Neutral Citation: [2013] IEHC 405

THE HIGH COURT

[2013 No. 8682P]

BETWEEN

DECLAN TAITE AND SHARON BARRETT

PLAINTIFFS

AND

JOHN PHILIP QUEARNEY

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 4th day of September, 2013.

The proceedings and the plaintiffs' application

1. These proceedings were initiated by plenary summons which issued on 14th August, 2013. Contemporaneously, the plaintiffs issued a notice of motion seeking the following reliefs:

> (a) an injunction restraining the defendant from interfering with or otherwise obstructing the plaintiffs in exercising their rights and discharging their obligations as joint receivers over the properties set out in the schedule thereto; and
>
> (b) an injunction restraining the defendant or any party on notice of the order from interfering with or otherwise impeding the plaintiffs in the collection of rents from the tenants of any of the properties more specifically described in the schedule thereto.

There are six properties described in the schedule to the notice of motion, namely:

> (i) No. 13, North King Street in the City of Dublin, title to which is unregistered;
>
> (ii) No. 41, Mount Symon Green, Clonsilla, Dublin, 15, which is registered on Folio 149221F of the Register of Freeholders, County Dublin;
>
> (iii) No. 42, Mount Symon Green, which is registered on Folio 149270F of the Register of Freeholders, County Dublin;
>
> (iv) Apartment 105, Erris Square, Waterville, Blanchardstown, Dublin 15, which is registered on Folio 135332L County Dublin;
>
> (v) Apartment 111, Erris Square, which is registered on Folio 135977L County Dublin; and
>
> (vi) Apartment 112, Erris Square, which is registered on Folio 133871L County Dublin.

The defendant is one of two or more joint owners of each of the said properties. As regards the property at (i), he is joint owner with Jean Quearney. As regards the properties at (ii) and (iii), he is joint owner with Robert Quearney. As regards the properties at (iv), (v) and (vi), he is joint owner with Robert Quearney, Jean Quearney and Brian Quearney. Each of the properties was mortgaged to AIB Mortgage Bank and Allied Irish Banks plc (the Banks) as joint mortgagees in 2006 or 2007. On 10th July, 2013 the Banks, by six separate deeds, appointed the plaintiffs to be joint receivers over each of the properties.

2. The plaintiffs have instituted these proceedings against one of the joint owners of the properties, the defendant, solely because he has interfered, and, they believe, intends to continue to interfere, with the exercise by them of their functions as joint receivers. The defendant appeared in person at the hearing, having filed a replying affidavit in person. He made submissions to the Court.

The security documentation

3. All of the relevant documentation in relation to the creation over each of the six properties of the security in favour of the Banks and the powers of the Banks to appoint the plaintiffs as receivers and such appointments in relation to each of the six properties has been exhibited in the affidavits filed on behalf of the plaintiffs and I am satisfied that all of the documentation is in order. Accordingly, I propose only outlining the relevant documentation by reference to one property, namely, No. 41, Mount Symon Green, which, as I have stated, is registered on Folio 149221F of the Register of Freeholders, County Dublin.

4. The security documentation in relation to No. 41, Mount Symon Green discloses the following:

> (a) By a letter of offer of mortgage loan dated 9th November, 2006, AIB Mortgage Bank offered Robert Quearney and the defendant a loan of €182,000 on the terms set out therein on the security of No. 41, Mount Symon Green, Clonsilla. The offer was accepted by Robert Quearney and the defendant on 23rd November, 2006. The particulars of the offer of the mortgage loan as set out provided, *inter alia*, that it was a twenty year loan which was to be repayable by monthly repayment instalments. In Clause 2 of the General Terms and Conditions, the offerees agreed to repay the Mortgage Loan and interest to the Banks.
>
> (b) By a deed of mortgage in favour of the Banks dated 14th February, 2007 (the Mortgage Deed), the defendant and Robert Quearney charged No. 41, Mount Symon Green, being all the lands comprised in Folio 149221F of the Register of Freeholders, County Dublin with payment of the Total Debt (as defined) owing to each of the Banks. It is clear from the copy of the Mortgage Deed exhibited that it has been registered as a burden on Folio 149221F of the Register of Freeholders, County Dublin. Clause 4 of the Mortgage Deed provided as follows:
>
> "The AIB Mortgage Conditions are hereby incorporated in the Mortgage. In the event of any conflict

between the terms of the AIB Mortgage Conditions and this mortgage, the terms of this mortgage shall prevail."

