'Reilly told him that the first plaintiff did not want to sign the trust documents immediately and

wanted some time to pass following the completion of the sale to avoid queries being raised by revenue. He said that Mr. O'Reilly told him that he trusted the first plaintiff to keep his agreement.

15. Mr. Shields stated that there were a number of matters which occurred subsequent to the purported sale of the properties, which were consistent with the existence of the trust agreement. Firstly, in 2017, he took steps to arrange a viewing of the convent building for a prospective purchaser. However, that sale did not go through.

16. Mr. Shields stated that in late January and early February 2018, he prepared further documentation to effect the transfer of the properties back into Mr. O'Reilly's name. Mr. O'Reilly met the first plaintiff in February 2018, following that meeting, Mr. O'Reilly told Mr. Shields that the first plaintiff still wanted further time to pass before signing the documents. Mr. Shields further stated that he arranged for various insurance policies to be taken out in Mr. O'Reilly's name concerning the disputed properties. Mr. O'Reilly continued to insure the convent building, even though it was vacant. Mr. Shields stated that he held the keys for the O'Connor farmhouse and for the convent building in his office. He stated that no keys were ever given to the first plaintiff for these properties.

17. An affidavit was sworn by Mr. Aidan O'Brien, an architectural technician employed by Mr. O'Reilly, who stated that he had been involved in preparing maps for the sale of various properties to the plaintiffs including the sale of Duneske House, the gate lodge and Snugborough, on approximately 20 acres of land. He had a number of conversations with Mr. O'Reilly in relation to the boundary that would be fixed between those lands and the O'Connor farmhouse, which was being retained by Mr. O'Reilly.

18. Mr. O'Brien stated that he also prepared maps outlining the areas being held by the first

named plaintiff in trust for Mr. O'Reilly. Those maps were sent to Mr. O'Reilly on 29th June, 2017. Mr. O'Brien further stated that in late July 2017, he met with Mr. Billy Ryan of Ryan Fencing at the O'Connor farmhouse, to mark out the location for the erection of a fence. Mr. Ryan proceeded to erect the fence thereafter. Its purpose was to separate the O'Connor farmhouse from the land being sold to the plaintiffs.

19. Mr. O'Brien further stated that on 20th October, 2017, he forwarded a set of architect's drawings for a proposed apartment scheme in the convent building to Mr. O'Reilly, as he understood that Mr. O'Reilly had been in discussions with an interested party to sell the property. In early 2018, Mr. O'Brien prepared further sketches on layout options for that property. He stated that in or around August 2017, he was aware that a number of gates and entrances between the 20 acres of land sold to the plaintiffs and the SAP lands were blocked off, to separate the lands owned by Mr. O'Reilly. He stated that in January 2018, at the request of Mr. O'Reilly, he drew up plans for a new gate to be erected from the SAP land to a public road. He provided them to Mr. O'Reilly by email dated 16th January, 2018. He stated that in or around March 2018, the gate was constructed by a firm of contractors.

20. An affidavit was sworn by Mr. Ned Cunningham, a field manager employed by the defendant, which affidavit was sworn on 7th May, 2021. He stated that prior to the sale of Duneske House to the plaintiffs, he had maintained those lands. He stated that after the sale had been completed, the plaintiffs asked him to remain on as gardener, but he was unable to do so. However, he stated that he continued to be employed by Mr. O'Reilly to maintain the gardens around the O'Connor farmhouse. He also planted beech hedging for Mr. O'Reilly on the inside boundary fence around the O'Connor farmhouse, to separate it from the land purchased by the plaintiffs.

21. Mr. Cunningham stated that around the time the sale closed in July 2017, he met the first plaintiff, who told him that he had purchased Duneske House, the gate lodge and Snugborough, on about 20 acres of land. It was at that time that the first plaintiff asked whether Mr. Cunningham would be interested in working for him.

22. Mr. Cunningham also described an encounter that he had on 23rd February, 2018 with the first plaintiff's father, who had driven onto the SAP land in his jeep. When Mr. Cunningham challenged him and told him that he was the field manager employed by the defendant company and that he was entitled to know what Mr. Meagher's business was, Mr. Meagher told him to "fuck off" and he then drove off the SAP land.

23. Mr. Cunningham confirmed that in August 2017, Mr. O'Reilly had arranged for a number of gates and entrances between the 20 acres of land sold to the plaintiffs and the SAP land, to be blocked off to separate the lands. He stated that in or about March 2018, Mr. O'Reilly had a new gate constructed, leading from the SAP land to the public road.

