THE HIGH COURT

CHANCERY

[2017 No. 2774 P]

BETWEEN

SEAN MCGONAGLE

CONNIE MCGONAGLE

PLAINTIFFS

AND

MICHAEL MCATEER

DEFENDANT

JUDGMENT of the Hon. Ms. Justice Stewart delivered on the 10th day of November, 2017.

1. In the application currently before the Court, the plaintiffs seek injunctive relief as against the defendant, who was appointed under a deed of appointment of receiver dated 13th June, 2013, over a number of secured properties set out in the schedule to that deed. The plaintiffs issued plenary proceedings on 27th March, 2017. The notice of motion for interlocutory relief was issued on 12th June, 2017, following on from a number of other orders sought from and adjudicated upon by the High Court.

2. The plaintiffs first proceeded by way of *ex parte* application and sought interim injunctive relief. The defendant was informally put on notice and he undertook not to proceed with the proposed auction and/or disposal of the properties the subject matter of the proceedings pending the issuance and determination of the application for injunctive relief made to this Court. The plaintiffs did not issue the notice of motion for interlocutory relief for two and a half months, by which stage the defendant indicated to the Court that it was neither in the position, nor was it willing, to continue aforesaid undertaking. In those circumstances, the matter proceeded to hearing on the 28th July, 2017. The matter was to resume the following Tuesday, 30th July. However, due to unforeseen circumstances, the Court was unavailable to finalise the application and the hearing resumed and concluded on the afternoon of Tuesday 3rd October, 2017.

3. The plaintiffs contend that there is a fair issue to be tried at the hearing of the within proceedings. They rely on the existence of a complaint made to the Financial Service Ombudsman (hereinafter referred to as the FSO) in June, 2012. The plaintiffs maintain that that complaint is extant and could not have been processed in the intervening period due to their inability to access information and documents. That lack of access related to ongoing issues regarding the release of files from the solicitors that had formally represented the plaintiffs in related matters, as well as ongoing data protection request lodged by the plaintiffs. It should be pointed out at this stage that no information regarding the details and/or further progress of that complaint has been put before this Court. Furthermore, the defendant is not a party to that complaint. Insofar as the Court is aware, the complaint relates to the actions of Ulster Bank, the lenders who initially advanced monies to the plaintiffs, and the plaintiffs' former solicitors, M.D. White and Co. Ltd. The plaintiffs contend that the lodging and pursuit of that complaint was a legitimate and reasonable action to take that excuses and/or justifies any alleged delay in commencing these proceedings and seeking relief by way of interlocutory injunction.

4. The plaintiffs also argue that the extent of their liabilities to Ulster Bank and their successor, Promontoria (Aran) Ltd., has not been finalised and is open to dispute. They also submit that there are issues arising on foot of the signatures attaching to the guarantees in respect of the company's indebtedness. More specifically, they allege that the document does not contain their signatures. Further, there are issues raised in relation to the dates of the guarantees, as well as the waiver of legal advice documents allegedly signed and dated by the plaintiffs. In particular, it is argued that the date beside the second-named plaintiff's signature appears to have been changed from a 20 to a 28, in contradistinction to the witness's signature, which is dated 20th March, 2009. It is also submitted that the plaintiffs are not aware of any such witness and did not meet that person at the Ulster Bank branch in Buncrana in or around that time.

5. The plaintiffs borrowed monies from Ulster Bank Ltd., both in a personal capacity and also as directors of the company, Malin Holiday Homes Ltd. The purpose of the company was to build a number of holiday homes on lands contained in some of the folios the subject matter of these proceedings. Following the defendant's appointment, it appears that he proceeded to sell three of the properties developed on the said lands. These sales occurred in the intervening period between June, 2013 and April, 2017. No steps were taken by the plaintiffs at any stage to issue proceedings in respect of the proposed sales, nor did they to seek to inhibit them in any way.