(c) The AIB Mortgage Conditions (2006 Edition) are standard conditions, which apply as between the mortgagor and the Banks where so stipulated in a Mortgage Deed. The provisions thereof which are relevant for present purposes are the following:

(i) Clause 3.2, which provides:

"Notwithstanding the terms of the Mortgage Deed, the Total Debt owing to a lender as shall for the time being remain unpaid shall be immediately become due and payable on demand to the relevant Lender on the happening of an Event of Default.

(ii) Clause 7.2, which provides:

"Each Lender shall have the statutory powers conferred on mortgagees by the Conveyancing Acts as varied and extended by the Mortgage and in particular subject to the following variations and extension that is to say:

(a) The Total Debt owing to the Lender (whether demanded or not) shall be deemed to become due within the meaning and for the purposes of the Conveyancing Acts on the execution of the Mortgage.

(b) . . .

(c) . . .

(d) Any Receiver appointed by a Lender under the power to appoint a Receiver shall be deemed to be the agent of the mortgagor and the mortgagor shall be solely responsible for the acts and defaults of such Receiver and for the remuneration . . .."

The expressions "Conveyancing Acts" is defined as meaning the Conveyancing Acts 1881 to 1911 and the Registration of Title Act 1964.

(iii) Clause 8.1, which provides as follows:

"The Lenders or either of them shall not exercise any of the powers provided for in sub-clause 3.2 unless any of the following events shall occur:

(a) . . .

(b) If the mortgagor fails to pay or discharge within three months of the due date any money payable by him or any obligation or liability payable by him from time to time to a Lender . . ..

(d) By separate letters dated 3rd April, 2013 to the defendant and to Robert Quearney, the Banks demanded immediate payment and discharge of the monies due on foot of the Mortgage Loan, which at that date amounted to €175,320.58 and reserved the right without further notice to exercise the power of sale and all other powers conferred by the Mortgage Deed. It was stated in each letter to the addressee that the loan account was substantially in arrears and that that constituted an Event of Default under the terms of the letter of offer.

(e) By deed dated 10th July, 2013, the Banks appointed the plaintiffs to be joint receivers over No. 41, Mount Symon Green to the intent that they might exercise all powers conferred on the Banks and on the receivers in relation to that property, whether under the mortgage or by law or otherwise. The deed of appointment was under the seal of each of the Banks.

5. On 4th March, 2013, letters of demand were also issued by the Bank in respect of each of the other five properties. The amounts demanded in respect of the six properties aggregated in excess of €1.74m, the aggregate of the loans advanced in 2006 and 2007 being €1.809m.

Validity of appointment of plaintiffs as joint receivers

6. The defendant submitted that the plaintiffs were not validly appointed as receivers over the six properties. The submission related to his claim against Allied Irish Banks plc, which will be addressed later, and his argument was that the appointment was invalid because he should be allowed time to bring his case against Allied Irish Banks plc "to get justice".

7. I am satisfied that the plaintiffs have been properly appointed as joint receivers over each of the six properties for the following reasons:

(a) The purpose of Clause 7.2(a) of the Mortgage Conditions was to fix the legal date for redemption, with a view to identifying when the mortgagees' statutory power of sale "arose", as distinct from when it was "exercisable" (*cf*. Wylie on *Irish Land Law*, 4th Ed. at para. 13.28). The statutory power of sale "arose" on the execution of the Mortgage Deed.

(b) Clause 8 identified when the statutory powers conferred on the mortgagees by Clause 7.2 became exercisable. The powers were probably exercisable on 3rd April, 2013 by virtue of the application of Clause 8.1(a), which provided that the powers would be exercisable on the happening of "an event by virtue of which [the mortgagees] become entitled to demand any of the Total Debt". I say "probably", as it is not clear from the letters of 3rd April, 2013 for how long the instalments were in arrears. In any event, by 10th July, 2013, the powers were exercisable because the mortgagors had failed to comply with the letter of demand of 3rd April, 2013 for more than three months.

(c) One of the powers conferred on the Banks as mortgagees by reference to the Conveyancing Acts, was the power to appoint a receiver by reference to s. 19(1) of the Conveyancing Act 1881 which was in force at the time of the Mortgage Deed and provided:

"A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i) . . .

(ii) . . .

(iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof . . ..”

