

# THE HIGH COURT

[2024] IEHC 294

[Record No. 2022/4351P]

BETWEEN

JAMES OSBOURNE

PLAINTIFF

AND

GOREY BUSINESS PARK (RAMSTOWN) LIMITED

DEFENDANT

**Ex tempe JUDGMENT of Mr Justice Nolan delivered on the 14<sup>th</sup> day of May 2024**

## **Introduction**

1. This is an application brought by the Defendant to strike out the Plaintiff's proceedings on the grounds that they disclose no reasonable cause of action and are frivolous and vexatious and bound to fail. Thereafter, the Defendant seeks an order vacating the *lis pendens* registered by the Plaintiff on Folio 62501 F County Wexford.
2. The Defendant also seeks an Issac Wunder order prohibiting the Plaintiff issuing any further proceedings in relation to this matter.

## **Background**

3. The background to these proceedings are complicated to say the least. Between the years of 2002 and 2009 the Plaintiff borrowed sums of in excess of €7 million from IIB Bank which became KBC bank. He used the money to finance construction and development at Gorey Business Park and to refinance his existing commercial borrowings. The lands at Gorey Business Park used to be part of the old Gorey Workhouse and then became the Fever Hospital.

4. From September of 2015 onwards, the Plaintiff instituted a series of actions, a chronology of which is set out in the Grounding Affidavit. In total there have been 19 attempts to appeal, set aside, stay the enforcement of, or otherwise indirectly challenge or undermine a summary judgment which was marked against the Plaintiff in the sum of €6,217,162.27 on the 15<sup>th</sup> of December 2015. The most imaginative of these was a case taken against KBC for, among other things, “*reckless lending*”.

5. On foot of the judgment obtained, KBC appointed a Receiver, Mr. Ken Tyrell, over the lands, which were secured by way of a mortgage registered on the 25<sup>th</sup> of February 2003. The lands themselves comprised a registered portion of land, Folio 14039 F and an unregistered portion, which itself has since been registered and now comprises Folio 62501 F. It is these lands that this litigation is concerned with.

6. The Receiver sold the lands to the Defendant on the 28<sup>th</sup> of February 2018 and on the 21<sup>st</sup> of March 2022, the Defendant was registered as full owner and crucially a charge that had been formally registered in favour of KBC, was cancelled on the same date, thereby indicating that as far as KBC was concerned their interest was at an end.

7. On the 27<sup>th</sup> of September 2022, the Defendant’s lender was informed by the Property Registration Authority that the Plaintiff had applied to register a *lis pendens* over the lands.

## **The Litigation**

8. The Plaintiff, acting as a personal litigant, issued a plenary summons seeking damages for negligent registration, trespass and unlawful interference with and damage to what he described as “*the Plaintiff’s property*”, namely Folio 62501 F. He also sought an injunction preventing the sale of that folio.

9. The Statement of Claim, delivered in April of 2023, alleged that the Defendant was a purchaser or transferee not for value. This seems to have been on the basis of an allegation that Sean Doyle, the deponent of the Defendant’s affidavits, and a director of the Defendant, had in the past, acted as an intermediary between the Plaintiff and his bank when his difficulties arose and that he had commercial information in relation to the Plaintiff’s business, the extent of his indebtedness and the fact that the Plaintiff had authorized him to communicate and deal with the receiver in relation to his lands.

10. The Plaintiff alleges that the sale which took place between the receiver and DAB Property Investments Limited, a company owned by Mr. Doyle, on the 28<sup>th</sup> of February 2018, only related to part of the lands mortgaged and that the sale wrongly included lands that had been excluded from the ambit of the mortgage. The Plaintiff says that Mr. Doyle knew the extent of the mortgage premises due to his engagement as his agent. This is confirmed by Mr. Gibbons SC for the plaintiff.

11. Therefore, the Plaintiff has two grounds to his case. The first is that the unregistered portion of land, which now forms part of Folio 62501 F, was not part of the original mortgage. The second is that Mr. Doyle, due to his engagement with the Plaintiff, was well aware of the alleged deficiencies of the map and therefore when his company purchased the property, they purchased it knowing of these alleged deficiencies.

12. The Defendant says that the sale took place appropriately and that the chain of title is clear and unambiguous and that the unregistered lands now forming part of Folio 62501 F, was

lawfully conveyed and therefore the registration of the property is perfectly in order. Mr. Doyle also sets out, in his affidavit, some background in regard to the other cases the Plaintiff has brought.

13. In reply, the Plaintiff says that the history of the difficulties he had with the bank is not relevant since those proceedings have now been settled. He questions why this application was brought before the Statement of Claim was delivered. He summarizes his case as being “*a rather basic issue of title as to whether the land secured by the mortgage fall within the confines of the title offered*”. He says this litigation is an entirely different matter and has nothing whatsoever to do with previous litigation. On that basis, he says that there are serious issues to be determined and that the case could not be described as being frivolous, vexatious or bound to fail and should be allowed go to trial. Whilst replying affidavits were filed by both parties, they does not change the issues.

