



**THE COURT OF APPEAL
CIVIL**

Record No. 2018/00272

**Peart J.
McGovern J.
McCarthy J.
BETWEEN/**

ANGELA OMAN

**PLAINTIFF/
APPELLANT**

- AND -

JAMES OMAN, AIB PLC, STEPHEN TENNANT AND EVERYDAY FINANCE DAC

DEFENDANTS

**THE COURT OF APPEAL
CIVIL**

Record No. 2018/331

**Peart J.
McGovern J.
McCarthy J.
BETWEEN/**

ALLIED IRISH BANK PLC, STEPHEN TENNANT AND EVERYDAY FINANCE DAC

APPELLANTS

- AND -

ANGELA OMAN

1ST RESPONDENT

- AND -

MICHELLE OMAN AND FABIAN OMAN

**NOTICE PARTIES/
2ND AND 3RD RESPONDENTS**

JUDGMENT of Mr. Justice McGovern delivered on the 16th day of October 2019

1. Although these are two separate causes of action and appeals, they are inter-connected insofar as they both concern premises at 114-116, Capel Street, Dublin ("the property") and both involve Angela Oman. As the parties have different roles in each of the appeals they will be referred to by name rather than as "appellant" and "respondent". The proceedings bearing appeal number 2018/000272 shall be referred to as the "Angela Oman proceedings" and the appeal bearing record number 2018/000331 shall be referred to as the "Bank proceedings". The appeal in the Angela Oman proceedings is against an order of O'Connor J. made on the 13th June, 2018 striking out the proceedings on the grounds that there was no bona fide reason for the continued prosecution of the proceedings against the first named respondent, who is her husband, and on the grounds that the proceedings against the second and third named respondents were frivolous and/or vexatious and that Angela Oman had no bona fide cause of action.
2. In the Bank proceedings, Allied Irish Banks plc ("the bank") and Stephen Tennant ("the receiver") are appealing a stay on an order made by Stewart J. on the 6th July, 2018. In her order, she granted the bank/receiver an injunction restraining Angela Oman or any persons with notice of the order from trespassing or entering or otherwise attending the

premises known as 114/116, Capel Street, Dublin or any part thereof, and that she deliver up to the bank and receiver all keys, access codes, alarm codes on the 2nd floor of the property where she was residing. The High Court judge directed that these orders be stayed pending the determination of the Angela Oman proceedings. Angela Oman has cross-appealed against the injunctive relief ordered by Stewart J.

3. By order of the Court of Appeal made on the 21st June, 2019, Everyday Finance DAC were joined as a party to each of the appeals, having purchased the loan from the bank.

Background

4. On 1st November, 1986, Angela Oman married James Oman. On the 18th October, 1988 James Oman purchased the properties 114/116, Capel Street, Dublin and a plot of ground on Angelsea Row abutting the rear of the Capel Street premises for the sum of IR£110,000. Angela Oman claims to have contributed IR£30,000.12 towards the purchase price. The premises 114/116 were commercial premises which contained an apartment at number 115. The Oman family lived there between 1988 and 1992 at which time James Oman purchased 15, Belgrave Square, Rathmines. Thereafter, 115, Capel Street remained vacant and was not rented or otherwise used as part of the commercial enterprise carried on at the premises. It is an essential part of the case made by Angela Oman that 115, Capel Street was separate and distinct from the property described as 114/116. No evidence has been offered to the High Court or this court to show that it was treated separately either when the property was purchased or when the property was offered as security for advances made to James Oman.
5. On the 2nd March, 2004 James Oman offered the premises 114/116, Capel Street as security for a loan of €1.2m. The loan was a commercial loan. On that date James Oman completed a family home declaration that 114/116, Capel Street was not a family home and that no person other than him had any interest in the property and that neither he nor any other family member ordinarily resided in the property or any part of it. He confirmed that the family resided at 15, Belgrave Square, Rathmines and that the property was acquired as a commercial investment. His statutory declaration stated inter alia "the property is not subject to any trust, licence, tenancy or proprietary interest in favour of any person or body corporate".
6. On the 8th April, 2016 the bank (AIB) obtained judgment against James Oman for €1,622,649.75.
7. In due course, Stephen Tennant ("the receiver") was appointed receiver over the property by deed of appointment dated the 26th March, 2015. As James Oman resisted the receivership and the bank's entitlement to secure possession it was necessary for the bank to issue further proceedings seeking an order for possession of the property ("the possession proceedings").
8. The possession proceedings were listed for plenary hearing on the 21st November, 2017. James Oman was represented by solicitor and counsel. After the case had been opened to the trial judge (O'Connor J.), a settlement was reached between the parties in which

