

THE HIGH COURT

[2018 No. 615 P.]

BETWEEN

KIERAN REGAN AND COLM REGAN

PLAINTIFFS

AND

HARBELL DAC

AND

TOM O'BRIEN

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 23rd day of November, 2018

1. This is an application by the plaintiffs for an interlocutory order restraining the sale by the defendants of a house at 15 Carrickmines Chase, Carrickmines, Dublin 18.

2. The notice of motion sought, besides, an injunction preventing the defendants from interfering with the second plaintiff's occupation and use of the property and an injunction preventing the defendants from alienating, using selling, divesting or marketing the property. Such an order would have prevented the letting of the property pending the trial of the action but that much of the claim was abandoned in the course of argument.

3. I am bound to say that I found the pleadings, the evidence, and the argument made on behalf of the plaintiffs to be confused and unfocussed but in the end a tolerably clear picture emerges.

4. On 13th November, 2003 the second plaintiff took a conveyance of a house at 15 Carrickmines Chase, Carrickmines, Dublin 18 (*"the Carrickmines' property"*). There is no evidence before the court as to how the purchase was funded.

5. By letter of loan approval dated 27th March, 2006 Irish Life & Permanent plc offered to the plaintiffs a loan of €448,000, repayable over over eighteen years, on the security of the Carrickmines property. The court has no evidence of the purpose of that loan but the plaintiffs' case is that the first plaintiff was named as a joint applicant because he, at the time, was the stronger covenant.

6. By mortgage dated 18th May, 2006 between the plaintiffs of the one part and Irish Life & Permanent plc of the other part, the Carrickmines property was mortgaged to Irish Life & Permanent plc. The mortgage identified the property, the fact that it was owned by the second plaintiff, the amount of the loan (referred to as the *"initial advance"*), and the term of eighteen years. It was in the Irish Life & Permanent plc printed standard form.

7. The loan of €448,000 (*"the Carrickmines loan"*) was drawn down and has since been serviced, more or less as required, by the second plaintiff.

8. In 2007 the first plaintiff was approved by Irish Life & Permanent plc for a loan of €750,000 to fund or part fund the purchase by him of two apartments in Spencer Dock. I will refer to this borrowing as *"the Spencer Dock loan"*.

9. The letter of loan approval of 5th April, 2007 shows the applicant as the first plaintiff (only) and the security as the two Spencer Dock apartments and the Carrickmines property.

10. In circumstances which are not quite clear (perhaps because there was a gap between the purchase of the two Spencer Dock apartments) a further letter of offer was issued by Irish Life & Permanent plc to the first plaintiff on 2nd May, 2008 for the same amount and this was accepted by the first plaintiff on 7th May, 2008.

11. On 30th May, 2008 the first plaintiff executed a mortgage of the two Spencer Dock properties to Irish Life & Permanent plc. Again the mortgage was in the lender's printed standard form and showed the amount of *"the initial advance"*, the term, and the title to the two Spencer Dock properties.

12. The Spencer Dock loan went into arrears and following a process of engagement between the first plaintiff and Irish Life & Permanent plc was rescheduled by capitalising the arrears, rescheduling the loan, and providing for monthly payments of combined principal and interest of €2,426.99.

13. The revised terms for the Spencer Dock loan were set out in a letter from Irish Life & Permanent Plc to the first plaintiff of 20th April, 2015. That letter set out that *"the arrangement will be reviewed every three years but may have a greater frequency, when all borrowers will be required to complete a new Financial Assessment Form"*.

14. In the correspondence exchanged before the commencement of these proceedings, and in the affidavits, and in argument, a great deal of time was devoted to whether the variation agreement of 20th April, 2015 varied the 2007 letter of approval or the 2008 letter of approval. For the purposes of this application I do not believe that anything turns on that but I do observe that the copy letter of 5th April, 2007 which has been exhibited does not have the first plaintiff's acceptance endorsed on it while the copy letter of 2nd May, 2008 does.

15. Counsel for the defendants submitted that the failure of the plaintiffs to recognise and acknowledge that the 2007 letter of approval had been superceded by the 2008 letter of approval and their persistence in maintaining that it had not been was a factor to be taken into account in deciding the substance of the application. I have to say that I understand counsel's frustration that so much ink has been spilled and so much time taken in agitating an issue that does not appear to be an issue at all but I do not believe that it goes to the merits of the case.

