

# THE HIGH COURT

[2023] IEHC 77

[2022 5011 P]

**BETWEEN**

**MONKSWOOD INVESTMENTS LIMITED**

**PLAINTIFF**

**AND**

**EVERYDAY FINANCE DAC**

**FIRST DEFENDANT**

**DECLAN TAITE AND ANN O'DWYER**

**SECOND AND THIRD DEFENDANTS**

**DENIS F. MCDWYER**

**PRACTISING AS DENIS F. MCDWYER AND COMPANY SOLICITORS**

**FOURTH DEFENDANT**

**THE REGISTRAR OF COMPANIES**

**FIFTH DEFENDANT**

**AND THE PROPERTY REGISTRATION AUTHORITY**

**SIXTH DEFENDANT**

**JUDGMENT of Mr. Justice Cregan delivered on 9th day of February, 2023**

## **Introduction**

1. This is an application by the plaintiff for, *inter alia*:
  - (i) An interlocutory injunction to restrain the first, second and third defendants from taking any steps, directly or indirectly, to sell or market the lands in dispute; and

(ii) An interlocutory injunction prohibiting the second and third defendants acting in their capacity as receivers over the said lands.

2. The application is grounded upon the affidavit of Mr. William Kells dated 28<sup>th</sup> September, 2022 which sets out the background to this application.
3. The plaintiff is a property development company incorporated in Ireland with a registered address in County Cavan. According to Mr. Kells, the plaintiff is the legal and beneficial owner of the property in dispute. Mr. William Kells and his brother, Mr. Alan Kells, are the two directors of the plaintiff company.
4. The first defendant, Everyday Finance, DAC is a company which purchased a debt from the plaintiff to Allied Irish Banks Plc (AIB).
5. The second and third defendants are receivers appointed by the first defendant over the said property.
6. The fourth defendant is the Plaintiff's former solicitor.
7. The fifth defendant, the Registrar of Companies, was joined because the plaintiff alleges that an incorrect charge was registered with the Companies Registration Office (CRO).
8. The sixth defendant was joined because the plaintiff alleges that incorrect details of the true owner of the said lands have been registered with the Property Registration Authority.
9. The events which triggered the plaintiff's application for an interlocutory injunction 6defendant's agents were on the lands in dispute taking photographs and measurements and were apparently taking steps to prepare the said lands for sale.

### **Background**

10. The background to this matter is that a series of loans were provided by Allied Irish Banks Plc over a period of years to the plaintiff in the sum of €2.4 million (approx.).

Mr. Kells referred to various facility letters or loan agreements dated 9<sup>th</sup> October, 2006, 18<sup>th</sup> November, 2006, 9<sup>th</sup> January, 2009 and 9<sup>th</sup> September, 2010. Some of these agreements were signed on behalf of the plaintiff and others were not so signed.

11. Mr. Kells also states at paragraph 10 in his affidavit:

*“I say and believe that on or about 27<sup>th</sup> September, 2006, it was agreed by oral agreement between the executive directors for MIL [the plaintiff] of the one part and Lorna Wilson with a male colleague, as agents for the bank of the other part, on the development site in Crossdoney, County Cavan that MIL would repay sums due and owing under the facilities through the development and sale of the land, the subject of the dispute.”*

12. In effect, Mr. Kells states that the agreement between the plaintiff and the bank was that the plaintiff would borrow money to purchase and develop the land, and that it would repay the bank on an ongoing basis with the proceeds of sale of various houses when they were completed and sold.
13. It was also submitted, on behalf of the plaintiff, that it was not only agreed between the plaintiff and AIB that the proceeds of sale of each house were to be used to repay the debt, but that this condition was also set out in writing in the various loan agreements.
14. Mr. Kells also states in his affidavit that the plaintiff company did not default in making payments under the terms of the loan agreements dated 9<sup>th</sup> October, 2006, 18<sup>th</sup> November, 2007 and/or 9<sup>th</sup> January, 2009 respectively.
15. Despite this, he says, a series of letters of demand were issued to the plaintiff (or to the secretary and directors of the company) by Allied Irish Banks Plc seeking repayment by the plaintiff to the bank in the sum of approximately €1.7 million.
16. It is notable that AIB never sought to issue proceedings against the plaintiff company and AIB has never obtained a judgment against the plaintiff. The position therefore is

that a demand for repayment has been made by AIB and the company is contesting that demand as it says it is not in default.