In the Mortgage Deed dated 14th February, 2007 in relation to No. 41, Mount Symon Green, the defendant and Robert Quearney agreed with the Banks that the Banks would have the statutory powers conferred by s. 19 of the Conveyancing Act 1881 (the Act of 1881) as varied and extended in Clause 7.2. Accordingly, as a matter of contract between the parties to that Mortgage the relevant powers were conferred on the Banks in the same manner as if there had been no reference to the Act of 1881 and powers had been spelt out in full in Clause 7.2, incorporating the variations and extensions which were, in fact, provided for. The powers conferred by Clause 7.2 of the Mortgage Deed dated 14th February, 2007, in my view, have not been affected by the repeal of s. 19 and s. 24 of the Act of 1881 by the Land and Conveyancing Law Reform Act 2009 (the Act of 2009), because the Banks can rely on the express powers conferred on them by the Mortgage Deed in Clause 7.2, albeit by reference to the statutory powers as varied and extended, so that, in effect, they are not relying on the statutory powers created by statutes which have been repealed.

8. Section 24 of the Act of 1881 contained specific provisions in relation to the appointment, powers, remuneration and duties of receivers. Sub-section (3) provided as follows:

> “The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.”

Sub-section (8) of s. 24 dealt with the manner in which a receiver should apply all money received by him and the application of subs. (8) was varied by the portion of Clause 7.2(d) of the Mortgage Conditions which has not been quoted earlier.

9. The foregoing analysis of the security documents which the Banks hold and the manner in which the plaintiffs were appointed as joint receivers goes further than, perhaps, it is necessary for a court to go on an interlocutory application on which the defendant has not pointed to any specific defect in the Banks’ title or the manner of the appointment of the plaintiffs as joint receivers. The objective in so doing is to demonstrate the true legal position, as disclosed by the evidence before the Court, to the defendant in the hope that he will benefit from it. However, it is important to emphasise that this is an interlocutory application and, if the orders sought by the plaintiffs are granted, they will only operate pending the determination of the substantive proceedings. Further, the Court is not ignoring Lord Diplock’s much quoted dictum in *American Cyanamid v. Ethicon* [1975] 1 All ER 504, where he stated (at p. 510):

> “It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations.”

It will be open to the defendant in the substantive action to challenge the Banks’ title and the appointment of the plaintiffs as joint receivers, if he so wishes.

The defendant’s case against Allied Irish Banks plc and its relevance

10. On 8th July, 2013 the defendant, as plaintiff, initiated proceedings entitled John Philip Quearney v. Allied Irish Bank plc (Record No. 2013/6974P) (the Plenary Proceedings). The plenary summons in the Plenary Proceedings was issued by the defendant in person. In the general endorsement of claim his claim is stated to be a claim for gross negligence and misrepresentation orchestrated by Allied Irish Banks Plc and its servants or agents. Following the statements which are quoted below, it is stated that his claim “is for €1m damages and an order declaring the mortgage is null and void” and that any “liens or charges to be removed”. The statements which precede those claims are as follows:

> “1. Where the Bank broke serious Liquidity Laws which has caused the financial collapse. But for this action and knowledge of same I would or could have made different decisions about my financial affairs.
>
> 2. Without disclosure and foreknowledge of their intention this contract is seriously flawed.
>
> 3. Due to excessive Securitisation the Banks created the False Boom and Bust situation which has crippled our country.
>
> 4. The plaintiff’s claim is also for reckless lending procedures by the Bank who have ignored their own Bank Guidelines which is in breach of the consumer protection code.
>
> 5. The plaintiff’s health and relationships have suffered greatly as a result of Allied Irish Banks Plc and its Servants’ actions.”

The “mortgage” referred to is not identified.

11. Most of the defendant’s replying affidavit, which was sworn on 19th August, 2013, is concerned with setting out the grievance which the defendant has against Allied Irish Banks Plc, which has led to the Plenary Proceedings. The defendant has exhibited documentation from various sources, including documentation he received from the Chartered Accountants Regulatory Board in connection with complaints which he made, apparently, before 2009, in relation to a firm of Chartered Accountants and Registered Auditors who had acted in the years 2002 to 2004 as accountants and auditors for a company with which the plaintiff had done business in 2004. In 2004 the defendant paid, by way of two bank drafts, the sum of £140,000 Sterling and the sum of £150,000 Sterling to the company in respect of deposits on properties in an intended development in the United Kingdom in which the company was involved. The development did not proceed. In 2006 the defendant and a co-plaintiff brought summary proceedings in the High Court against the company and obtained judgment in 2008. From copies of two Court orders exhibited by the defendant it appears that by 2009 there was due by the company to the defendant and his co-plaintiff in those summary proceedings a balance of approximately €440,264.20.