24. Finally, an affidavit was sworn by Mr. Tom Walsh, a retired company director. He had known Mr. O'Reilly since they had been in university together. They had been co-founders of the defendant company. He stated that Mr. O'Reilly had told him that he had entered into a trust agreement with the plaintiffs in relation to the SAP lands. He stated that the first request for rent that was made of the defendant by the plaintiffs had been in July 2018, which was a year after they had allegedly purchased those lands.

Legal Submissions of the Parties.

25. On behalf of the plaintiffs, Mr. Fitzgerald BL stated that the plaintiff's case was very simple. They had purchased the entire lands set out in the folios, which included the lands that

were held under the lease by the defendant. It was submitted that, as the plaintiffs had been registered as full owners of the lands comprised in the relevant folios, s. 31 of the Registration of Title Act 1964, provided that their registration as full owners was conclusive evidence that they were the owners of the land.

26. In this regard, counsel relied on the decision of the Court of Appeal in *Tanager DAC v Kane* [2019] 1 IR 385. Counsel further submitted that it was established at common law that a tenant who held lands under a lease from a landlord, was estopped from denying the landlord's title.

27. Counsel stated that in this case there was no denial that the sums claimed were due as arrears of rent under the lease. As the plaintiffs had been registered as full owners of the relevant lands and as the lease had clearly been included in the Deed of Transfer and Conveyance, there was no basis on which the defendant could avoid paying the arrears of rent to the plaintiffs. It was submitted that, while Mr. O'Reilly had attempted to put forward an alleged trust agreement, which had been designed to fraudulently deprive the lending institution of the full proceeds of sale of the land in satisfaction of their debt, that was not a matter that could avail the defendant in its response to the plaintiffs' action against it for arrears of rent, as set out in these proceedings.

28. In response, Mr. Flynn BL referred to the case law which established that on an application for summary judgment, it was not necessary for a defendant to establish that he had a defence that was likely to win; it was only necessary that he establish that there was an arguable defence. Counsel stated that on an application such as this, it was inappropriate for the court to attempt to resolve on affidavit evidence disputed matters of fact; nor was it appropriate for the court to assess the credibility of various parties, or their assertions. It was submitted that the law provided that summary judgment could only be marked where it was "very clear" that the

defendant had no defence to a plaintiff's action.

29. It was submitted that having regard to the matters set out in the affidavits sworn by Mr. O'Reilly, Mr. O'Brien, Mr. Shields, and Mr. Cunningham, there was more than ample evidence to support the proposition that there had in fact been an agreement between the plaintiffs and Mr. O'Reilly, that they would hold the disputed parcels of land in trust for Mr. O'Reilly, notwithstanding their registration as full owners of those properties.

Conclusions.

30. Summary judgment procedure is only suitable when there is a clear prima facie legal entitlement on the part of the plaintiff to the sum claimed. Usually when such applications are being moved, the plaintiff has a very strong case that money is owed to him by the defendant and the real question before the court is whether the defendant has established sufficient evidence in his affidavit to cross the threshold that he has at least an arguable defence to the plaintiff's claim, such that he should be allowed to resist judgment being marked against him in a summary manner and should be allowed to have the matter remitted to plenary hearing.

31. The approach which the court should take to an application such as this, is well settled in law. The relevant test was set down by the Supreme Court as far back as 1996 in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75. In that case Murphy J., giving the judgment of the court, endorsed the following test laid down in *Banque de Paris v. DeNaray* [1984] 1 Lloyd's Law Rep 21, which had been referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank PLC v. Daniel* [1993] 1 WLR 1453:-

“The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole

situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence.”

32. The test set down in the Anglin case has been applied in a number of cases in the intervening years. The appropriate test was more recently set out in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607 in which case Hardiman J. stated as follows at page 623:-

“In my view the fundamental questions to be posed on an application such as this remain: is it ‘very clear’ that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendants affidavits fail to disclose even an arguable case?”

33. In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, McKechnie J. having analysed the relevant case law, set out a helpful summary of the relevant principles. It is not necessary to set these out in this judgment, as they are very well known. The court has had regard to all of these cases and to the principles set out in *Harrisrange* in reaching its determination herein.