16. By deed dated 19th June, 2015 the Carrickmines loan and the Spencer Dock loan and all security held in respect of them were

assigned to the first defendant.

17. In October, 2016 the first defendant embarked on a review of the Spencer Dock loan, calling on the first plaintiff for a sworn Statement of Affairs and vouching documentation. The first plaintiff took the view that the first defendant was not entitled to review his loan within three years of 20th April, 2015 and did not engage. On 24th January, 2017 the first defendant's agent issued a letter calling for revised monthly repayments on the Spencer Dock loan of €17,758.27, up from €2,398.09.

18. There is some dispute as to whether the first plaintiff had been meeting the lower monthly repayments but it is common case that following the letter of 24th January, 2017 he ceased paying altogether.

19. On 10th August, 2017 the first defendant demanded payment by both the first plaintiff and the second plaintiff of the balance of €719,326.70 outstanding on the Spencer Dock loan and in default of payment within ten days, possession of all three properties.

20. In October, 2016 the first defendant also embarked on a review of the Carrickmines loan, calling on both plaintiffs for a sworn Statement of Affairs and vouching documentation. Again the plaintiffs took the view that the first defendant was not entitled to review the loan and did not engage and on 24th January, 2017 the first defendant called for revised monthly repayments of €5,678.39. That revised monthly repayment has since been met, more or less. The plaintiffs' evidence is that it is the second plaintiff who has been making the repayments.

21. By separate deeds dated 5th September, 2017 the first defendant appointed (or purported to appoint) the second defendant as receiver over, respectively, the two Spencer Docks apartments and the Carrickmines property.

22. There was a dispute in correspondence as to whether the second plaintiff had paid the revised monthly repayments on the Carrickmines loan in full and the first defendant wrote a number of "*pre-demand*" letters but to date there has been no demand for payment of the Carrickmines loan.

23. As I have said, I find the plaintiffs' solicitor's correspondence rather confusing but the upshot of the exchange of correspondence was that the first defendant was insisting that it was entitled to sell the Carrickmines property to pay down the Spencer Dock loan.

24. There is no direct evidence as to the value of the three properties but I was told that one of the Spencer Dock apartments has been sold. The amount said to be outstanding on the Spencer Dock loan at the date of demand in August, 2017 was €719,326.70 and the balance now claimed is €498,354.79. From this I deduce that the sale of the apartment which has been sold realised about €220,000. While it is not said that the two apartments were identical or even similar, I think that it is reasonable to infer that the sale of the remaining Spencer Dock apartment will not satisfy the Spencer Dock loan.

25. There is no evidence as to the value of the Carrickmines property. At the time of the last review of the Carrickmines loan in December, 2016 the balance outstanding was €468,395.96. This will have reduced somewhat by the monthly repayments made in the meantime and, possibly, by some rental income received by the receiver. Since the defendants want to sell the Carrickmines property to pay down the Spencer Dock loan it seems reasonable to infer that the property is worth more than the balance of the Carrickmines loan. For present purposes I think that it is significant to observe that if the Carrickmines property were to be sold, the proceeds would be applied first, to the costs of sale, then to repayment of the Carrickmines loan, and only then (subject to recoupment if the action were to succeed) to the Spencer Dock loan, or, perhaps, the balance of the Spencer Dock loan after the proceeds of realisation of the remaining Spencer Dock apartment.

26. As I have said, there is no evidence as to the value of the Carrickmines property but it is significant that the proceeds of any sale would be applied primarily to repayment of the Carrickmines loan which, it is common case, is not due, and only after that liability had been satisfied, to a contested liability in respect of the Spencer Dock loan.

27. This action was commenced by plenary summons dated 24th January, 2018 and the motion now before the court was issued on 2nd May, 2018.