James Oman consented to an order for possession in favour of the bank and the receiver. It was agreed that the order for possession be stayed until the 1st June, 2018. On the 15th October, 2017, shortly before the hearing of the possession proceedings, Angela Oman wrote to the bank's solicitors referring to the proceedings and stating her intention to initiate legal proceedings with regard to establishing an alleged interest in the property. This was the first time she had disclosed any purported interest in the property. The bank's solicitors advised her by return that the possession proceedings would proceed to hearing on the 21st November, 2017, the hearing date having been fixed in July of that year. Angela Oman did not initiate any proceedings at that time and did not attend court on the day of the hearing or make any representations in respect of an alleged interest in the property.

9. At the hearing, James Oman confirmed that his family members were aware of the proceedings and the court order records the fact that his family members were on notice of the existence of the possession proceedings.
10. It is important to note that in the mortgage deed of the 2nd March, 2004, the property offered as security is described as "114/116, Capel Street in the City of Dublin". There is no separate designation for the apartment at 115, Capel Street. Likewise, the letter of sanction of loan refers to the purchase of 114/116, Capel Street without differentiation in respect of 115, Capel Street. The property is similarly described in the declaration by James Oman that it is not a family home within the meaning of Family Home Protection Act, 1976 (as amended) and in the deed of appointment of the receiver the property charged is described in the same manner.

Discussion

11. In order to properly consider these appeals one must have regard to the nature and extent of the litigation which has already taken place concerning the premises in issue, the judgment debt which has been pronounced against James Oman and the security offered by the mortgage of the 2nd March, 2004. Other relevant issues are: the extent of the knowledge of Angela Oman of the possession proceedings which were settled by her husband and whether the Family Home Protection Act applied to the property secured by that mortgage. While there has been some reference of a general nature to certain proceedings, the following is a more detailed account of the proceedings which have taken place to date including the matters under appeal.
12. In High Court proceedings, 2014 record number 1932S, the bank (AIB) obtained judgment against James Oman for €1,622,649.75 on the 8th April, 2016. An appeal by James Oman against that order was dismissed by the Court of Appeal on the 6th November, 2017.
13. A receiver was appointed over the property and as James Oman resisted the receivership process the bank brought possession proceedings, High Court record number 2016/1618P. These were listed for plenary hearing on the 21st November, 2017 and a settlement was reached whereby James Oman consented to an order for possession in favour of the bank (AIB) and the receiver. There was a stay on the order for possession

until the 1st June, 2018. Angela Oman and the members of the Oman family were aware of those proceedings for the reasons set out at paras. 8 and 9 above.

14. By High Court proceedings, record number 2018/1997P James Oman sought a declaration that the Deed of Mortgage was void, invalid and without legal effect notwithstanding the settlement of the possession proceedings. The statement of claim delivered by him in those proceedings included a plea that "the residential quarter has at all material times been the family home of the plaintiff. The plaintiff's spouse is in the process of issuing proceedings claiming 50% share in the ownership of the family home, i.e. the residential quarter". The "residential quarter" referred to is an apartment at 115 within the premises 114/116, Capel Street. This plea is irreconcilable with the family home declaration dated the 2nd March, 2004 and seeks to repudiate it. The proceedings were struck out by Baker J. as an abuse of process and being bound to fail.
15. The Angela Oman proceedings were commenced on the 11th May, 2018, High Court Record Number 2018/4180P and were struck out by O'Connor J. in an *ex tempore* judgment delivered on the 13th June, 2018. This has been appealed by Angela Oman and forms one of the two appeals for the court's consideration.
16. On the 25th July, 2018, James Oman commenced proceedings against AIB, High Court record number 2018/6806P, in which he claims damages for breach of contract in denying the plaintiff an opportunity to fully and properly defend summary judgment proceedings and causing the plaintiff to be overcharged by deliberately obscuring information from him. These proceedings were struck out by Barrett J. on the 13th May, 2019 as an abuse of process and have been appealed by James Oman.
17. Finally, there are proceedings taken by the bank and the receiver against Angela Oman, 2018/5837P, in which Stewart J. made an order on the 6th July, 2018 requiring Angela Oman to vacate the premises known as 114/116, Capel Street with a stay on the order pending the outcome of the appeal against the decision of O'Connor J. The bank and receiver have appealed the granting of a stay and that is the other appeal before this court.
18. There can be no doubt that the judgment sum of 1,622,649.75 against James Oman is *res judicata*, his appeal against the judgment having been dismissed in November, 2017 by the Court of Appeal. There can also be no doubt that Angela Oman knew of the possession proceedings and despite being on notice of them took no steps to intervene in the proceedings. In the Bank proceedings Angela Oman argues that she was never served with the possession proceedings as required under Ord. 9, r.9 of the Rules of the Superior Courts which provides:-

"In other actions for the recovery of land, it shall be necessary to serve every person in actual possession, or in receipt of the rents and profits, of the lands or any part thereof, unless the Court shall otherwise direct."