6. The defendant rightly points out that the plaintiffs have delayed to an extraordinary degree in taking any steps to prevent the final disposal of the properties by the defendant. It appears that a period in excess of four years has elapsed since the appointment of the receiver, with no steps taken by the plaintiffs in the intervening period. The plaintiffs have submitted that they lodged their FSO complaint in 2012, six months before the receiver was appointed, and that there has therefore been no delay in seeking to challenge the defendant's actions. However, the receiver has taken a number of significant steps in carrying out his duties as receiver, including the sale of some of the secured properties, and no proceedings were instituted to prevent that action from being taken. The plaintiffs argued in oral submissions that they were not aware that those sales were proceeding. However, no such complaint is made in the various affidavits filed on behalf of the plaintiffs before the Court. Instead, the only complaint made in relation to those sales is the plaintiffs' belief that the properties were sold at an undervalue.

7. It seems to be an inescapable and unavoidable conclusion that the plaintiffs in this case have delayed to such an extent that the Court is obliged to be cautious in considering the grant of their application for interlocutory relief. The plaintiffs seek to rely on an extract from Chapter 4 of the second edition of *Kirwan on Injunctions* and, in particular, the views expressed therein relating to an exception to the rule in respect of delay, the doctrine of *laches* in respect of interlocutory injunctions and the application of Jacob J.'s decision in *Newport Association Football Club Ltd. v. Football Association of Wales* [1995] 2 All E.R. 87. However, one of the conclusions reached by Jacob J. was that a delay in excess of two years would be a nigh-automatic bar to the grant of interlocutory injunctive relief. Furthermore, Jacobs J. was at pains to point out that the case he was dealing with was an exceptional case in and of itself. I cannot see any such exceptional aspect in the case brought by the plaintiffs to this Court. Thus, it seems to me that, on

the question of delay alone, the plaintiffs could not succeed in their application for interlocutory relief.

8. Even if I had held otherwise on the delay point, the Court would have a number of other concerns regarding the plaintiff's case. In relation to the question of a fair issue to be tried, the plaintiffs's main argument related to their FSO complaint. They argue that it would be inequitable for the defendant to proceed with the receivership in circumstances where active steps are being taken in respect of that FSO complaint. The plaintiffs rely on *Kinsella & Ors v. Wallace* [2013] IEHC 112 in this regard. Setting aside for a moment that the receivership has been proceeding for four years and that the plaintiffs only issued legal proceedings seeking to halt that process in 2017, the Court must hold against the plaintiffs in applying the Kinsella decision for similar reasons as those set out in its decision in *Hogan v. Deloitte & Ors* [2017] IEHC 673, which is being delivered contemporaneously to this decision. This Court is unconvinced that the *Kinsella* decision can be applied to this case and remains of the view that its reasoning is inextricably bound up in its own facts.

9. Furthermore, even if the Court were to consider making a determination on interlocutory relief on grounds of a pending complaint before the FSO, such a determination would require a comprehensive review of the arguments and material put before the FSO under that complaint. As it stands in this matter, the paperwork put before the Court is incomplete. It is particularly notable that the material submitted to the FSO to initiate the complaints process has not been exhibited. The most informative material relating to the complaint is exhibited to the first-named plaintiff's affidavit, sworn on 17th July, 2017. In that regard, the material put before the Court remains unsatisfactory. Exhibit "SM1" is particularly disjointed, in that it comprises of chunks from at least three different documents compiled out of order, followed by copies of various facility letters that are faded and unintelligible at several points. In terms of the case actually being made by the plaintiffs, Exhibit "SM4" provides the most guidance. The document contained therein makes a variety of allegations. The sum total of the allegations made therein, when taken at their height, would lead to one of two conclusions: either that 1) Ulster Bank and the plaintiffs' former solicitors have been jointly incompetent at numerous stages over the course of the impugned transactions, or 2) the Bank and the former solicitors have engaged in a grand conspiracy against the plaintiffs for reasons unknown. Regardless of which conclusion the Court might reach, it would also assume such a fundamental lack of appreciation on behalf of the plaintiffs regarding their own finances as to border on wilful ignorance.

