

## THE HIGH COURT

[2015 No. 9196 P]

BETWEEN

DENIS ENGLISH

PLAINTIFF

AND

PROMONTORIA (ARAN) LIMITED

DEFENDANT

**JUDGMENT of Ms. Justice Murphy delivered on the 16th day of November, 2016.**

1. The plaintiff seeks the following reliefs: an order setting aside the defendant's appointment of Ken Fennell as receiver of the plaintiff's unregistered land at Knocklofty House, Knocklofty, Clonmel, Co. Tipperary on 6th November, 2015; an injunction directing the defendant to disclose all and any instruments, terms and conditions, deeds of novation, deeds of assignment, deeds of conveyance and assignment or any document or instrument on which the defendant relies as entitling it to appoint a receiver; and an order declaring that the defendant is not entitled to hold itself out as validly and legally entitled to the rights, title, interest and all other rights connected to the land.

**Background**

2. On 8th November, 2007, the plaintiff entered into a mortgage agreement with Ulster Bank Ireland Limited in respect of unregistered land at Knocklofty House Knocklofty, Clonmel, Co. Tipperary.

3. Between the years 2008 to 2011, the plaintiff entered into a series of facility agreements with Ulster Bank Ireland Limited as follows: facility letter dated 11th August, 2008 addressed to Denis English and Diane English; facility letter dated 7th November, 2008 addressed to Denis English and Gabrielle Martin; facility letter dated 13th May, 2010, addressed to Denis English and Gabrielle Martin; and facility letter dated 21st March, 2011 addressed to Denis English.

4. By letter dated 5th January, 2015, Ulster Bank Ireland Limited wrote to the plaintiff to inform him that it had agreed to transfer his loans to an affiliate of Cerberus Global Investors pursuant to the terms of the facility letters. It further informed the plaintiff that it would contact him immediately after the date of transfer of legal ownership to provide him with contact details for the purchaser.

5. Prior to the date of the letter of notification of 5th January, 2015 Ulster Bank Ireland Limited appears to have executed a mortgage sale deed in respect of the plaintiff's lands to Promontoria Holding 128 B.V. This deed, which has not been disclosed to the plaintiff, is according to the evidence, dated 16th December, 2014. This agreement was apparently the subject of a deed of novation dated 12th February, 2015. That deed has not been disclosed to the plaintiff either.

6. On the same date, 12th February, 2015, a global deed of transfer and a deed of conveyance and assignment were executed by Ulster Bank Ireland Limited and three related entities, UB SIG (ROI) Limited, Ulster Bank Limited and UB SIG (NI) Limited transferring all rights, title, interest and benefits in the facility letters and the mortgage relating to the plaintiff, to the defendant Promontoria (Aran) Limited. Heavily redacted copies of each of those deeds have been furnished to the plaintiff. In the deed of conveyance and assignment a section headed "*Background*" has been fully redacted as has detail of other mortgages assigned and details of the identities of the parties executing the deed on behalf of each of the Ulster Bank entities. In the global deed of transfer, the recital clause which the plaintiff contends describes the relationship between the parties, has been completely redacted, as has the consideration paid by the purchaser, the other mortgages sold and the identities of those executing the deed on behalf of Ulster Bank Ireland Limited and the other bank entities who are parties to the deed.

7. On 22nd September, 2015, and on 16th October, 2015, the defendant issued letters of demand in accordance with the terms of the facility letters agreed by the plaintiff with UBIL.

8. On 6th November, 2015, the defendant appointed Mr. Ken Fennell of Deloitte as fixed charge receiver pursuant to the mortgage of the plaintiff's lands by way of instrument of appointment. The basis of the defendant's entitlement to appoint a receiver is expressed to be a transfer of the plaintiff's mortgage from Promontoria Holding 128 B.V. to Promontoria (Aran) Limited.

9. On 10th November, 2015, the plaintiff issued a plenary summons claiming declaratory and injunctive reliefs arising from his contention that Promontoria (Aran) Limited was neither validly nor legally entitled to hold itself out as being entitled to UBIL's interest in the facility letters nor the security underpinning them.

10. On 16th November, 2015, the defendant provided the plaintiff with copies of the facility letters, the mortgage, a redacted copy of the global deed of transfer and a redacted copy of the deed of conveyance and assignment in response to a notice of motion issued by the plaintiff seeking documentation relating to the transfer.

11. On 30th November, 2015, the transfer of mortgage from Ulster Bank Ireland Limited to the defendant was registered in the Registry of Deeds. The grantor is specified to be Ulster Bank Ireland Limited, Ulster Bank SIG (ROI) Limited, Ulster Bank Limited and UB SIG (NI) Limited. Evidence of the registration was produced in the course of the hearing by the defendant *de bene esse* and in response to arguments made by the plaintiff's counsel relating to the redaction of the execution clauses in the agreements.