19. At the time that the proceedings were issued the bank had no reason to believe that Angela Oman or any other member of the Oman family had an interest in the property. At the time of the creation of the mortgage over the property James Oman made a family home declaration in which he stated "the property is not subject to any trust, licence, tenancy or proprietary interest in favour of any person or body corporate". It is not in dispute that at the time when the mortgage was created the family home was at 15, Belgrave Square, Rathmines. There was nothing to put the bank on enquiry that Angela Oman should be served with the proceedings.
20. The purpose of O. 9, r. 9 of the RSC is to ensure that persons in actual possession of a property and who may wish to claim an interest in the premises or be otherwise heard by the court on an application for an order for possession, are made aware of the proceedings. The fact that the rule concludes with the words "...unless the Court shall otherwise direct" suggest that the court is given a discretion as to whether or not to dispense with the requirement. However, in the course of the possession proceedings it was brought to the attention of the trial judge that Angela Oman had written to the bank's solicitors referring to the proceedings and stating her intention to initiate legal proceedings in respect of an alleged interest. She was informed more than a month before the hearing of the date that had been fixed, demonstrating that she knew of the possession proceedings. While I do not accept there was any reason for the bank to consider that she should have been served with the proceedings any frailty created by non-service in accordance with Ord. 9, r.9 RSC was cured by the fact that she was put on notice of the proceedings and chose not to take part. Furthermore, as already pointed out at para. 8 James Oman confirmed that she and other family members were on notice of the proceedings.
21. Angela Oman was unable to demonstrate in the High Court that the bank was on actual notice of the existence of any equitable interest held by her in the property even if the bank was aware that she paid money into her husband's account for two years prior to 1988. The bank was entitled to rely on the statutory declaration made by James Oman to the effect that the property was not subject to any trust, licence, tenancy or proprietary interest in favour of any person or body corporate. It would certainly have been clear to the bank that the premises were not a family home at the time when the statutory declaration was made and the deed of mortgage was executed. In *Re Jeffel* [2012] IEHC 279 Gilligan J. held that a mortgagee is not bound to inspect a property on which he is taking a mortgage and is entitled to rely on the statutory declaration of the borrower.
22. In *Hickey v. O'Dwyer* [2005] IEHC 365 Laffoy J. said:-

"The basis on which a court will decide that a wife is entitled to an equitable interest in a property in the sole name of her husband on the basis of a contribution of money to the purchase or on the basis of a contribution, either directly or indirectly, towards repayment of the mortgage instalments is subject to the overriding requirement that such a decision will be made only "in the absence of

evidence of some inconsistent agreement or arrangement” per Finlay J. in *W. v. W.* at p. 204”.

23. In the cases under appeal there is the clearest inconsistent evidence rebutting the existence of an equitable interest of Angela Oman. This is to be found in the family home declaration made by James Oman.
24. No legal authority was cited by Angela Oman to suggest that any beneficial interest claimed by her would take priority over the deed of mortgage. Nor did she suggest that there were any enquiries which the bank ought reasonably to have made at the date of creation of the mortgage which would have revealed the existence of her alleged equitable interest.

The Angela Oman proceedings

25. The court’s jurisdiction to strike out proceedings on an interlocutory motion for being frivolous or vexatious should be exercised sparingly. In *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 at 428-429 McCarthy J. said:-

“Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought. Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture.”

26. In *Salthill Properties Limited v. Royal Bank of Scotland* [2009] IEHC 207 Clarke J. observed that there have been many cases where crucial evidence allowing a plaintiff to succeed only emerged in the course of the proceedings. While this is true and the courts must always proceed with caution on such applications, the present appeal can be distinguished from many of the authorities simply because the facts have already been canvassed before the courts in the many proceedings already referred to in this judgment. The court is also entitled to have regard to the fact that the possession proceedings were settled by James Oman having informed the court that all his family members were aware of those proceedings and in circumstances where there can be no doubt that Angela Oman was aware of the proceedings.
27. There are other unusual features about this appeal. On the 30th May, 2019 the appellant served three supplemental affidavits in support of her appeal in the bank proceedings without seeking leave from the court to do so. In running both these appeals Angela Oman has sought to raise, for the first time, matters which could have been raised earlier and in particular a contention that somehow the second floor premises at 115, Capel Street are separate and in some way distinct from the property 114/116 which has been the subject of a consent possession order. Even when the appeals were listed for case management no reference was made to the admission of new evidence.
28. While the court is prepared to allow the new affidavits to be opened *de bene esse* I am quite satisfied that they are not admissible in aid of the appeal of Angela Oman for two