12. The defendant’s complaint against Allied Irish Banks Plc., as I understand it, arises from the fact that, while the two bank drafts furnished by the defendant to the company, which were dated 30th July, 2004, were lodged to a sterling current account in the name of the company with Allied Irish Banks Plc on 3rd August, 2004, another company (the other company) connected to the company by reason of common directors, had control over the sterling account for its operations and the money lodged to the sterling current account was treated as its money in its financial statements. At the material time, the company and the other company had different

auditors. The wrongdoing which the defendant alleges against Allied Irish Banks plc is that it gave details of the sterling account in the company's name to the auditors of the other company. Obviously, it would be wholly inappropriate for this Court to express any view on whether the defendant has a good cause of action against Allied Irish Banks Plc on the basis of the foregoing, and, in any event, it is utterly impossible to form any view on that issue. However, even if the defendant has a good cause of action and, in due course, recovers damages from Allied Irish Banks Plc which could be set off against his indebtedness to the Banks, as things now stand, having regard to the factual basis of his dispute with Allied Irish Banks Plc as set out in his replying affidavit, there appears to be no connection between the wrong the defendant, as plaintiff in the Plenary Proceedings, alleges against Allied Irish Banks Plc and his alleged consequential loss, on the one hand, and the entitlement of the Banks to enforce their security on the six properties with which the Court is concerned by the appointment of the plaintiffs as receivers, on the other hand.

13. In relation to each of the six properties, the mortgage given by the plaintiff and his co-owner or co-owners to the Banks, which the Court was told by the defendant involved re-financing, was created at a time when the problem in relation to the proposed investments in the United Kingdom had arisen. It is clear from documentation exhibited by the defendant that, in connection with the earliest of the mortgage transactions with the Banks, the transaction in relation to 13, North King Street, the defendant apprised the Banks of the fact that he hoped to get the deposits on the properties in England back and that was consideration in the assessment of the loan application in question. That, however, does not mean that the Banks have any responsibility for the loss incurred by the defendant in relation to the proposed investment in the United Kingdom, so that it is an arguable defence to the entitlement of the plaintiffs to exercise their functions as receivers over the six properties. That issue is for another day.

14. The only other line of defence advanced by the defendant at the hearing related to the status of the plaintiffs exercising their functions as joint receivers as agents of the mortgagors. The defendant asserted that, under the law, a person cannot have an agent forced upon him. The fact is that the defendant executed six mortgages which incorporate the Mortgage Conditions, which expressly stipulate in Clause 7.2(d) that a receiver shall be deemed to be the agent of the mortgagor. The defendant also asserted that the plaintiffs, as joint receivers, owe the mortgagors a duty of care. In that context, there is a certain irony about the defendant's averment in his replying affidavit that the plaintiffs had just arrived and taken control of his assets and restricted his ability to service his loan and that he had not been supplied by the plaintiffs "with a statement of accounts showing and proving that the tri-party agreement is servicing the Bank better than I can if I was in control of the tenants' funds". The reason the defendant is not in control of the tenants' funds is that, as outlined in each of the letters of demand of 3rd April, 2013, each of the loan accounts was substantially in arrears, from which it is to be inferred that the rents payable by the tenants in the six properties were not being used to service the loans. The irony is that it was in the defendant's interest to service the loans himself, so as to avoid further interest accruing on the loans and the legal expenses and remuneration in connection with the appointment of the plaintiffs as receivers being incurred and added to his debt.

The plaintiffs' allegations of interference with the exercise of their functions.

15. The plaintiffs' evidence is that each of the six properties is occupied by tenants, but in some cases they have no information about the nature of the tenancy, because the defendant has failed to provide the information despite being requested to do so by a letter dated 12th July, 2013 from the plaintiffs.

16. By e-mail dated 16th July, 2013 from the defendant to the plaintiffs, the defendant stated that he was happy to accept their appointment as joint receivers "upon the conditions you can provide the following proof and assurances as listed below". None of the points made in the e-mail, most of which were based on a misunderstanding of the law, are of any substance and the reality is that the defendant was indicating that he was not accepting the plaintiffs' appointment as joint receivers.