14. It is important to note that this is not the first time that the Plaintiff has utilized the instrument of a *lis penden*, in an attempt to frustrate an imminent sale. O'Moore J. delivered two decisions on the matter last year.

### **The Decisions of O'Moore J.**

15. The background to these decisions is in many ways quite remarkable. On the 30<sup>th</sup> of October 2020, the Plaintiff sought an order removing the obligations of an undertaking provided by him, in court, in lieu of an Isaac Wunder order. He then sought liberty to issue proceedings, which he exhibited. In his decision of the 30<sup>th</sup> of May 2022, O'Moore J. noted that the Plaintiff's case was that an undertaking given to McGovern J. in April 2018, had been given without his authority. This gave rise to a most unusual situation where his then counsel was obliged to swear an affidavit stating that he had instructions from the Plaintiff to give the

undertaking. The judge was then forced to decide between the Plaintiff and his counsel. He preferred the views of his counsel.

16. This was followed up by a more detailed judgement delivered on the 20<sup>th</sup> of December 2023. O'Moore J. noted that the Plaintiff's then counsel had been requested by the plaintiff's solicitor to remove his account of how the Isaac Wunder undertaking had been given. Had he agreed, a crucial paragraph included in the judgment would have been deleted. Both the plaintiff and his counsel were subjected to cross examination. O'Moore J. was not impressed by the evidence of the plaintiff. He described some of the evidence as being "*quite incredible*". The plaintiff had said that he honestly did not know the significance of an undertaking. The judge's response was that he did not accept this "*as remotely honest evidence*".

17. Having refused the application to allow the plaintiff be released from his undertakings, an undertaking which is still in place, he turned to the proceedings which the plaintiff sought permission to issue.

18. Those proceedings were against KBC, JC Hogan and Company (as agents for KBC), Mr. Tyrrell, the receiver and Sean Doyle, to whom the lands were sold. That is the same Mr. Doyle and part of the same lands as features in this case. One of the issues raised was an argument based on the map attached to the mortgage entered into by the plaintiff, the same map as in this case. The judge said as follows:

*"The third issue in the intended action is an argument based on the map attached to the mortgage entered into by Mr. Osborne. As is the case in respect of all matters which Mr. Osborne wants to advance in these proceedings, it is accepted by his counsel that this could have been raised in earlier proceedings....."*

*The property involved in this third issue was sold to Mr. Doyle by Mr. Tyrrell in 2018. Mr. Tyrrell was then discharged as receiver. The mortgage, to which the disputed map was attached, was executed by Mr. Osborne in 2003. This issue could and should have been agitated in earlier*

*proceedings. Allowing it to be the subject of new proceedings would facilitate the very sort of vexatious and oppressive litigation warned against by Lord Bingham in Airey v Attorney General of Granada, as cited with approval by Hardiman J. in AA. I will therefore not allow proceedings to be issued on this ground”.*

### **Issuing proceedings in breach of an Isaac Wunder order**

19. Mr. Hayden SC on behalf of the Defendant urges the court to dismiss these proceedings on the basis that they were issued in breach of the Isaac Wunder type undertaking. However, Mr. Gibbons SC for the Plaintiff says that those proceedings are now settled and that the court order made on the 21<sup>st</sup> of December 2023, simply noted that the motion was dismissed.

20. However, that is to ignore the judgment of O’Moore J. delivered the day before. To ask this court not to have regard to a judgement of the High Court, on exactly the same subject matter, is remarkable and I reject that submission entirely. That judgment remains in place as does the undertaking given to McGovern J. The fact the case may have been settled as between those parties does not remove the Plaintiff’s obligation to abide by his undertaking to seek the Court’s permission before issuing proceedings. That is the whole point of the Isaac Wunder order procedure.

21. The second reason given is that this case does not involve the same parties as the Isaac Wunder type undertaking. Given that the plaintiff gave evidence that he didn’t understand what an undertaking was, something which was disbelieved by O’Moore J., it is hard to take this argument seriously. However, that submission cannot be correct in circumstances where the proceedings that O’Moore J prohibited from being issued related to part of the same lands, the same map and the same Sean Doyle.

22. Nonetheless, I asked Mr. Hayden to proceed with the rest of his application.

23. The Defendant's case is simple. There was nothing wrong with the conveyance. The maps which were attached to the conveyance and lodged in the Land Registry are in order. In particular, he points to the fact that the map lodged was part of the original mortgage deed and was confirmed in correspondence from the Plaintiff's then solicitors, M T O'Donoghue and Co, in their letter of the 10<sup>th</sup> of December 2002.