17. However AIB issued summary proceedings (Record No. 2015/512S) in March 2015 seeking liberty to enter final judgment against Mr. William Kells and Mr. Alan Kells in the sum of €1.79 million. Mr. William Kells and Mr. Alan Kells were sued as guarantors of the said debt.
18. On 17<sup>th</sup> November, 2016 the High Court granted an order for judgment in the sum of €1.7 million against Mr. William Kells and Mr. Alan Kells. It was submitted at this hearing that the Kells brothers represented themselves at this hearing and made mistakes in how they defended the case.
19. Subsequently, on or about 2<sup>nd</sup> August, 2018, Allied Irish Banks Plc and AIB Mortgage Bank transferred all the relevant loans about which these proceedings are concerned to Everyday Finance DAC.

#### **The issues in these proceedings**

20. The fundamental issue in these proceedings is that the plaintiff company alleges that it never entered into any mortgage or charge in favour of AIB or AIB Mortgage Bank over the said property, the subject matter of these proceedings.
21. Most fundamentally, Mr. Kells states that documents which purport to be mortgages or charges given by the company are forgeries, that the signatures of the directors which were affixed to those mortgages/charges are forgeries and that neither he nor Mr. Alan Kells ever put their signatures to such a deed of mortgage or charge.
22. Mr. Kells also exhibits an expert report from Mr. Brian William Craythorne, a handwriting expert, in which he examined the signatures of Mr. William Kells and Mr. Alan Kells, compared them to the signatures on the purported deed of mortgage/charge in favour of AIB, concluded that they were not the same signatures and that the

signatures on the deed of mortgage/charge and debenture were forged. In his report, (which I note was prepared on 20<sup>th</sup> October, 2015) Mr. Craythorne states:

*“As far as can be determined from the examination of photocopy material, in my opinion, the William Kells’ signatures on the following documents are forgeries.”*

23. In relation to Mr. Alan Kells signature, Mr. Craythorne’s report is more nuanced and he states that “it would not be possible to rely on this as being the genuine signature of Alan Kells”.
24. Clearly, these allegations of forgery are significant and, if true, could establish that the plaintiff never in fact granted a mortgage or charge over its property at any time to AIB, or Allied Irish Banks Mortgage Bank and as a result such a mortgage or charge could never have been assigned to Everyday Finance DAC. It is clear that this is a central issue in these proceedings.
25. The plaintiff also pleads in its statement of claim that the fourth defendant, its former solicitor, acted in breach of fiduciary duty and/or outside the scope of the ordinary course of business and/or outside of express or implied authority and without instructions and in breach of contract and *inter alia* committed slander of title by acting to register any such charges with the Property Registration Authority or the Companies Registration Office.
26. Mr. William Kells also states in his affidavit that in order to create a valid mortgage or charge by the company over the company’s lands, the company seal would have to be affixed to the said deeds. He alleges that the plaintiff’s corporate seal was with the fourth defendant from July 2004 through to November 2016 and that the fourth defendant had sole and exclusive use and control of the plaintiff’s corporate seal throughout this period.
27. Thus at paragraph 34 Mr. Kells states as follows:

*“Furthermore MIL’s [the plaintiff] corporate seal was with the fourth defendant from July 2004 through to November 2016. The fourth named defendant has sole and exclusive use and control of the plaintiff’s corporate seal between the aforementioned period. I say this deponent believed the 9<sup>th</sup> October, 2006 mortgage documents which were in the sole custody of the fourth defendant at the material time contained the forged signature of William Kells on two copies. The fourth defendant was also the solicitor on record for AIB. The company debenture documents also contained a forged signature as did the documents filed in the company’s registration office on 3<sup>rd</sup> November 2006 and the registry of deeds on 9<sup>th</sup> October, 2006. All of the above documents emanated from the fourth named defendant’s office with the said forged signatures”.*

**28.** He says at paragraph 35 of the affidavit:

*“Separate claims are maintained by the plaintiff against the fourth defendant as part of these proceedings for breach of contract, breach of trust and duty and deceit all of which relate to incorrectly effected charge documentation and registration of same by the fourth defendant.”*

