

**THE HIGH COURT**

**[2014 No. 5043 P]**

**BETWEEN**

**DECLAN MCDONALD**

**PLAINTIFF**

**AND**

**THOMAS MICHAEL HILL**

**DEFENDANT**

**JUDGMENT of Mr. Justice Binchy delivered on the 25th day of November, 2014**

**The Proceedings and Application for Interlocutory Relief**

1. The plaintiff in these proceedings is a receiver appointed by Danske Bank A/S trading as Danske Bank (the Bank), over the lands registered on Folios 2189F and 12081F County Cavan, which were charged by the defendant in favour of the Bank firstly by way of a Deed of Mortgage dated 18th December, 2007, over lands called the "Larrigan lands," contained in the Folios 2189F and 129081F, County Cavan and secondly, by a Deed of Mortgage dated 13th February, 2008, over the Public House known as "Fiona's Bar."

2. These proceedings were initiated by plenary summons issued on 4th June, 2014, in which the first relief sought by the plaintiff was an order restraining the defendant from attempting to frustrate the activities of the plaintiff as receiver over the receivership property. Various other reliefs were sought, including damages.

3. The application to which this judgment relates is an application for interlocutory relief which was initiated on 19th June, 2014, in which the plaintiff seeks orders –

(a) restraining the defendant, his servants or agents and all persons acting in concert with him, from interfering with, or attempting to frustrate, the activities of the plaintiff as receiver over the receivership property;

(b) restraining the defendant, his servants or agents and all persons acting in concert with him, from preventing, impeding, and/or obstructing the plaintiff, servants or agents from taking possession of, entering in and collecting rent and/or licence fees relating to the receivership property;

(c) restraining the defendant, his servants and agents and all persons acting in concert with him, from entering onto, or otherwise interfering with the receivership property without the prior written consent of the plaintiff;

(d) by way of mandatory injunction directing the defendant his servants or agents, to deliver up to the plaintiff forthwith the keys, alarm codes, locks and all other security and access devices and equipment of the receivership property;

(e) restraining the defendant, his servants and agents and all persons acting in concert with him, from harassing or intimidating any employee and/or agent of the plaintiff and/or occupant of the receivership property.

**Background**

4. On 2nd August, 2007, the Bank advanced facilities to the defendant for the purpose of purchasing a public house known as "Fiona's Bar" located at Kilnaleck, County Cavan. The sum advanced by the Bank to enable the purchase was €583,000.00. It was to be repaid by 240 consecutive monthly instalments to include capital and interest commencing one month from the date of drawn down of the loan.

5. The security to be provided by the defendant to the Bank in connection with the loan was:-

(a) A legal mortgage over circa 57 acres of lands at Larrigan, Carrickaboy, County Cavan;

(b) A legal mortgage over the public house known as "Fiona's Bar" at Kilnaleck, County Cavan; and

(c) An assigned life policy in the name of Tom Michael Hill in the amount of €500,000.00.

6. The acquisition of the property proceeded in accordance with the terms of the loan and the defendant duly executed deeds of mortgage and charge in favour of the Bank dated 18th December, 2007 and 13 February 2008. The description of the mortgaged property as set out in the schedule to the former deed of mortgage is: "The properties comprised in Folios 2189F and 129081F, County Cavan," and in the latter is:-

"Property comprised in Conveyance dated the 13th day of February 2008 made between Fiona Traynor of the one part and Tom Michael Hill of the other part and therein described as "ALL THAT AND THOSE the Residence, Public House and Lounge Bar, known as "Fionas Bar", together with the Back yard and all Out-offices, situate at Main Street, Kilnaleck in the County of Cavan, being the property more particularly delineated on the map annexed to a certain Indenture of Conveyance dated 11th day of February 1997, Margaret Brady of one part and Bernard and Josephine Leggett of the other part and thereon surrounded by a red verge line, together with the benefit of the full Publicans On-Licence attaching thereto."

7. At the time of drawn down of the mortgage the defendant also completed ancillary documentation in connection with the same,

and this included a declaration completed by the plaintiff and his wife that the property known as "Fiona's Bar" was not their family home within the meaning of that term in the Family Home Protection Act 1976, and further stating that their family home is located elsewhere at Larrigan, Carrickaboy, County Cavan. This was also confirmed in Replies to Requisitions and Title delivered on behalf of the defendant by his solicitors to the solicitor for the Bank at the time of the drawn down of the loan.

