THE HIGH COURT

[2017 No. 7402 P.]

BETWEEN

TOM KAVANAGH

PLAINTIFF

AND

JOSEPH WALSH

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 16th day of February, 2018

1. The plaintiff acting as receiver claiming to have been appointed by Ennis Property Finance Limited, now Ennis Property Finance DAC ("Ennis"), has sought injunctive relief and an order for possession of certain properties in Co. Kerry owned by the defendant. A number of issues arose for consideration in the course of the hearing of the motion but this judgment deals with one question concerning the validity of the deed or instrument of appointment of the plaintiff as receiver in regard to which Mr. Walsh argues that there exists a material defect in the attestation clause.

2. Rulings have been given regarding the other arguments raised by the defendant in opposing the injunction following oral submissions, but having regard to the importance of the matter raised by Mr. Walsh regarding the attestation clause, I invited further submissions from the parties to deal with that question only.

3. Mr. Kavanagh was appointed receiver by Ennis by two deeds of appointment under seal made on 18th February, 2016 and 17th October, 2016 respectively. In each case Ennis was acting as mortgagee in pursuance of powers vested in it by two mortgages made by Mr. Walsh with its respective predecessors in title. No argument now exists regarding the devolution of the interest of the mortgagee in the security interest.

4. The deeds are in standard form and appointed Mr. Kavanagh as receiver over the properties identified in the schedule. The deeds were executed under seal and the attestation clause identifies that the seal was affixed in the presence of a director and secretary. Mr. Walsh argues that the signature of the director on each deed is no more than a "squiggle" and, as the name of the director is not anywhere identified in the deed or in the attestation clause, it is not possible for a person reading the deed to be able to identify who witnessed the affixing of the seal. It is argued in those circumstances that it is not possible to objectively and independently verify compliance with the mode of appointment chosen by Ennis to appoint Mr. Kavanagh, and that therefore the deed of appointment is defective.

5. The defendant relies on the principle explained by Gilligan J. in *The Merrow Limited v. Bank of Scotland plc & Anor* [2013] IEHC 130, where he stated the proposition that: -

> "Since a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument. This principle has been recognised by the leading commentators in this area and accepted and applied by the courts throughout the common law world." (At para 29)

6. Gilligan J. went on to stress the "importance of strict adherence to the terms of the debenture" and at para. 44 explained that: -

> "…a receiver who is not appointed in accordance with the terms of the debenture is not validly appointed. In addition, an invalidly appointed receiver may be a trespasser on Company property."

7. I adopt this approach of Gilligan J. and note that there is no real argument to the contrary made by the plaintiff.

8. Cregan J. in *McCleary v. McPhillips* [2015] IEHC 591 quoted extensively from the judgment of Gilligan J. and distilled the principles from the case law at para. 131 of his judgment where he, *inter alia*, explained the imperative that a receiver be appointed according to the terms of the contract between the parties, and that where a receiver's authority is derived from an instrument under which he is appointed, the appointment is not valid unless it is made in accordance with the terms of that instrument. He summarised the principle as follows: -

> "Considerations of basic fairness and contractual interpretation mean that the Bank should be obliged to comply with the terms it chooses to impose in the instrument involved."

9. The defendant argues that as Ennis has chosen to appoint Mr. Kavanagh as receiver by deed under seal, it is imperative that the affixing of the seal of the company be authenticated by those persons authorised by resolution of the board or by the memorandum or articles of association of the company.

10. That proposition is correct and scarcely contentious.

The Companies Act 2014

11. The appointment was made by instrument intended to be a deed under seal and the formalities therefor are governed by s. 64(2) of the Land and Conveyancing Law Reform Act, 2009 by which is provided that a document under the seal of a company is to be executed in accordance with the company's articles of association. Section 43(2) of the Companies Act, 2014 provides that save where otherwise provided in the constitution of a company or by the Act, the company seal shall be used only by the authority of its directors, and the instrument to which the company seal shall be affixed shall be signed by a director or a suitably appointed person and countersigned by its secretary.