12. The plaintiff raised multiple issues in his plenary summons and grounding affidavits but at the hearing, the issues were narrowed to the plaintiff's entitlement to access to the full "*suite*" of documents relating to the transfer and to his entitlement to have them in an unredacted form. He also challenged the validity of the appointment of the receiver.

**Access to full "suite" of documents**

13. The plaintiff submits that the documents which the defendant has provided to him are insufficient to establish the defendant's entitlement to appoint a receiver over the plaintiff's property. The defendant has provided the plaintiff with a redacted copy of the global deed of transfer dated 12th February, 2015; a redacted copy of the deed of conveyance and assignment dated 12th February, 2015; and a copy of the instrument of appointment of receiver dated 16th November, 2015.

14. The plaintiff asserts the right to have sight of, or otherwise have presented to the Court, the entire “*suite*” of documents relating to the transfer of the mortgage, including the mortgage sale deed dated 16th December, 2014; the deed of novation dated 12th February, 2015; and the second deed of conveyance and assignment dated 12th February, 2015. The plaintiff contends that the first transfer which appears to have been between Ulster Bank Ireland Limited and Promontoria Holding 128 B.V. may affect the second transfer which appears to have been between various entities in the Ulster Bank group including Ulster Bank Ireland Limited and the defendant Promontoria (Aran) Limited. He further argues that the fact of registration in the Registry of Deeds does not establish the validity of the transfer to the standard required. The defendant responds that all relevant and necessary documentation has been provided to the plaintiff.

#### **Redaction**

15. The plaintiff submits that due to the extent of redaction of information in the global deed of transfer and the deed of conveyance and assignment, it is impossible to ascertain whether the documents have been properly executed and thus their validity and reliability is undermined. The plaintiff points in particular to the absence of signatures and identities of those executing the deeds.

16. The defendant submits that the information which has been redacted is of a particularly sensitive commercial nature and that the plaintiff has been provided with all of the relevant information relating to the transfer which he requires. In reply the plaintiff contends that if there are security issues relating to the information, the defendant should present the unredacted documentation to the Court for inspection, if not to the plaintiff.

#### **Instrument of appointment of receiver**

17. The plaintiff alleges that there are errors on the face of the instrument of appointment of receiver dated 6th November, 2015. He refers to clause B of the instrument of appointment in this regard. It states:

*“By way of a Mortgage Sale Deed dated 16 December 2014 and made between Promontoria Holding 128 B.V. (‘Holding’) UBIL agreed to sell and Holding agreed to buy, inter alia, all right, title, interest and benefit (from both present and future) of UBIL in and under the Security Documents. By (1) a Deed of Novation, (2) a Deed of Assignment and Transfer (3) a deed of Conveyance and Assignment (Unregistered Property), (4) a further deed of Conveyance and Assignment (Unregistered Property), and (5) a Form 56 all dated 12 February 2015, Holding transferred, all the rights, title, interest, benefit and obligations of UBIL in relation to certain of the indebtedness and other obligations owing by the Borrower to UBIL (the Secured Obligations) and which were secured by the Security Document were, together with all the rights, title, interest, benefit and obligations of UBIL in the Security Document to the Secured Lender (the ‘Transfer’).”*

The plaintiff contends that the word “*transferred*” appears to be missing from the final sentence in clause B of the document and that this could lead to a failure to actually transfer the property. The defendant rejects this, submitting that although the syntax of the sentence is unwieldy, it ultimately makes sense and it is not incomplete; the operative use of “*transferred*” follows immediately after “*Holding*”.

18. The plaintiff further points to the reference to “*Security Documents*” in clause B and the fact that while the term “*Security Document*” has been defined, the term “*Security Documents*” has not. The defendant replies that this is a mere typographical error and that all other references throughout the document are to “*Security Document*”.

19. The defendant further submits that in any case, clauses A, B and C are part of the recital only, and not operative or for use in interpretation.

#### **Issue of due execution of deeds**

20. The defendant, citing *South Dublin County Council v. Balfe* (Unreported, High Court, Costello J., 3rd November, 1995) submits that since the plaintiff failed to raise the issue of proper execution of deeds on affidavit, it is now impermissible for the plaintiff to raise the issue at hearing and at such a late point in the proceedings. The defendant submits that it would have dealt with this issue had it been raised at the proper stage, but that nonetheless it had carried out searches showing in fact that the transfer of the mortgage from Ulster Bank Ireland Limited to Promontoria (Aran) Limited was registered on 30th November, 2015 in the Registry of Deeds. In response to this argument the plaintiff submits that the issue of execution is included within the broad strokes of his claim and that ultimately it is for the defendant to prove that the receiver is entitled to enter the plaintiff’s lands at Knocklofty House as the documents provided to date do not establish this.