8. The defendant proceeded to take up occupation of the licensed premises and together with his wife, has operated the licensed premises (having changed its name to TM's Vintage Bar) ever since. The Larrigan lands comprising 57 acres, which were also given as security by the defendant to the plaintiff and are contained in Folios 2189F and 129081F, Co. Cavan, have been, according to the defendant, in the defendant's family for more than a century. The defendant derives his livelihood exclusively from the licensed premises and the Larrigan lands.

9. At some stage following upon the drawn down of the loan (it is not clear precisely when), the defendant began to fall into arrears with his repayments. It appears from correspondence exhibited, that the problem may have commenced in or about January, 2012. At all relevant times for the purpose of these proceedings it appears that the defendant's scheduled monthly repayments to the Bank were €3,175.00.

10. The earliest correspondence exhibited in the various affidavits exchanged indicating that the defendant was falling into arrears is a letter from the Bank to the defendant dated 26th January, 2012, in which the Bank demanded payment of arrears of €4,324.00. Between that date and 22nd November, 2013, the Bank claims to have written to the defendant demanding arrears on no less than sixteen occasions. The defendant acknowledges receipt of at least nine of the letters identified by the Bank (in para. 11 of his affidavit of 25th June, 2014). From a review of that correspondence, it would appear that the arrears oscillated during the period but at no time were they any greater than €8,750.00, and at their lowest amounted to of the order of €2,684.00.

11. The deed of mortgage completed by the defendant in favour of the Bank, in the usual way, contained a clause (in this case Clause 6(1) of the deed of mortgage) stating that:-

"The monies owing upon this security shall be deemed to have become due within the meaning of s. 19 of the Conveyancing and Law of Property Act 1881, and s. 4 of the Conveyancing and Law of Property Act 1911, immediately on demand for payment being made by the Bank or the Bank's solicitor for the time being or upon the happening of any other event upon the happening of which the power of sale is exercisable and that such demand may be effectually made by notice in writing either left at or sent by post to the mortgagor either at the mortgagor's usual or last known place of abode or business in Ireland, or left for the mortgagor on any part of the mortgage property..."

12. The Bank claims that on 22nd November, 2013, it sent to the defendant a letter demanding payment of the amount then owing (according to the plaintiff) by the defendant to the Bank in the sum of €481,759.06. A copy of this letter is exhibited in the grounding affidavit of Mr. Declan McDonald dated 4th June, 2014, and referred to at para. 12 thereof. The defendant denies that he ever received such a letter, and whether or not this letter was actually sent by the plaintiff to the defendant is the central issue in connection with this application.

13. Additionally, the defendant asserts that he had an implied agreement with the Bank in relation to the reduction of his arrears. This is asserted on behalf of the plaintiff in a letter of his solicitors, McDowell Purcell, dated 1st May, 2014, to the plaintiff (the receiver ultimately appointed by the plaintiff whose appointment I refer to below). However, there is no further reference to this agreement in the correspondence exchanged between solicitors, or in the affidavits exchanged in the context of this application, save that in para. 12 of his affidavit of 25th June, 2014, where the defendant states that if it had been apparent to him that the plaintiff had decided to terminate its facilities, that he would not have continued to make payment to the plaintiff as he did following 22nd November, 2013.

14. By two deeds of appointment dated 14th April, 2014, the Bank did appoint Mr. Declan McDonald of P.W.C., 1 Spencer Dock, North Wall Quay, Dublin 1, as receiver firstly over the properties contained in Folios 2189F and 12081F, Co. Cavan and secondly over the licensed premises, previously known as "Fiona's Bar," now known as "TM's Vintage Bar". By letter dated 19th May, 2014, the solicitors for the defendant, Messrs. McDowell Purcell, informed Mr. McDonald that, for the reasons given in their earlier letter of 1st May, 2014, to Mr. McDonald, vacant possession of the property would not be delivered by the defendant to the plaintiff, and it is as a consequence of that refusal that the plaintiff brings the within application for interlocutory relief.

### **The Dispute**

15. As alluded to above, the central dispute in these proceedings is whether or not the Bank actually sent the letter of demand dated 22nd November, 2013, to the defendant. The defendant stoutly maintains that the letter could not have been sent, as he would have received it. The defendant maintains that he is careful about the management of his correspondence (para. 11 of his affidavit of 25th June, 2014) and exhibits numerous letters that he confirms he received from the Bank. These are the same letters referred to in a letter of Byrne Wallace Solicitors for the plaintiff, to the solicitors for the Defendant, dated 13th May, 2014. At no stage, however, does the defendant claim that he ever replied to any of this correspondence.

16. On the other hand, it is clear that the plaintiff is unable to prove as a matter of certainty that Danske Bank sent the letter of 22nd November, 2013, to the defendant.