10. No authority has been opened to the Court to indicate the circumstances, if any, in which it is appropriate to grant interlocutory relief on foot of a pending complaint to the FSO. The Court does not intend to provide such an indication at this juncture. However, it is axiomatic that the particulars of the complaint, and a chronology/record of the steps taken in pursuit of it, would have to be put before the Court in a clear and comprehensive manner, so that the Court can at least determine that there is reality to the complaint and that it is not an abuse of process. It is not simply a matter of a litigant making a complaint to the FSO and then coming to court seeking to influence the grant of interlocutory relief based on the mere existence of that complaint. While this is only an interlocutory application, the Court must at least be satisfied that there is some level of merit to the complaint before it even considers how that complaint should affect its decision on interlocutory relief. As it stands, a high degree of ambiguity is contained in the plaintiffs' affidavits and the oral submissions made on this point focused on the application of the *Kinsella* decision, rather than on providing any clarity to the actual contents of the complaint. In those circumstances, I am not satisfied that the issues raised in the FSO complaint have been set out with sufficient clarity for the Court to make a determination on their merits or their impact on the application for interlocutory relief.

11. The plaintiffs go on to make a number of other arguments, including undue influence and the improper exercise of the receiver's powers. The former of these arguments in couched, not in terms of undue influence exercised by the first-named plaintiff over the second-named plaintiff, but rather as a form of undue influence exercised by the bank over the second-named plaintiff. While various averments address the second-named plaintiff's relationship with bank officials, none of that evidence sufficiently explores that relationship in the lead up to the execution of the relevant documents, nor does it explore the acts that the second-named plaintiff was allegedly influenced into committing. Rather, the plaintiffs deny committing some of the relevant acts at all. This would seem to imply an allegation of fraud, not undue influence, but fraud has not been pleaded. In the absence of the necessary evidence, the Court cannot make a finding that a fair question to be tried has been established under the heading of undue influence.

12. Regarding the issue of improper exercise of receiver's powers, the plaintiffs' argument relates to the power of sale. Aengus Burns, a colleague of the defendant, swore an affidavit dated 20th July, 2017, on behalf of the defendant (the defendant being outside the jurisdiction and not in a position to swear the affidavit himself before the matter came on for hearing), in which he avers that the defendant's role does not include the exercise of a power of sale. Rather, he prepares the properties for sale, at which point the mortgagee enters into possession and exercises the power of sale under the mortgage deed. The plaintiffs have not set out in any way, either in oral submissions or on affidavit, why this would not be a valid exercise of the receiver's powers. Therefore, no fair question to be tried can be found under this heading either.

13. During the hearing, the plaintiffs also sought to make issue of the fact that some of the loans over which the receiver was appointed are currently held by Promontoria (Finn) Ltd., rather than Promontoria (Aran) Ltd, neither of whom are a party of this action. This argument ignores the fact that the receiver was appointed by the Bank and not by any entity of Promontoria. At the time of the appointment, the Bank was vested with, in respect of the loans it held, all the rights and entitlements of a mortgagee that had properly served a letter of demand and had not recovered the sums it was due. These rights and entitlements were subsequently transferred to various other entities, including Promontoria (Aran) Ltd and (Finn) Ltd. That has no impact upon the defendant's appointment. He has been appointed to deal with the security attaching to certain loans previously held by Ulster Bank. I fail to see how his appointment and actions in respect of those loans have been undermined by a change in the number or identity of the mortgagors, where such changes occurred after he was appointed.

14. While the burden on the plaintiffs at this juncture is simply to establish that they have an arguable case, I find it difficult to conceive, given the background to this matter, any fault in the appointment of the receiver. Even if I were wrong in that view, and the plaintiffs could establish that there is a fair issue to be tried, it seems to me that the principle of damages as an adequate remedy provides sufficient protection for the plaintiffs in this case. Much emphasis has been placed on the nature of the lands the subject matter of the receivership. It was argued 1) that the land constitutes part of a family farm that had been in the family for generations, and 2) that the property contained in one of the folios belonged to the first-named plaintiff's late mother. In addressing this argument, I would refer again to my decision in *Hogan* (*supra*). I hold therein that the sentimental value placed in a specific piece of property by a party is insufficient, in and of itself, to warrant the grant of interlocutory relief, where that piece of property is not the family home. It must also be borne in mind that the said lands were used for the development of holiday homes, so it is quite clear that they were used for commercial and/or investment purposes.