28. The first issue on an application such as this is to identify whether there is a *bona fide* issue to be tried.

29. The focus of the second plaintiff's argument was on the fact that at the time of the mortgage on 18th May, 2006 the first plaintiff had no interest in the Carrickmines property and so could not have been a mortgagor. Since the second plaintiff had no interest in the Spencer Dock apartments and was not party to the Spencer Dock loan, so the argument goes, the first defendant cannot have security for that loan over the Carrickmines property. A number of technical arguments are advanced by reference to the letter of loan approval, the mortgage, the standard form terms and conditions, and the Irish Life & Permanent plc standard forms which were and were not completed. The demand made on the second plaintiff on 10th August, 2017 for repayment of the Spencer Dock loan was said to be manifestly incorrect. The issue is said, by the plaintiff, to be whether the first defendant can appropriate the Carrickmines property to the Spencer Dock loan.

30. As I have said, I found the pleadings and affidavits of the plaintiff very confusing. It is asserted by the second plaintiff in his affidavit and it is pleaded in the statement of claim that the appointment of the second defendant as receiver was invalid, yet there is no claim for a declaration to that effect.

31. The second plaintiff has repeatedly asserted that the first plaintiff had no proprietary interest in the Carrickmines property but that, I agree with counsel for the defendants, is not material to the core issue as to whether the charge created by the second plaintiff stands as security for the Spencer Dock loan.

32. It seems to me that the principal issue in the action, and on this application, is identified in the affidavit of Karl Smith, filed on behalf of the first defendant. That issue is whether the Carrickmines property is charged for all present and future advances to each and either and both of the plaintiffs. On its face, this is what the mortgage says but it is clear that the Carrickmines mortgage was given, initially at least, as security for the Carrickmines loan. It is true, as counsel for the defendants points out, that the facility letters for the Spencer Dock loan referred to the Carrickmines property and that the same firm of solicitors appear to have been instructed in both transactions but the second plaintiff says that he had no involvement with the Spencer Dock loan and that evidence is, so far, uncontradicted.

33. The focus of the argument advanced on behalf of the second plaintiff is on the charge created by the mortgage. In fairness to counsel, this is rather fuelled by the fact that the first defendant appears to be limiting its recourse against the second plaintiff to the second plaintiff's interest in the Carrickmines property and has counterclaimed against the first plaintiff, only, for a money

judgment for the balance of the Spencer Dock loan.

34. The core issue, in my view, is not the charge but the covenant to pay. If the first defendant is correct, the effect of the mortgage was to make each of the plaintiffs liable, beyond the balance of the Carrickmines loan, for any and all further advances that might have been made to the other, whether or not the other had any interest in, or even knowledge of, the additional borrowing. That may very well be so and on a literal reading of the paper work counsel for the first defendant rather appears to have the better end of the argument, but on the authority of *Bank of Ireland v. McCabe* (Unreported, Supreme Court, 19th December, 1994) [1994 WJSC-SC 2105] the express written terms of an all sums due guarantee can be displaced by extrinsic evidence of the intention of the parties. The same principle must apply to a covenant in a mortgage to pay all sums due.

35. In my view there is a *bona fide* issue to be tried as to whether the second plaintiff is liable for the Spencer Dock loan. If he is not, that loan is not secured on his interest in the Carrickmines property.

36. It seems to me that the issue as to whether there was a valid demand is inextricably linked to the issue of the second plaintiff's liability for the Spencer Dock loan. If the second defendant is liable for this loan, repayment has been demanded.

37. Since the demand for repayment of the Spencer Dock loan was made within three years of the amendment or variation agreement of 20th April, 2015 I suppose that there is an issue as to the entitlement of the first defendant to have reviewed the loans in December, 2016 but because the first plaintiff stopped paying altogether after January, 2017 I do not see where that issue goes.

38. It is submitted on behalf of the defendants that because the plaintiffs are represented together, they should not be heard to say that the Carrickmines mortgage did not extend to later borrowings. Counsel points in particular to the fact that the Carrickmines property is listed as part of the security for the Spencer Dock loan. I do not accept that argument. It is undoubtedly the case that the Spencer Dock facility letters may be relevant to the issue as to the intention of the parties at the time of the Carrickmines loan and mortgage but the argument as to the intention of the parties at the time of the mortgage and the effect of the mortgage over the second plaintiff's house is fundamentally the second plaintiff's argument.