17. To deal with this case, the plaintiff procured a number of affidavits from those officers/employees of Danske Bank to support the contention that the letter was indeed sent. In para. 5 of his affidavit of 14th July, 2014, Peter Collins, Senior Business Manager of Danske Bank and based in Galway, states that:-

"On 22nd November, 2013, I checked, printed, signed and placed in the internal bank postage process (for subsequent external posting to the defendant via the Head Office of the Bank) the said letter of demand and that I scanned a copy of the customer folder on the same date."

18. In para. 6 of the same affidavit he states:-

"After I signed the letter of demand it was issued by ordinary post to the defendant's address at Larrigan, Carrickaboy, County Cavan. I beg to refer an exhibited copy of a printout of the comment, which I added to the customer portal in the Bank's internal computer system dated 22nd November, 2013, noting that the demand letter had issued."

19. In para. 7 of the same affidavit he states that:-

"I have worked for the Bank since May, 2006 and in all my years I have never encountered, nor am I aware of any

situation where a letter was entered into the customer portal as having been issued and where it subsequently transpired that it was never posted.”

20. While a subsequent affidavit was sworn by Mr. Niall O'Reilly dated 15th July, 2014, stating that, on 10th July 2014, he received an email from the said Peter Collins confirming that he issued demand letters to the defendant, there is no evidence available to the court to prove as a matter of certainty that the demand letter was sent. Such evidence could be in the form of a certificate of posting from the postal authorities or in the form of a certificate or affidavit from the person who actually posted the letter. In light of this issue, the Bank subsequently sent a further demand letter to the defendant dated 18th July, 2014, of which it did keep a record (provided by An Post) to demonstrate that that letter was sent. This letter was sent entirely without prejudice to the Bank's position that it had posted the demand letter of 22nd November, 2013.

21. Against that background, the plaintiff invites the court to accept that, as a matter of probability, the letter of demand was sent by the Bank to the defendant in accordance with the deeds of mortgage and prior to the execution of the deeds of appointment by the Bank of the plaintiff as receiver.

22. In the course of the proceedings, other issues of dispute have surfaced but in the context of this interlocutory application it is unnecessary for the court to adjudicate upon these issues. For the record, however, these issues are:-

(a) 1. For the first time in the proceedings, and in his third affidavit dated 7th October, 2014, the defendant states that the property comprising TM's Vintage Bar "is not merely a public house but also includes a residence. I say that the pub has, since 2007, been my family home and my principal primary residence. I say that upon purchasing the bar in Kilnaleck in 2007, my wife and I moved into the property having lived with my mother up until that date in her home in Larrigan".

By reason of this the defendant contends that he is entitled to the benefit of the Central Bank's Code of Conduct on Mortgage Arrears.

2. It is clear, however, that the facilities provided by the Bank to the defendant were in the nature of a commercial loan and not a domestic mortgage and furthermore, that neither the plaintiff nor the Bank had any reason to believe at any relevant time for the purpose of these proceedings that the defendant and his wife were residing at TM's Vintage Bar, and Mr. Niall O'Reilly of the Bank confirms as much in his affidavit of 17th October, 2014.

3. In a further affidavit of 4th November, 2014, the defendant exhibits a letter from Garda Michael Fitzpatrick of the garda station at Kilnaleck, Co. Cavan who confirms that the defendant has resided in the licensed premises since August, 2007. However, the defendant states at para. 7 of this affidavit that he calls regularly to the house at Larrigan "to ensure that everything there is in order. Accordingly, no difficulty arises with our receiving post which has been sent there...".

(b) 1. In this affidavit he also states, for the first time, that one of his son's, Michael, has built a house on about three quarters of an acre of the lands described as the "Larrigan Lands" in the plaintiff's grounding affidavit.

2. In an affidavit of 11th November, 2014, Mr. Niall O'Reilly of Danske Bank states that:-

"The Bank's consent to the construction of a dwelling was never sought. Nor did the defendant seek consent for the transfer of this parcel of the lands to his son. I am advised that the construction of any dwelling on the lands is a breach by the defendant of Clause 4(2) of the mortgage and charge dated 18th December, 2007."

(c) Finally, in the same affidavit, Mr. O'Reilly states that on or about 22nd November, 2013, (the date the plaintiff's claims the letter of demand issued) the defendant was €8,531.55 in arrears and that he remained in arrears in the amount of €3,533.88 on 14th April, 2014, being the date upon which the plaintiff was appointed as receiver. The defendant contends that the amount of the arrears as of the date of the plaintiff's appointment as receiver was at or around €2,200.00.