21. The defendant rejects this position again noting in particular the plaintiff’s failure to raise the issue of execution on affidavit. The defendant further asserts that the documents provided to the plaintiff represent sufficient proof of entitlement to appoint the receiver.

#### **Decision of the Court**

22. The plaintiff does not contest the validity of the mortgage entered into by him with Ulster Bank Ireland Limited on 8th November, 2007. He does not challenge nor does he contest that he entered into a series of facility agreements with Ulster Bank between the years 2008 and 2011. He does not challenge the entitlement of Ulster Bank Ireland Limited to transfer, assign or dispose of his loans together with the benefit of the first legal mortgage over his property, without notice to him. His issue is that he has a right and entitlement to see proof of the transfer of ownership to a third party before he can be compelled to cede control of his property to that third party. The Court agrees that the plaintiff has such a right.

23. As a condition of granting the plaintiff loan facilities Ulster Bank Ireland Limited required the plaintiff to agree that Ulster Bank Ireland Limited could transfer his loans and the security provided in respect thereof, to whoever it wished, whenever it wished, without his consent and without notice to him. This is a significant power contractually granted by the plaintiff to UBIL. If, as in this case, it purports to exercise that right of transfer, then a complete stranger with whom the plaintiff has no connection can come knocking on his door claiming an entitlement to possession of his property. It appears to the Court that before ceding possession of his property, the plaintiff is entitled to insist that the stranger prove its entitlement to possession by showing that it duly acquired the interest of the bank in his loans and the security underpinning those loans, in particular, the mortgage on the property.

24. Where the land in issue is registered land, proof of ownership is straightforward in that the register is conclusive as to title. If the stranger is registered as owner of the first legal charge then he has all the rights and entitlements that flow from the charge.

25. The position in respect of unregistered land is not so straightforward. Registration of a mortgage transfer in the Registry of Deeds is not an assurance of good title. Registration in the Registry of Deeds may confer some priority on a valid mortgage transfer but it is not a warranty of the validity of the transfer.

26. The issue for the Court therefore is whether on the basis of the documentation furnished to date the ownership of Promontoria (Aran) Limited of the plaintiff's mortgage is clearly established such as to entitle it to invoke the provisions of the mortgage for the purpose of appointing a receiver. On a consideration of the evidence including the limited redacted documentation furnished, the Court is not satisfied that Promontoria (Aran) Limited has clearly demonstrated that it has duly acquired the interest of UBIL in the mortgage of the plaintiff's lands.

27. The factual position in respect of the purported transfer is unclear. According to the evidence on 16th December, 2014 UBIL sold to Promontoria Holding 128 B.V. all its rights, title, interest and benefit in its mortgage over the plaintiff's lands. The sale was effected by way of a mortgage sale deed. On 12th February, 2015, UBIL together with the other named Ulster Bank entities purported to sell to Promontoria (Aran) Limited the same mortgage which UBIL had already sold to Promontoria Holding 128 B.V. two months earlier. There is reference in the evidence to a deed of novation also dated 12th February, 2015 between unnamed parties which deed may explain how UBIL, having sold its interest in the plaintiff's mortgage to Promontoria Holding 128 B.V. in December, 2014, was able to sell the same mortgage to Promontoria (Aran) Limited two months later. Without sight of the mortgage sale deed of 16th December, 2014 and the deed of novation of 12th February, 2015 it is not possible to assess the validity of the purported transfer by UBIL and associated entities to Promontoria (Aran) Limited on 12th February, 2015.

28. A further element of confusion and uncertainty arises from the contents of the instrument of appointment of the receiver dated 6th November, 2015. The recital in the deed detailing the basis of the entitlement of Promontoria (Aran) Limited to appoint a receiver (which is clumsily drafted and as a minimum contains an unnecessary and confusing "were" after the words "Security Document" on the third last line) indicates that the alleged right to appoint a receiver derives from a transfer by Promontoria Holding 128 B.V. of its interest to Promontoria (Aran) Limited. It is not at all clear how that transfer arises particularly when the only documents that have been produced to the Court and to the plaintiff suggest that Promontoria (Aran) Limited's rights (if any) derive from a direct transfer from UBIL and associated Ulster Bank entities, to Promontoria (Aran) Limited.

29. In considering the basis of the purported instrument of appointment, it is interesting to note that the registration of the transfer of the plaintiff's mortgage in the Registry of Deeds does not refer to a transfer between Promontoria Holding 128 B.V. and Promontoria (Aran) Limited, as does the instrument of appointment of the receiver, but rather to a transfer between UBIL and the other Ulster Bank entities and Promontoria (Aran) Limited. The details of the transfer were registered on 30th November, 2015, some weeks following the execution of the instrument of appointment of the receiver.