12. The minutes of a meeting of Ennis held on 16th February, 2015 show that authority was given to any one director to "agree and approve or ratify" the document of the types identified in the minutes, including a deed of appointment. The evidence now before me is that the seal of Ennis was affixed and attested by a director, and countersigned by the secretary and the statutory provisions contained in s. 43(2) of the Act have in my view been satisfied.

13. The identity of the person who attested to the affixing of the corporate seal was raised by Mr. Walsh in correspondence and later in his replying affidavit sworn on 6th November, 2017. He avers that the deeds of appointment were "signed by an unverifiable person purportedly acting on behalf of Ennis. There is thus no printed legal name therein for the purported Director…."

14. An affidavit of Mr. Donal O'Sullivan in reply sworn on behalf of Ennis on 23rd November, 2017 avers to the fact that an inspection of the original deeds of appointment reveals that they were made under the seal of Ennis, but for the avoidance of doubt confirms in his third affidavit sworn on 22nd January, 2018 that the signature of the attesting director on each of the deeds is that of Mr. Jonathan Hanly, who was at the time a director of Ennis. He also avers that Mr. Hanly was authorised to execute the deeds of appointment by virtue of a resolution made by the board of Ennis passed on 16th February, 2017, and he exhibits the minutes of the board meeting.

15. The current state of the evidence is, therefore, that there is affidavit evidence from which it is possible to identify that the "squiggle" is that of Mr. Hanly. That the relevant person is a director of the company is clear on the face of the deeds, and requires no further clarification.

16. On the evidence the affixing of the seal of Ennis was attested by the signature of a person authorised to so do.

17. However, the defendant raises a further point, that the attestation cause and the identity of the director who attests the affixing of the company seal must be capable of objective verification from a reading of the deed. He argued that "exact compliance with a mode of appointment must be verifiable" and that in the present case the "squiggle" which purports to be a signature cannot be objectively identified as the signature of any person, and that a person reading the deed could not know who had attested the affixing of the seal and whether that person was duly authorised.

18. This argument requires that I consider the purpose of the attestation clause.

The attestation clause
19. The fixing of the seal is the act of the company, and the signature is by way of attestation. The purpose of the attestation is to authenticate the affixing of the seal.

20. Some assistance can be obtained in regard to the general rules to execution of a deed or the execution of a will. In *Clarke v. Clarke* [1879] 5 LR Ir. 47, the old Court of Appeal considered that sufficient evidence had been given to pronounce in favour of the validity of a will. Ball C. stated the matter at p. 54: -

> "The Court of Probate is no more restricted to direct proof than our other Courts. In all, circumstantial evidence supplies the want of direct; and presumptions are constantly drawn to compensate for the loss of positive testimony occasioned by accident or lapse of time. This being so, we have in the present case simply to consider whether its facts afford reasonable grounds for inferring to execution."

21. The matter of attestation is to be considered by reference to the intention of the person attesting a signature or affixing of a seal. McDermott L.C.J. giving the judgment in *Re: Estate of Bulloch*, deceased 1968 N.I. 96 was considering whether a will had been properly witnessed. After the signature of the testator there appeared the names of a married couple described as witnesses. The name of the wife was written by her in her own hand, but the name of the husband was not written by him, but was produced by means of a rubber stamp. The evidence showed that the stamp was affixed to the will by the wife in the presence of her husband but without any physical act or participation on the part of the husband. It was the fact of an absence of evidence of the participation of the husband that made the court come to the conclusion that the will was not duly executed. McDermott L.C.J. regarded the test as being whether the witness had "properly subscribed" in accordance with the requirements of s. 9 of the Wills Act, 1837 and considered that signing or the affixing of a rubber stamp could be a sufficient subscription. He did add "that a hand written signature is much to be preferred, if only because it is so much more easily authenticated". McDermott L.C.J. then went on to say the following: -

> "The witness, for one reason or another may not be able to sign his name in the ordinary way, and I have said, it has been recognised that he may make a valid subscription in some way, as by making a mark or appending his initials. But he must do something himself, if though the effort is made with the aid of another".