**29.** He also states at paragraph 36 of his affidavit:

*“On foot of the foregoing matter I say and believe and I am so advised that the charge documents sought to be relied on by the first named defendant in directing and liaising with the second and third named defendants are defective and do not entitle the second and third named defendants to continue to act as receivers over the lands the subject matter of the dispute.”*

**30.** The fourth named defendant has not entered an appearance, as yet, in these proceedings.

**Replying affidavit of Everyday Finance**

31. Mr. Kieran Dowling, head of insolvency with BCMGlobal ASI Ltd (the service provider for the first named defendant, Everyday Finance DAC) filed a replying affidavit on behalf of the first, second and third defendants. In his affidavit, Mr. Dowling said that the first defendant, Everyday Finance, asserted its right to possession of the property, the right to sell the property and the right to appoint the second and third defendants under the terms and conditions of a facility letter dated 9<sup>th</sup> January, 2009 between the plaintiff as borrower and AIB as predecessor in title of Everyday Finance.
32. In his affidavit, Mr. Dowling says that the security conditions were set out in the loan facility of 9<sup>th</sup> January, 2009. Mr. Dowling said that the mortgage was registered as a burden on the relevant Folio with the Property Registration Authority on 21<sup>st</sup> September, 2009 and that Everyday Finance was registered as the owner of the said charge on 11<sup>th</sup> December, 2018.
33. Mr. Dowling also said that the mortgage was registered as a charge with the CRO on 23<sup>rd</sup> January, 2014.
34. Mr. Dowling also set out in his affidavit at paragraph 18 that, by letter dated 12<sup>th</sup> January, 2015, solicitors for AIB called upon the plaintiff to repay the debt in the sum of €1.77 million but despite that demand the plaintiff failed neglected and/or refused to pay any part of the sum demanded.
35. However, as set out above, the plaintiff disputes that it is in default on the said debt and it is notable that the first defendant has never instituted proceedings against the plaintiff for judgment in the sum of €1.77 million and there are no outstanding proceedings in this regard.

36. Counsel for the first defendant also sought to rely on the debenture made on 19th October, 2006 by Monkswood with Allied Irish Banks. There are however significant difficulties with this document also. First, the plaintiff alleges that the signatures of its directors, Mr. William Kells and Mr. Alan Kells, are also forged on this document; secondly, in the definitions section of the debenture, in paragraph 1(f), “legally mortgaged property” is defined as “the property described in the first schedule hereto”. However when one turns to the first schedule there is no such property described.
37. Likewise, the phrase “the equitably charged property” is described as the property described in the “second schedule hereto”. However when one looks at the second schedule it states that it consists of “all that all or any future estate or interest in the legally mortgaged property [...]” but, as set out above, there is a complete lack of certainty as to what constitutes “the legally mortgaged property”.
38. Counsel for Everyday Finance further submitted that even if both of these documents (i.e. the mortgage/ charge and the debenture) were forgeries, nevertheless it could rely on the various loan agreements which state on their face that the security to be provided for these loans were legal charges over land and also debentures over the fixed and floating assets of the plaintiff.
39. However some of these loan agreements were not signed by the company and therefore it could not be concluded that the company agreed to these conditions for the loans.
40. The first defendant also submitted that the loan agreement of 9th January, 2009 was a renegotiation of previous agreements and therefore the oral agreement which the plaintiff alleged did not apply. However, as a matter of fact, the loan agreement states that the repayment terms are “repayable on demand and at the pleasure of the bank subject to review by 31/3/2009 to be cleared from Crossdoney/Killicleen/Killishandra unit sales with 100% of net sales or proceeds to be provided in permanent debt



reduction in the interim.” It would appear therefore that the agreement which the plaintiff alleges it had with the bank is reflected in writing in the 2009 loan agreement.