24. Mr. Gibbons says that if you look at other correspondence, there are a number of other maps which show that what was part of the original mortgage were only the properties on the unregistered land excluding the common areas. In particular, he relies upon a map which first appears in his affidavit at exhibit "JO8". The copy map exhibited is unreadable and therefore, I permitted a more detailed copy to be handed into court. It contains some markings, which on closer examination, seems to be the handwritten notes of one Ian Roberts, a design and planning consultant. The note is dated the 17<sup>th</sup> of February 2003 and reads as follows:-

*"The map attached, dated 10th of December 2002, was furnished to me by Jim Osborne on the 17th of February 2003, and to correspondence of same instance, I wish to note the following: I have marked a layout map as an addendum to the map which was furnished to me. The layout is only for reference and clarity purposes as original map's scale does not allow for this".*

25. He then went on to make a number of comments including that the area marked yellow were common areas and "excluded".

26. There are four different dates on it and therefore the genesis of the document is entirely unknown. Taking it on face value, all that can be said is that it seems to be a map given to Mr. Redmond by the Plaintiff on the 17<sup>th</sup> of February, 2003.

27. How Mr. Redmond is able to assert that the area marked in yellow are common areas and therefore, were excluded from the mortgage, is impossible to say. There is no affidavit from Mr. Redmond which could explain his note. At best it is some form of hearsay assertion,

probably based upon what the Plaintiff told him. Either way I find that it has no evidential value; good, bad or indifferent.

28. The map is dated the 8<sup>th</sup> of December 1999 and is entitled “*site lay additional car parking*”. It would seem to have been produced for planning permission purposes since there are two date stamps from Wexford Co Co. planning section, one dated the 5<sup>th</sup> of April 2000 and the other the 13<sup>th</sup> of April 2000. The case the plaintiff now seeks to make is that this map was prepared following correspondence from the Plaintiff’s then solicitor and may have been relied upon to prepare a valuation document prepared by CBRE, dated the 4<sup>th</sup> of February 2003. Therefore, it might show what was part of the mortgaged property and that the common areas were excluded.

29. I do not accept this argument for a moment. It would be bizarre, to say the least, that a financial institution would accept security for the buildings on land, but not the land around the buildings or as described the common areas, unless specify so designated. However, here it is clear that the mortgage was granted over the entirety of the lands as shown in the map which was registered in the Land Registry.

30. Mr. Gibbons goes on to say that what is described as the mortgaged property is delineated by the letter “A”, but that the map registered in the Land Registry does not have any letters “A”. That is to ignore the fact that the original conveyance registered in the Registry of Deeds has a map with the letter “A” written on it.

31. If further evidence was required, and I believe it is not, it is clear from the description of the lands in the mortgage deed, that the lands related to part of the lands formerly known as Gorey Workhouse. The map that was registered in the Land Registry has a building marked as “*Fever Hospital*”. The Fever hospital was in the past, the Workhouse.

32. Therefore, it seems to me abundantly clear that the argument being put forward by the Plaintiff, that there is some deficiency in the map, has no merit whatsoever. There was no



deficiency with the map, and I so find. The map registered with the Land Registry is clear, unequivocal and unambiguous.

33. Mr. Hayden says that it was open to the Plaintiff to have brought proceedings at any time after the sale in 2018. Mr. Gibbons says that the reason this wasn't done was because the Plaintiff was a personal litigant. That does not bear any analysis given, as the chronology in the affidavit shows, the Plaintiff was engaged in very significant litigation throughout 2016 right up to 2019. Further, as the O'Moore J. noted, the very issue which the Plaintiff is now seeking to litigate, was the very issue he was prohibited from litigating, namely *“an argument based on the map attached to the mortgage entered into by Mr. Osborne”*.

#### **Registered title**

34. The provisions of Section 31(1) of the 1964 Act make the entry on the Register conclusive evidence of title, subject to the jurisdiction of the court to direct the rectification of the Register on the ground of actual fraud or mistake.

*“31 (1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just....”*

35. In *Tanager DAC V Keohan* [2018] IECA 352 Baker J. said

*“The first observation to be made with regard to the power of rectification is that the jurisdiction is limited to rectification in the case of actual fraud or mistake, and s. 31(1) of the 1964 Act expressly excludes from the power of rectification any argument that might derive*

*from the knowledge of the registered owner of any “deed, document, or matter relating to the land”. The purpose of that restrictive power is to remove from registered title the vexed question of express or implied notice of any equities that might affect the ownership of land, precisely the type of issue that made and continues to make the conveyancing of unregistered land complex and, at times, uncertain”.*

36. She went on to note that Rule 7 of the Land Registration Rules provided the mechanism for such applications. No such application has been brought and these proceedings are not such an application. Ironically those proceedings would be against the very parties the Plaintiff has undertaken not to sue without leave of the Court.