22. Thus the purpose of the signature or other subscription to a will is to authenticate or attest the execution by the testator. The purpose of the signature of a director is similarly to attest or subscribe to the affixing of the seal of a company. The purpose is authentication, and that purpose must of its nature require some physical act or action by the attesting witness that signifies his or her affirmation or attestation of the document.

23. As Maguire P. said in the old Irish case of In *Re Mullins*, [1937] Ir.Jur.Rep. 43, the signing by a witness "had the effect of completing the execution of the codicil". He held that the erasure of the signature of an attesting witness did not have the effect of leaving the codicil unexecuted, and he was prepared to accept evidence that the testator did sign the document and that it was duly attested. The question was whether the authenticating or attesting signifier was duly affixed.

A signature
24. The Court of Appeal for England and Wales in *Goodman v. J. Eban Ltd*. [1954] 1 Q.B. 550, held that a rubber stamp with a facsimile of the signature of the plaintiff's solicitor was sufficient for the purposes of the Solicitors Act, 1932. The dissenting judgment of Denning L.J. is often quoted, and is useful not so much for its dissent but for its description of the uniqueness of a signature: -

> "The virtue of a signature lies in the fact that no two persons write exactly alike, and so it carries on the face of it a guarantee that the person who signs has given his personal attention to the document" (at p. 561).

25. A signature is generally to be preferred but this can give rise to difficulty when the handwritten signature is indecipherable. The question then becomes one of proof that the person who attested the affixing of the seal, or the signature of a testator, did in fact so attest.

26. But as a matter of law there is no general requirement that a signature be capable of being decipherable. If a rubber stamp will suffice, any mark or signifier that signifies an intention to attest will suffice.

27. It is also the case and well established that a person may sign or signify by his mark.

28. The purpose of a signature is to signify, and provided the mark, signature or rubber stamp, or other means of signification, is sufficiently unique or personal to the signifier there seems to me to be no reason why the signature should be decipherable.

29. FitzGibbon L.J. in his judgment in *Clarke v. Clarke* noted that the question of the validity of the will was a question of fact whether the evidence reasonably sustained the instrument. I accept this to be a correct statement of the law.

30. The evidence of the correctness of an attestation clause does not require any special proofs and the matter is to be resolved in the light of the evidence.

Application to the facts

31. Applying those principles to the instant case the following emerges. The seal of the company was affixed to the deeds of appointment, and is clear on the face of the instruments. The affixing of the seal was attested by a director and the secretary of the Company. It is not on the face of the document easy or indeed possible to discern the identity of the attesting director. Evidence has been heard and is not controverted that the relevant signature was that of Mr. Hanly.

32. The defendant argues that the deed is objectively speaking invalid. I consider that the deed is objectively speaking valid and was objectively speaking correctly executed, and appropriately attested. Subjectively it is difficult to read the signature of Mr. Hanly and subjectively a person who did not by other means know or recognise Mr. Hanly, might not have been aware upon reading the document that it was properly witnessed. The subjective fact that it is difficult to discern the signature could not invalidate the document.

33. I accept the argument that as a matter of good practice a person executing or attesting a deed should ensure that the identity of that person can be discerned either from the signature or from another part of the deed. In the case of a conveyance the identity of the signing parties will be clear from the attestation clause read together with other parts of the document when both parties are natural persons. In the case of a company it is good practice that a director attesting the fixing of the seal of the company should be identified by a legible means, and that is because it may be necessary to ascertain whether the affixing of the company seal was attested by an authorised person. A prudent purchaser or other person examining the devolution of the title could legitimately requisition a statutory declaration to confirm the identity of the person who affixed the seal of the company.

34. I accept that the authorities bear out the proposition that a court must be vigilant regarding the validity of the appointment of a receiver who seeks an injunction against a mortgager and a court is entitled to scrutinise the deed of appointment. The making of an injunction in favour of a receiver is a remedy not to be likely made, and the proofs must be sufficient and clear.

35. In the present case, the proofs are established and I am therefore satisfied that the arguments made by the defendant are not borne out on the facts or in law.