34. The court has also had regard to the dicta of Moriarty J. in *Allied Irish Banks v. Killoran* [2015] IEHC 850, where he warned that the court should not accord substantive relief to defendants in summary judgment motions who raise spurious, fanciful or conjectural contentions to resist judgment. He advised that courts must be alert to defendants who seek merely to defer the evil day on the basis of arguments that do not pass muster, and must remain mindful of the de minimis rule in assessing summary judgment applications; see paragraph 56 of the judgment.

35. I am satisfied that the defendant has raised an arguable defence. That defence is based on the assertion by Mr. O'Reilly that he had a side agreement with the plaintiffs that they would hold lands, comprising the SAP lands, the O'Connor farmhouse and the convent building, in trust for him and that they would re-convey those parcels of land to him approximately one year after

the initial sale of the lands to the plaintiffs, which had occurred in July 2017.

36. That assertion is supported by the following matters: works were done to the disputed lands after the date of completion of the sale. The fact that Mr. O'Reilly, or his agents, went on to the lands and carried out those works, at Mr. O'Reilly's expense, is not consistent with the plaintiffs being the full owners of those lands. It is more consistent with the plaintiffs holding those lands in trust for Mr. O'Reilly, as the beneficial owner thereof. The fact that Mr. O'Brien drew up some architectural drawings in respect of a proposed scheme of development on the site containing the convent building, which drawings were prepared after the completion of the sale of that site to the plaintiffs, is only consistent with Mr. O'Reilly retaining some beneficial ownership in those lands and his having an intention to either carry out development thereon, or at least selling the lands with the benefit of a potential for such development. Similarly, the fact that Mr. O'Reilly continues to insure buildings on the disputed parcels of land, is indicative of his retaining a beneficial interest in those lands.

37. The fact that Mr. Cunningham is employed by Mr. O'Reilly to maintain the lands around the O'Connor farmhouse, and has continued to maintain those lands after the purported sale of the lands to the plaintiffs, is indicative of Mr. O'Reilly retaining a beneficial interest in those lands.

38. There is also the evidence contained in the second affidavit sworn by Mr. O'Reilly in relation to the valuations of the SAP lands at approximately €1.925 m in September 2017, and a valuation of the Duneske House lands from 2013, of approximately €750,000 – €800,000, which would tend to suggest that the total value of the lands was considerably in excess of the price which the plaintiffs maintain they paid for the entire holding.

39. There is also the fact that there were numerous communications between Mr. O'Reilly

and the first plaintiff and the first plaintiff's father, after the completion of the sale of the lands in July 2017; which included furnishing draft deeds of trust in respect of the disputed parcels of land; all of which is inconsistent with the position taken by the plaintiffs that they had bought the entire of the lands outright in July 2017.

40. It is also noteworthy that there was no claim for rent made by the plaintiffs of the defendant for approximately one year after the completion of the sale in July 2017. It is hard to believe that if the plaintiffs saw themselves as the beneficial owners of the SAP lands as and from that time, they would not have communicated with the tenant and requested payment of the rent much sooner.

41. Finally, there are the handwritten notes, which were allegedly made by Mr. O'Reilly at the various meetings that he had with the plaintiff, in some of which, there is reference to the trust agreement. However, given that those notes were mostly undated and were all unsigned, the court does not afford much weight to this evidence.

42. Having regard to all of these factors and to the tests that have to be applied by the court as set out in the case law referred to earlier in the judgment, the court is satisfied that it is not appropriate to grant summary judgment to the plaintiffs in the sums claimed in their notice of motion and grounding affidavit. The court is of the view that having regard to the very real disputes that exist between the plaintiffs and Mr. O'Reilly, as set out in the affidavits, it is appropriate that this matter be remitted to plenary hearing.

43. To that end, the court gives the following directions: the court will allow four weeks from 1st September, 2022 for delivery of a statement of claim by the plaintiffs; three weeks thereafter for the defendant to raise notice for particulars; three weeks thereafter for replies by the plaintiffs; three weeks thereafter for delivery of a defence on behalf of the defendant. The parties

shall have two weeks from closure of the pleadings to make any request for voluntary discovery of documents and the party receiving such a request, shall have two weeks therefrom to furnish its reply to the request.

44. On consent of the parties, the court directs that these proceedings be linked with the proceedings bearing title and record number: Jeremiah O'Reilly, Plaintiff, and Pat Meagher & Laura Meagher, Defendants, (Record No. 2021/2043P) and that the two sets of proceedings shall travel together to a hearing.

45. In accordance with the decision in *ACC Bank v Hanrahan* [2014] 1 IR 1, the court will reserve the question of costs of this application to the trial of the action.