30. There may well be a perfectly good explanation for the apparent uncertainty and potential confusion as to the manner in which Promontoria (Aran) Limited acquired its claimed entitlement to appoint a receiver to the plaintiff's property. If so, that explanation with appropriate supporting documents should be proffered to the plaintiff. It is for Promontoria (Aran) Limited to demonstrate to the plaintiff that it is in fact entitled to appoint a receiver to his property before it can require him to cede possession of his property to its receiver. To date, in the Court's view, it has not done so. Insofar as reliance appears to be placed on the mortgage sale deed of 16th December, 2014 and a deed of novation of 12th February, 2015, those documents should be disclosed.

#### **Redaction**

31. Relying on *South Dublin County Council v. Balfe*, counsel for Promontoria (Aran) Limited suggested that as the plaintiff had not specifically adverted to the issue of redaction of documents in his affidavits, he should not be permitted to raise the issue of redaction of documents at the hearing. The Court considers that to so hold would be an unwarrantedly harsh application of the *Balfe* principle. From the outset of this application, which was initiated four days after the purported appointment of the receiver, it has been clear that the plaintiff is challenging the entitlement of Promontoria (Aran) Limited to take possession of his property. As part of that challenge, he has sought the full "suite" of documents on which Promontoria (Aran) Limited's entitlement to ownership of the charge and power to appoint a receiver is allegedly based. It cannot therefore come as any surprise to the defendant that it might be challenged in respect of the redaction of details of the deeds of transfer and conveyance of 12th February, 2015. The defendant has also sought to uphold its entitlement to redact the deeds because of the commercial sensitivity of certain information contained in the deeds. The Court has some sympathy for this argument. It appears to the Court that the consideration for any sale, while of no doubt of interest to the plaintiff, is a matter between the purchaser and the seller and is not information to which he is entitled. Similarly, the plaintiff is not entitled to details of other properties included in the sale. However, it also appears to the Court that the defendant is not entitled to redact the identities of those who executed and witnessed the agreement on behalf of UBIL. The plaintiff is entitled to know the identity of the signatory and proof that at the material time that person was a duly authorised signatory on behalf of UBIL. Similarly, the plaintiff is entitled to proof that the contract was properly witnessed.

32. The Court has not arrived at a definitive view as to whether the section headed "Background" in the deed of conveyance and assignment should be disclosed nor has the Court come to a definitive view as to whether the recital clause in the global deed of transfer which has been completely redacted should also be disclosed. If the material contained therein touches on the manner of transfer of UBIL's interests to Promontoria (Aran) Limited then it appears to the Court that it should be disclosed. Put another way, if the fact of the alleged transfer is inexplicable without sight of those sections of the deeds, then disclosure would appear to be necessary.

33. Under the terms of the facility letters and the mortgage, the mortgagor retains few rights. It appears to the Court that one of those rights is to insist on proof of transfer and ownership of the mortgage before being required to comply with the request of a stranger to vacate the property. It is matter for Promontoria (Aran) Limited to establish that it has duly acquired UBIL's rights, titles and interests in the plaintiff's loans, facility letters and mortgage. On the basis of the documentation furnished to date, it has not done so.

34. The Court accordingly proposes to stay the appointment of the receiver Ken Fennell until such time as Promontoria (Aran) Limited has established as a matter of law and fact that it had at the relevant time a right to appoint him. As matters stand, the defendant has not established that it is legally so entitled. The plaintiff has also sought an order enjoining the defendant to disclose all and any instruments, terms and conditions, deeds of novation, deeds of assignment, deeds of conveyance and assignment or any document or instrument on which the defendant relies as entitling it to appoint a receiver. The Court does not propose to make such an order. The decision to disclose such documents is entirely a matter for Promontoria (Aran) Limited, but the Court observes that should it choose not to do so its legal entitlement to appoint a receiver to the plaintiff's property may well remain unestablished.

35. Finally there has been a suggestion in the course of the hearing that unredacted documents might be produced to the Court for inspection so that the Court could be satisfied that the interests of UBIL in the plaintiff's loans and mortgage have been properly transferred. This is a novel and in the Court's view, an unacceptable proposition. It is not the role of this Court to act as some kind of filter between the plaintiff and the defendant, in a process in which the Court would inspect documents for the purpose of assuring the plaintiff that his mortgage was legally transferred to the defendant, but without disclosing to him the means whereby that had been achieved. Nothing but mischief would result.

36. One of the greatest guarantees and safeguards of the independence and integrity of our judicial system is that the Court's business is conducted in public. That is as it should be.