15. The Court is particularly concerned that, throughout the proceedings, and up until the final affidavits were filed in the latter half of July, 2017, the plaintiffs sought to argue that the land the subject matter of the receivership comprised of and/or impacted upon the family home of the plaintiffs. Ultimately, and very belatedly, it was accepted that the family home was completely separate and formed no part of the receivership process. It is a well-established principle that those who come to equity must come with clean

hands. The plaintiffs were involved in drawing up the loan agreements between themselves and the Bank and it seems inconceivable to me that they were unaware that their family home had been transferred to a new folio so as to take it outside the scope of the Bank's security. I can only conclude that the plaintiffs have, at the very least, obfuscated the truth and been less than candid with the Court in their averments, most particularly in the affidavit of the first-named plaintiff, dated 12th June, 2017. While it may be, and has been, suggested on behalf of the plaintiffs that they were unrepresented at the commencement of these proceedings, that does not alleviate and/or dispense with the requirement placed on all deponents to be honest and to tell the truth when engaging with the courts. Indeed, that is the purpose of the oath and affirmation contained in an affidavit where the deponent swears to the truth of the contents of the affidavit. It is undeniable that the plaintiffs neglected their duties in that regard when devising the affidavits sworn in these proceedings. It is also a matter of concern to the Court that legal professionals appear ready and willing to advance such excuses on behalf of their clients in circumstances where it is indisputable that the contents of their client's affidavits are not a truthful representation of the facts.

16. It is clear that the properties the subject matter of the receivership do not impact and/or affect the plaintiffs' family home. The properties are commercial, business and/or investment properties. The plaintiffs borrowed substantial monies, both personally and on behalf of the company of which they were both directors, from the Bank. Ulster Bank issued letters of demand and called in the debts in June, 2013. The loans were sold in 23rd July, 2015, thereby assigning all rights and interests in the loans to the new mortgagees. The plaintiffs were notified of this sale by letter dated 27th October, 2015. An issue has arisen in relation to the date of the demand letters and whether the requisite time had elapsed before the appointment of the receiver. Any queries on this issue have been obviated by the supplemental affidavit of Aengus Burns dated 26th July, 2017, which exhibits a letter of 10th June, 2013, sent to both Sean and Connie McGonagle demanding the payment of the debt in full. The deeds of appointment in respect of the defendant were executed on the 13th June, 2013, and he accepted his appointment the following day. This would appear to fully comply with the terms of the loans in respect of the appointment of receivers. It should also be pointed out that the mortgages in question were all sums due mortgages. There was no question but that the prior default by the plaintiffs entitled the mortgagee to issue the demand letter and appoint the receiver when the debt was not paid.

17. In relation to the plaintiffs' undertaking as to damages, the defendant submits that, given the level of indebtedness, such an undertaking provides no comfort to the defendant, nor should it to the Court. It is clear from the decision of Clarke J. in *Molloy v. Molloy* [2007] IEHC 282 that the Court is entitled to rely on an undertaking as to damages from the plaintiff. However, in weighing the question of where the balance of convenience lies, the Court can to have regard at that stage to the reality or the viability of that undertaking as to damages. Clarke J. describes it best as looking to where the "inconvenience" lies. It seems to me that, given the business and/or commercial nature of the property the subject matter of the proceedings and the plaintiffs' level of indebtedness that the inconvenience lies against the plaintiffs. While the final figure of that indebtedness maybe disputed by the plaintiffs, it is beyond doubt that the level of indebtedness exceeds any potential value of the lands in question or any other realistic source of income through which the plaintiffs could substantiate their undertaking as to damages. In those circumstances, the plaintiffs' inability to compensate the defendant for any further loss caused by the prolonged delay and the grant of interlocutory relief must tilt the balance of convenience in favour of the defendant.

18. For all of these reasons, I am not disposed to grant interlocutory reliefs and so I therefore refuse the application.