39. Nor, on the evidence now before the court, can I accept the argument that at the time of the Spencer Dock borrowing the plaintiffs affirmed the availability of the Carrickmines property as security for the Spencer Dock loan. It is true that the same firm of solicitors appears to have acted in both transactions but both plaintiffs say that the second plaintiff had nothing to do with the later loan. There may very well be an issue at the trial as to the second plaintiff's knowledge of, or interest in, the Spencer Dock loan but I cannot, on this application, find that the second plaintiff affirmed the security.

40. I turn to the issue as to whether damages would be an adequate remedy.

41. The second plaintiff's case is that he has met his monthly repayment obligations in respect of the Carrickmines loan (repayment of the entire of which has not been demanded) and that the first defendant does not have security over the Carrickmines property for the Spencer Dock loans. The second plaintiff does not want the Carrickmines property sold before his action is heard.

42. In his grounding affidavit sworn on 25th April, 2018 (having given his address as the Carrickmines property, which it plainly was not) he deposed that he was returning from the United States and wished to reside in the Carrickmines property with his family and he offered the usual undertaking as to damages.

43. In a second affidavit sworn on 27th August, 2018 the second plaintiff deposed that he is to marry on 21st December, 2018 and plans to return to Ireland to reside in the Carrickmines property in April, 2019. He suggests that the property is irreplaceable as a residence and that he would not be able to afford to rent any similar property, even if such could be obtained.

44. In the course of the hearing it was conceded that the second plaintiff has never resided in the Carrickmines property and that the receiver had been in receipt of the rent until recently. The second plaintiff abandoned his claim for an interlocutory injunction to put him into possession and conceded that the earliest possible trial date he could hope for would be towards the end of the legal year. In those circumstances there is no prospect that the second plaintiff can move into the Carrickmines property in April, 2019.

45. It seems to me that the proposition that the Carrickmines property is irreplaceable is hyperbole. I am sure that it is a very nice house in a very nice residential development but it is not unique.

46. I do not believe that the second plaintiff's argument that he would not be able to rent any similar property gets him very far. In the first place, I am unconvinced that the second plaintiff would not be able to find an equivalent property in the area. Secondly, if the limited order now sought were to be refused, the house would be sold and the Carrickmines loan (or most of it, or a lot of it) would be repaid out of the proceeds of sale. This would relieve the second plaintiff of the burden of finding €5,678.39 each month to meet the loan repayments and free up that much money to rent somewhere else. Thirdly, now that the second plaintiff has abandoned his claim that he should be restored to possession *pendente lite*, it follows that if he returns to Ireland in April, 2019 as he says he plans to do, he will have to find somewhere else to live between then and the trial of the action. Counsel for the defendants rightly latches on to the averment that the plaintiff would not be able to afford to rent elsewhere as undermining his ability to meet any award of damages on foot of his undertaking if his action were eventually to fail but by contrast with many of these cases the second plaintiff is servicing the Carrickmines loan.

47. All that said, the Carrickmines property is the second plaintiff's property and I accept that he does not want to see it sold.

48. It is argued on behalf of the defendants that although Mr. Smith, on behalf of the first defendant, questioned the second plaintiff's ability to satisfy an award of damages on foot of his undertaking, the second plaintiff did not engage with the issue. There is merit in that. The evidence discloses that the second plaintiff lives somewhere in the United States of America: possibly, since he swore his affidavits before a Notary Public there, in Brooklyn. Beyond that, all that we know about him is that he is a "trader".

49. I accept the argument on behalf of the defendants that this is a commercial property, purchased and used as a buy-to-let. I accept the defendants' argument, on the authority of *Fennell v. Creedon* (Unreported, High Court, Murphy J., 9th November, 2015) [2015] IEHC 711, that the fact that the borrower has been using a property as a family home does not *simpliciter* alter the underlying terms of a contract freely entered by the borrower by which the borrower transferred his interest in the property to the lender as security for a commercial loan. This applies *a fortiori* where the height of the borrower's case is that he wishes to use what for 15 or 16 years has been an investment property as his residence. That said, the second plaintiff not only invokes a property right but challenges the right asserted by the defendants. To be sure the second plaintiff's wish to use the Carrickmines property as a residence does not undermine the underlying terms of his contract but the issue in this case is what that contract was. The

Carrickmines property was a commercial or investment property for the purposes of the Carrickmines loan but the defendants' object in seeking to sell it is not to satisfy that loan but the Spencer Dock loan. The Spencer Dock loan was also a commercial loan but whether the Carrickmines property is a commercial property for the purpose of that loan depends on whether the second plaintiff is liable for it: which is the core issue in the action.