reasons. In the first place they do not constitute “new evidence”. Secondly, they raise arguments that could and should have been raised before now and their admission at this stage would offend against the rule in *Henderson v. Henderson* (1843) 3 Hare 100.

29. While the courts must exercise caution before striking out proceedings in limine the court has power to strike out proceedings where necessary and where there is an abuse of process. In *Sweeney v. Bus Átha Cliath* [2004] 1 I.R. 576 O’Neill J. said at 584:-

“This court cannot confine itself to the simple application of the traditional rules as to issue estoppel. In my view, it is also necessary to consider whether or not the continuance of the proceedings, sought to be precluded, would amount to an abuse of the process of the courts and whether the court should invoke its inherent jurisdiction to strike out those proceedings as being an abuse of process.”

30. In *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1 at 31, Lord Bingham considered the rule in *Henderson v. Henderson* as being an aspect of the doctrine of abuse of court process when he said:-

“*Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same; that there should be finality in litigation and that a party should not be twice vexed in the same matter. The public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party, is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.”

31. In *A.A. v. Medical Council* [2003] 4 I.R. 302 Hardiman J. expressed the view that public policy required that a defendant should not be oppressed by excessive suits where one would do.
32. Even a cursory reading of the various proceedings taken by the Omans against the bank and the receiver in relation to the property at 114/116, Capel Street indicates a stubborn refusal to accept the consequences of the judgment of €1.6m. and the order for possession of the property on foot of a settlement between the bank and receiver on the one hand and James Oman on the other. It is clear that Angela Oman, in maintaining the proceedings against her husband and the bank and receiver, is seeking to mount a collateral attack on an earlier order for possession made by O'Connor J. She was fully aware of those proceedings. At para. 4 of the judgment of O'Connor J. he stated:-

"The plaintiff did not deny that she knew those proceedings were going ahead and she does not deny her knowledge of the terms of the consent order made thereafter. Moreover, the first named defendant [James Oman] in open court, having formally sworn to tell the truth, confirmed that his family members were on notice of those proceedings and he did not inform the Court that the plaintiff here did not understand that she did not have a role or interest in the outcome."
33. The proceedings by Angela Oman seek to impugn the deed of mortgage in circumstances where a similar attack by James Oman has already been condemned as an abuse of process by Baker J. in High Court Proceedings record number 2018/1997P. In doing so, the appellant has sought to introduce new claims which were never previously advanced namely that the security created by the deed of mortgage over 114/116, Capel Street does not include the second floor premises at 115, Capel Street.
34. In a period of approximately thirteen years since the deed of mortgage was executed Angela Oman made no claim for a beneficial interest in the property. Furthermore, the statutory declaration sworn by James Oman at the time of execution of the deed of mortgage expressly contradicts her claim to a beneficial interest in the property.
35. A period of over five months elapsed after the order for possession without any communication from Angela Oman and she only issued her proceedings just before the expiration of the stay on the order for possession.
36. The court is also entitled to have regard to the fact that James Oman issued parallel proceedings (struck out by Baker J. as an abuse of process) which were also designed to attack and defeat the final order of possession made by O'Connor J. notwithstanding the fact that James Oman consented to that judgment.
37. Angela Oman sought to advance a further claim raised just before the hearing of the appeal and not previously advanced, suggesting that a bank official was aware of information, fixing the bank with actual notice of her beneficial interest. That she never made such a claim before then makes the claim incredible and also abusive and vexatious.

38. In the course of his judgment O'Connor J. referred to para. 14 of a replying affidavit sworn on the 8th June, 2018 by Angela Oman that although she was aware of what was going to happen in the possession proceedings on the 21st November, 2017 she averred:-

"I was never named as defendant in the proceedings. I did not believe or understand that I had any role in them."

39. The High Court judge said that this averment:-

"can best be described as cautiously cute but could also be characterised as disingenuous or misleading because she gave no basis for the belief or understanding."

I entirely agree with the High Court judge's comment in that regard.