41. The defendants also sought to rely on a copy of an AIB mortgage dated 9<sup>th</sup> October, 2006 which states that the name of the mortgagor is Monkswood Investments Ltd and Alan Kells. However Mr. Kells alleges that this mortgage deed is also forged.
42. The first defendant also submits that even if the plaintiff were to establish a defect in the mortgage at issue, “the undisputed facts would, as a bare minimum, entitle AIB (and Everyday as successor in title) to an equitable mortgage over the property”.
43. However that is not accepted by the plaintiff and indeed it is difficult to see in principle how this could be so. The plaintiff’s case is that it never agreed to execute – and never did execute – any mortgage or charge over its properties. The plaintiff also states that any mortgage or charge which was signed on its behalf by the directors is a forgery and that their signatures were procured by deceit. These are very serious allegations. If they are true, it would mean that the plaintiff never executed, or agreed to enter into a mortgage or charge over its land or to grant any such security to the bank. If that were the case then neither AIB nor Everyday (as its successor) would have a legal or an equitable mortgage over the property.
44. It is also clear that the first defendant does not have a copy of the purported original mortgage dated 9<sup>th</sup> October, 2006. This was not exhibited before the court. Indeed on 23<sup>rd</sup> January, 2023 the solicitor for the first defendant wrote to the solicitors for the plaintiff calling upon them to produce the original mortgage. It appears that the plaintiff does not have the original mortgage either. Counsel for the first defendant indicated to the court that, as far as the first defendant was aware, the original of the said disputed mortgage had been sent to the CRO by the former solicitors for the plaintiff (i.e. the fourth named defendant) pursuant to his undertaking to AIB. In any event, the position

is that the first defendant was not in a position to produce an original mortgage validly signed by the plaintiff through its directors, to the court at this stage.

45. The Plaintiff also disputes whether the Receiver was validly appointed. Mr. Dowling states at para. 25 of his affidavit:

*“I confirm that following lawful demand, by deed of appointment of receiver dated 17<sup>th</sup> June, 2015, the second and third defendants were appointed as joint receivers over the property the subject matter of this application being the property now comprised in Folio CN22930F. In this regard I beg to refer to the deed of appointment of receiver which is at tab 14 of the booklet of exhibits.”*

46. This is a deed of appointment of a receiver dated 17<sup>th</sup> June, 2005 between Allied Irish Banks Plc and the second and third named defendants.
47. However the first defendant has not exhibited any deed of novation of that receivership despite being requested to do so by the plaintiff.
48. In the circumstances it is not established as a fact – based on the evidence before the court at this time – that the second and third defendants were actually appointed as receivers by Everyday Finance DAC.
49. Counsel for the first defendant further submitted that the plaintiff’s claim - that the terms of the repayment were governed by an oral agreement made between the plaintiff and Ms. Lorna Maxwell and another person from the bank - was not sustainable. He sought to rely on the decision of *Ulster Bank Ireland Ltd v. Dean* [2012] IEHC 248 (McGovern J.). However there are a number of important distinctions between the present case and *Ulster Bank v. Dean*. First, McGovern J. noted at page 4 of his judgment that the defendants in the *Ulster Bank* case did not produce any written documentation to support their claim of an oral agreement with the bank; by contrast in the present case the plaintiff has not only averred on affidavit that there was such an

oral agreement but the repayment terms in various facility letters also set out in writing that this was indeed a term of the repayment schedule agreed between the bank and the plaintiff; secondly there was no suggestion in the *Ulster Bank* case that the mortgage and/or charge had been procured by deceit and/or that signatures were forged as is the case here.

50. Thus all the crucial facts are in dispute - i.e. what were the conditions for the repayment of the loan, whether the plaintiff is in default on the loan, whether the company agreed to grant security, whether the mortgage/charge was procured by deceit, and/or whether the signatures on the mortgage/charge were forged.
51. Counsel for the defendants also submitted that Mr. William Kells and Mr. Alan Kells, as directors of the plaintiff, had been on notice of the said charge since 23<sup>rd</sup> January, 2014 and yet no steps had been taken on behalf of the plaintiff to challenge the validity of the charge prior to the commencement of the within proceedings.
52. Whilst that may be so, what prompted the issuing of these proceedings and the application to court for an interlocutory injunction was the fact that the first, second and third defendant were only recently observed taking measurements of the lands and photographs of the lands and were clearly preparing to sell the lands.
53. I am of the view that even if there was a delay in this matter it is not sufficient to defeat the plaintiff's application for an interlocutory injunction at this stage.