50. I accept the argument that the evidence in support of the second plaintiff's ability to satisfy his undertaking as to damages is meagre: although I think that it must be said that he has been meeting the monthly repayments on the Carrickmines loan and he must be paying something, whether by way of rent or mortgage repayments, for wherever it is he is living in the United States.

51. As to what damage might be suffered if the court were to make the order sought, the defendants point to the interference with a property right on the part of the receiver; the costs of the receivership; and the risk that the value of the property might drop.

52. The defendants accept that a sale of the Carrickmines property before this litigation has been disposed of might achieve a lower price than would be achieved if the title were clear. Any such loss, it is said, can be compensated by an award of damages. The defendants accept that the rate of interest applicable to the Carrickmines loan is a tracker rate, which is less than the market rate, and that there are a number of years to run on that loan. Any loss that might result from the loss of that interest rate, or the value of the property, it is said, could (if it were ever to come to it) be dealt with by an award of damages.

53. As to the adequacy of damages if the order sought is granted, it seems to me that if the property is not let pending a trial, the costs of the receivership will not be great. If it is let, the rental income will outstrip the costs. I accept that there is a risk that the value of the property may decline but, to some extent at least, this, if it comes to pass, will be mitigated by the payment by the second plaintiff of the monthly repayments.

54. The crux of the case, it seems to me, is the issue of interference with property rights. Not for the first time the issue as to the adequacy of damages is bound up with the issue of the balance of convenience.

55. In my view both the second plaintiff and the defendants assert property rights. On paper, it seems to me that the defendants' case is very much the stronger. While I do not rule out the possibility altogether, I think that the second plaintiff is unlikely to persuade a court that he can construe his way out of the terms of the mortgage. For the reasons given, however, I find that he has an arguable case that the common intention in 2006 was that the Carrickmines property would be held as security only for the Carrickmines loan. If the order now sought were to be made and the action were to fail, the result would be that the exercise by the defendants of their property rights would have been postponed. On the other hand, if the order were to be refused and the Carrickmines property sold and the action were to succeed, the result would be that the second plaintiff's property right would have been extinguished.

56. In deciding this application I have endeavoured to apply the sequential *American Cyanamid* analysis but I find myself drawn to the approach of Hoffmann J. in the *Films Rover International Ltd v. Cannon Film Sales Ltd* [1987] 1 W.L.R. 670 in which he proposed that the fundamental principle on an interlocutory application, whether for a prohibitory or a mandatory injunction, should be that the court should adopt whatever course would carry the lower risk of injustice if it turns out to have been the "*wrong*" decision.

57. After careful consideration, and not altogether without misgivings, I find that the balance of justice lies in favour of granting the limited order sought.

1. The defendants' object in seeking to sell the property at this stage is not to satisfy the debt for which it is held as the primary security but a collateral debt.
2. The defendants have available to them the remaining Spencer Dock apartment, which was the primary security for the Spencer Dock loan. Save as to finding a buyer, there appears to be no impediment to the realisation of that security.
3. The second plaintiff has been (at least more or less) meeting his obligations in respect of the Carrickmines loan.
4. The effect of the order will be to preserve the property for whichever of the second plaintiff or the first defendant is found to be entitled to it.
5. I think that the lesser risk of injustice if my decision turns out to be the "*wrong*" decision is that the defendants' property rights be postponed rather than the second plaintiff's right extinguished.
6. The significant monthly repayments which are being made by the second plaintiff will mitigate the risk that the value of the property may decline.
7. An order in the limited terms now sought will not prevent the receiver from letting the house.

58. There will be an order preventing the defendants from selling 15 Carrickmines Chase, Carrickmines, Dublin 18, pending the trial of the action.

59. That order is made on the basis that the second plaintiff will continue to make the monthly repayments in respect of the Carrickmines loan and will expedite the prosecution of the action. There will be liberty to the defendants to apply to discharge the order in the event of default in payment of the monthly repayments or delay in the prosecution of the action.