40. The High Court judge referred to *Barry v. Buckley* [1981] I.R. 306 and *Salthill Properties v. Bank of Scotland* [2009] IEHC 207 as representing the law relating to striking out proceedings under Ord. 19, r.28 of the RSC. He held that Angela Oman could have no interest recognisable or enforceable as against the interests of the bank and the receiver. He stated at para. 15:-

"At the time of the mortgage in 2004 she was residing with her husband and family in Belgrave Square, Rathmines and she never notified AIB of her purported acquisition of a family home interest in any part of the premises, at least prior to her letter of 15th October, 2017, which was in advance of the hearing on 21st November, 2017. At that time, she merely told the solicitors for the defendants that the High Court proceedings would be issued immediately."

41. He went on to refer to the consent order made against her husband (with a stay on same) and that she did not plead ignorance of that. He concluded that Angela Oman had not established, even at the height of the facts advanced, that she had an equitable interest which could defeat the bank's rights as finally incorporated in the order for possession. He concluded that the plaintiff did not have an arguable case and that even if she had it would be defeated by a plea of acquiescence and delay. I agree with those findings of the trial judge and there was ample evidence to support them.

42. When one looks at the other proceedings which have been referred to in this judgment and the surrounding facts, one is driven inexorably to the conclusion that these proceedings are a collateral attack on the order for possession of the property and are a clear abuse of process. In my view, the trial judge was correct in his conclusions that the plaintiff does not have an arguable case and that even if she did it would be defeated by a plea of acquiescence and delay.

43. The judgment of the High Court judge is based on a finding that Angela Oman does not have an arguable case. He does not appear to have approached the matter on the basis of abuse of process. The respondents' grounds of opposition to the notice of appeal do

not seek to cross-appeal in relation to the failure of the High Court judge to make a finding based on abuse of process. While it cannot therefore be a basis for this court reaching a conclusion on the appeal I should make it clear that if there had been a cross-appeal on that basis I would have unhesitatingly found that the Angela Oman proceedings do constitute an abuse of process.

44. I would dismiss the appeal.

The Bank proceedings

45. Counsel for the bank and the receiver argue that if this court upholds the judgment of O'Connor J. then it is difficult to see how the stay allowed by Stewart J. in the bank proceedings can stand. The court was referred to *In the Matter of Lobar Limited and in the Matter of the Companies Act 2014* [2018] IECA 129 where the Court of Appeal considered the principles applicable to an application for a stay pending appeal. At para. 15 Irvine J. summarised the position as follows:-

"The aforementioned authorities make clear that the court is bound to engage in what is often described as a two-stage test. First, the applicant must demonstrate that they [sic] have an arguable ground of appeal and is one which is bona fide rather than tactical. If the court is not satisfied that the appellant has demonstrated an arguable ground of appeal, that is the end of the stay application."

46. In the Angela Oman appeal, I have taken the view that the High Court judge was correct in concluding that she had no arguable cause of action. So on the basis of *Lobar Limited* it seems to me that the High Court judge (Stewart J.) should not have granted a stay.

47. I am also satisfied that the High Court judge failed to correctly analyse the issue of prejudice. I accept the submission of the bank and the receiver that the imposition of the stay rendered the injunction devoid of any practical effect and gave rise to a significant prejudice to the bank and receiver as it prevented them from exercising their right to possession of the premises.

48. The Digital Audio Recording ("DAR") records the curial part of the court's determination as follows:-

"...In the light of the convoluted and complex background to this matter, and the fact that the appeal is pending, I propose to place a stay on the coming into force of that injunction pending the resolution of the appeal before the Court of Appeal...but I think that the interest of justice and the balance of convenience in this case actually warrants, in order to do fairness to all parties and I don't see any great prejudice to the receiver in staying the implementation of the injunction pending the resolution of the appeal pending before the Court of Appeal."

49. In my view there was significant prejudice to the bank and the receiver by allowing a stay, having regard to the particular circumstances and the background facts attending this litigation.

50. But since the stay was to last until the determination of the appeal in the Angela Oman proceedings and since I have concluded that her appeal should be dismissed it follows that the stay lapses in any event.
51. Nevertheless, I would hold that the High Court judge was in error in imposing a stay on the basis that there were insufficient reasons given for doing so, and there was no arguable ground of appeal. The High Court judge did not address her mind to that issue. While she did say that she did not see any great prejudice to the bank and the receiver in staying the implementation of the injunction until the resolution of the appeal in the other proceedings she did not state why she took that view.
52. I would allow the appeal of the bank and the receiver. I would also dismiss the cross-appeal of Angela Oman against the granting an injunction.