#### **The legal test for an injunction**

54. In *Merck Sharp and Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65 the Supreme Court restated the law in relation to interlocutory injunctions and I have considered the various matters which the Supreme Court indicated should be considered in a case such as this.

- 55.** First, I am satisfied in the present case that, if the plaintiff succeeded at the trial, a permanent injunction might, or would be granted.
- 56.** Secondly, it appears on the current state of the evidence, for the purposes of this interlocutory injunction, that there is a fair issue to be tried as to whether:
- (a) there was an oral agreement reflected in the loan agreement as to the repayment terms of the loan;
  - (b) there was a default;
  - (c) the plaintiff ever agreed to grant a mortgage or charge over the lands the subject matter of the dispute;
  - (d) the plaintiff ever in fact signed such a mortgage or charge over the said lands;
  - (e) the signatures on the mortgages or charges are forgeries;
  - (f) the signatures on the debentures are forgeries; and
  - (g) the Receiver was validly appointed.
- 57.** I am satisfied on the basis of the current evidence before the court that there is a fair issue to be tried as to whether the plaintiff ever granted a valid mortgage or charge over the said lands, and whether Everyday Finance and/or the receivers have any legal right or entitlement to enter into possession of the said lands and/or to sell the said lands.
- 58.** The question as to whether the plaintiff ever granted a mortgage or charge over its lands is of course fundamental to the issues in dispute between the plaintiff and the first, second and third named defendants. If the plaintiff never granted a mortgage or charge over the said lands then the first defendant cannot appoint a receiver over the said lands and has no right or title to sell the said properties.
- 59.** I am also satisfied – based on the matters set out on affidavit – that there are a number of fair questions to be tried in this case and that the case will probably go to trial. Certainly, the decision at the interlocutory injunction stage will not decide the matter.

60. Thirdly, I have considered the balance of justice and the first component of that, the adequacy of damages. The plaintiff submitted that the damages would not be an adequate remedy because, if it turned out at the trial of the action, that the plaintiff's case was successful then the first, second and third defendant had no lawful mortgage or charge over the lands, they had no right to take possession of the lands and they had no right to sell the lands. In those circumstances the plaintiff would be deprived of its lands and the defendants would have engaged in a trespass over the plaintiff's lands.
61. The plaintiff submitted that it was clear from the authorities that trespass can never be adequately compensated in damages. The plaintiff relied upon the decision of Baker J. in *Harrington v. Gulland Property Finance Ltd* [2016] IEHC 447 which cited Laffoy J. in *Pasture Properties v. Evans* [1999] IEHC 214 who stated that: "*It is axiomatic in trespass cases that damages are not an adequate remedy.*"
62. I have also considered the dicta of Clarke J. (as he then was) in *Metro International SA v. Independent News and Media* [2005] IEHC 309 in which he said:
- "Thus, in many cases where a plaintiff alleges an infringement of his property rights the court will intervene by injunction where those property rights have been established rather than compensate the plaintiff for the loss of those property rights."*
63. I am satisfied in the present case, given that this is a dispute about whether the first three defendants have any legal or equitable title to sell the lands, that damages would not be an adequate remedy for the plaintiff, if the injunction were to be refused and the plaintiff were successful at trial.
64. Fourthly, the Supreme Court indicated that:
- "Whilst the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and*

*weighed in the balance in considering how matters are to be held most fairly pending a trial and recognising the possibility that there may be no trial.”*

65. I am of the view that the other factors which come into play, and which should be considered by the court and weighed in the balance are:
- (i) that the plaintiff disputes that it created any mortgage or charge over the lands in favour of AIB or its successor;
  - (ii) the fact that the directors of the plaintiff allege (and have provided a report of a handwriting expert to back up that view) that their signatures on mortgages and deeds of charges are forged; and
  - (iii) that therefore the right of the Defendants to sell the property is in dispute.
66. In my view, the circumstances in which title to land is disputed is a decisive consideration in assessing the balance of justice and in granting an injunction to restrain the defendants from taking any steps to sell the land until these matters have been resolved.
67. Moreover any such sale which might be entered into by Everyday Finance or its receivers could cause significant prejudice to a purchaser as their title to land might subsequently be compromised.

### **Conclusion**

68. In the circumstances I am satisfied that an injunction should be granted in this case. I will hear the parties further on the exact form of the order.
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