37. Therefore, even if I am mistaken in my analysis above, the register remains conclusive, unless the Plaintiff can prove fraud or mistake. That is not the Plaintiff’s case. There has been no fraud on the part of the Defendant nor has there been any mistake and I so find.

38. It seems to me that that is the end of the case since the second limb, that by virtue of the fact that Mr. Doyle acted as an agent or advisor to the Plaintiff and therefore came to the purchase with his knowledge of the alleged defective map, falls away since I have found that the map is not defective. Therefore, I found no merit whatsoever in the criticisms leveled against Mr. Doyle. They do not form part of the proceedings and therefore they can only be, at best, a supportive argument to a point which is already lost.

### **Application to Strike Out – Legal Principles**

39. The law is very clear on this issue, (see, for example, *Barry v Buckley* [1981] IR 306, *Salthill Properties Limited v Royal Bank of Scotland PLC* [2009] IEHC 207, *Lopes v Minister for Justice, Equality and Law Reform* [2014] IESC 21; [2014] 2 IR 30, *Clarington Developments Limited v HCC International Insurance Company PLC* [2019] IEHC 630,

*Kearney v Bank of Scotland* [2020] IECA 92) and it is unnecessary to conduct a full review of the authorities.

40. Dignam J. in *Towey & Anor v The Government of Ireland and others* [2022] IEHC 559 said:-

*“ In addition to these principles, the jurisdiction, whether under the Rules or the court’s inherent jurisdiction, is subject to a number of overarching principles: first, it is a jurisdiction to be exercised sparingly, given that it relates to the constitutional right of access to the courts; second, the onus is on the moving party to establish that the pleadings do not disclose a reasonable cause of action or that the case is bound to fail or that it is an abuse of process and the threshold to be met is a high one; third, the Court must take the plaintiff’s claim at its high-water mark; fourth, the Court must be satisfied not just that the plaintiff will not succeed but cannot succeed; and fifth, the Court must be satisfied that the plaintiff’s case would not be improved by an appropriate amendment to the pleadings or through the utilisation of pre-trial procedures such as discovery or by the evidence at trial (see *Keary v The Property Registration Authority of Ireland* [2022] IEHC, *Scanlan v Gilligan & ors* [2021] IEHC 825, *Irish Bank Resolution Corporation v Purcell & Ors* [2016]2 IR 83)”*.

41. In *McHugh V the Minister for the Environment* [2024] IEHC 41 I said as follows:-

*“In relation to the court’s jurisdiction to dismiss pursuant to Order 19 and its inherent jurisdiction to strike out proceedings where there is no possibility of success, it seems to me that the law is clear. (See *Ruby Property Company Ltd v. Kilty* [1999] IEHC 50 and *Salthill Properties Ltd v. Royal Bank of Scotland* [2009] IEHC 207). In *Keohane v. Hynes* [2014] IESC 66, Clarke J. (as he then was) said as follows:- “The function of the court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontrovertible evidence as the Defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out.*

*There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself.”*

42. I find that they should not have been issued without the permission of the High Court. The Plaintiff knew that O'Moore J. had prohibited him from raising the very issues he raises in these proceedings, relating to the same subject matter, the same map and the same person, namely Mr. Doyle, the director of the Defendant company. I can only assume that he issued them for the purposes of attempting to stymie the activities of Mr. Doyle and his companies. I find that these proceedings cannot be saved by any further amendment. I find that they are an attempt to circumvent the undertaking which he gave and then tried, unsuccessfully, to resile from. Therefore, they should never have been issued in the first place.

43. Either way, the proceedings are clearly frivolous and vexatious, no matter how you define the term. As O'Moore J. said *“The issue could and should have been agitated in earlier proceedings. Allowing it to be the subject of new proceedings would facilitate the very sort of vexatious and oppressive litigation warned against by Lord Bingham in Airey v Attorney General of Granada,”*.

44. The Register is conclusive. These lands are not his and have not been for some time. He is not entitled to any injunction or damages of any description. The proceedings are bound to fail.

45. In those circumstances I have no difficulty whatsoever striking out the proceedings on the grounds that they disclose no reasonable cause of action and are frivolous and vexatious and bound to fail. Further I shall make an order vacating the *lis pendens* registered by the Plaintiff in respect of these proceedings.

46. The final issue relates to the granting of an Isaac Wunder order. I asked Mr. Gibbons to address me specifically on that issue and having adopted my own observations in relation to

the constitutional access which the citizens have to the courts, he said that there was no history of proceedings between the Plaintiff and Mr. Doyle.

47. Given that the Plaintiff has already an undertaking in place, as found by O'Moore J., I invite him to give an undertaking in the same terms relating to Mr. Doyle and his companies and the lands. I shall adjourn the matter so that he can consider his position.