#### **Appointment of Plaintiff as Receiver**

23. No issue has been raised by the defendant as regards the form of deeds of appointment whereby the plaintiff was appointed as receiver, or as to the due execution thereof by Danske Bank. The only issue raised by the defendant as regards the Plaintiff's appointment as Receiver, is that the plaintiff has failed to show, as a matter of certainty, that the letter of demand of 22nd November, 2013, was sent to the defendant, and that this is an essential proof to establish the Plaintiff has been validly appointed as Receiver.

24. While there is a considerable volume of jurisprudence on the need for a deed of appointment of a receiver to be undertaken in strict compliance with the terms of the security documentation, there does not appear to be any authority dealing specifically with the standard of proof required to demonstrate that a letter of demand sent prior to exercising the power of appointment, has been sent. In the case of *The Merrow Ltd v. Bank of Scotland Plc and David O'Connor*, Gilligan J. reviewed the authorities applicable to financial institutions when exercising their power to appoint receivers. All of these authorities come to the same conclusion which may perhaps be best summarised by the passage quoted by Gilligan J. from Lynch-Fannon, "*Corporate Insolvency and Rescue*" (2nd Ed.):-

"The penalty for non-compliance with the formalities for the appointment of the receiver is that such appointment is void."

25. The authorities stress the importance of strict adherence to the terms of the debenture. Having reviewed the authorities, Gilligan J. commented:-

"It is clear from the foregoing that a receiver who is not appointed in accordance with the terms of debenture is not validly appointed. In addition, an invalidly appointed receiver may be a trespasser on company property."

26. It is clear from the terms of the deeds of mortgage completed by the defendant in favour of Danske Bank that it is a prerequisite that a letter of demand is issued by the Bank to the defendant before it may exercise its appointment of receiver. It is not necessary for the Bank to send it by registered post, or even to be able to prove that the demand has been received by the defendant; all the Bank must do is send it by post or leave it at the defendant's usual, or last known, abode or place of business. None of that is in dispute.

27. What is in dispute, however, is the standard of proof required of the Bank or the receiver to demonstrate that the letter of demand was sent. Having regard to the very serious consequences for the defendant of the appointment of a receiver over his farm

and licensed premises, and having regard to the fact that it was open to the Bank to keep a record that would prove definitively that the letter of demand was sent, I believe that there is a serious issue to be tried between the parties at a full hearing of the proceedings and that accordingly, the first of the three criteria laid down by the Supreme Court in *Campus Oil v. Minister for Industry and Energy* (No.2) [1983] I.R. 88 has been satisfied.

28. Turning to the second of the criteria in the *Campus Oil* case, the plaintiff contends that damages are an adequate remedy for the defendant in the event that the defendant succeeds in these proceedings, and the plaintiff has given the court an undertaking as to damages. I have difficulty, however, in accepting, in the particular circumstances of this case, that damages would be an adequate remedy for the defendant. To suggest this is to ignore the damage to the plaintiff's reputation, the impact on his dignity as a human being by reason of the deprivation of his livelihood and the distress caused by reason of being deprived of the Larrigan lands which have been in his family for more than 100 years.

29. The plaintiff expresses concern that the defendant will not have the means to meet any award of damages that may be made in favour of the plaintiff. Neither of the parties produced any evidence to the court as to the value of the Larrigan lands or the licensed premises, but having regard to the fact that the Larrigan lands comprise some 57 acres it seems likely to the court that, taken together with the licensed premises, the value of the assets should be adequate to meet any award of damages that may be made as against the defendant, in the event that he is unsuccessful at the trial of the matter. Moreover, the court was informed that the defendant is the owner of an additional residential premises contained in Folio 23630F, County Cavan, which is unencumbered. In all of the circumstances, therefore, I am satisfied that the defendant has the means to meet any award that may be made against him in the event that he is unsuccessful in defending the proceedings.

30. While it may not be necessary for me to consider the third of the criteria set forth in the *Campus Oil* case, nonetheless I think it is worth observing that the balance of convenience in this matter manifestly lies in favour of not granting the relief sought. If the relief sought is granted, the defendant will lose his livelihood with almost immediate effect, as against which the plaintiff has only been able to assert in the most general of terms that he will suffer any inconvenience as a result of having to await the determination of the proceedings. Clearly the receivership will not be able to proceed while the proceedings are pending, but any losses sustained by the receiver (if he is successful in the proceedings) should be adequately recompensed for the reasons given above.

31. For all of these reasons, I refuse the relief sought by the plaintiff herein.