17. On their appointment, the plaintiffs had sent letters addressed to the "Tenant of" the units in 13, North King Street and each of the other properties informing the tenant of their appointment and enclosing a copy of the relevant deed of appointment. It was stated in that letter that the plaintiffs are entitled to receive the rent in respect of the tenancy and the tenant was requested to cancel the current standing order facility in place with immediate effect and to henceforth pay the rent to an account, details of which were given. There is clear evidence that the defendant, in conjunction with another joint owner, Robert Quearney, whom I understand to be his brother, made contact with the tenants and told them to ignore the letters from the plaintiffs and to keep paying the rent to them.

18. In an e-mail of 2nd August, 2013 to a Manager in the plaintiffs' firm (RSM Farrell Grant Sparks), the tenant of 105, Erris Square informed the plaintiffs that he had been told by Robert Quearney to ignore the plaintiffs' letter and to keep paying the rent to him. Having discussed the matter with Threshold and a Citizens' Advice Bureau, the tenant informed Robert Quearney that he intended putting the rent into a separate escrow account until the matter was resolved. However, Robert Quearney and the defendant arrived at 105, Erris Square on the evening of 1st August, 2013 demanding rent and saying that they had "fired the receiver". They threatened to evict him in fourteen days. The tenant requested the plaintiffs to stop the defendant and Robert Quearney from coming to the house, as it affected his family life and his children.

19. Another example of interference by the defendant was recorded in an el-mail dated 8th August, 2013 from Threshold to the plaintiffs. It related to the tenant in 41, Mount Symon Green. In summary, she had been told by the defendant that the plaintiffs have no legal right to the rent and that he is in the process of challenging their appointment. It was suggested by Threshold to the tenant that, perhaps, the best course of action was for her to place the rent in an escrow account. It was recorded that the defendant had stated that, in that event, he would be forced to change the locks. The tenant, who was due to leave the country, was extremely concerned that she would return to find she had been evicted.

20. By letter dated 30th July, 2013, the plaintiffs' solicitors, Gartlan Furey, requested the defendant to give an undertaking within seven days that he would desist from making representations to the tenants of the six properties that the rents should be paid to him and threatened proceedings for injunctive relief if the undertaking was not forthcoming. The defendant did not respond to that letter and, even though he exhibited the letter in his replying affidavit, he did not give any indication to the Court that he would desist from interfering with the exercise by the plaintiffs of their functions as joint receivers.

Criteria for the grant of an interlocutory injunction and their application

21. Applying the criteria laid down by the Supreme Court in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 for assessing whether interlocutory injunctions of the type sought by the plaintiffs should be granted or refused, the first criterion is whether there is a fair issue to be tried that the plaintiffs, as joint receivers, are entitled to receipt of the rents from the six properties the subject of the proceedings pending the determination of the substantive action. That criterion has definitely been met. The evidence adduced on affidavit by the plaintiffs, which has not been controverted, clearly shows that the Banks were entitled to enforce their security in relation to each of the six properties by the appointment of a receiver when the deeds of appointment were executed on 10th July, 2013. None of the arguments advanced by the defendant in response to the application cast doubt on the validity of such appointments. Moreover, the defendant has not cast any real doubt on the entitlement of the plaintiffs to perform

their functions as such joint receivers in the manner in which they propose to do so, which is in accordance with the provisions of the Mortgage Deed in respect of each of the properties executed by the mortgagors.

22. The second criterion is the adequacy of damages as a remedy for the plaintiffs in the event of the injunction being refused, if they are ultimately successful in the proceedings. The first named plaintiff has averred in the grounding affidavit that he believes that damages would not be an adequate remedy in the circumstances of these proceedings, given that the defendant is heavily indebted to the Banks and given his belief that the defendant would not be in a position to discharge any award of damages that might be made against him. The defendant has not adduced any evidence to contradict what the first named plaintiff believes and, in particular, he has not demonstrated that, as a matter of probability, the Plenary Proceedings against Allied Irish Banks Plc, which he has recently initiated, will result in a positive reversal of fortune for him. On the other hand, in his grounding affidavit the first named plaintiff has proffered an undertaking to discharge any damages to which the defendant may be entitled in the event that an injunction is granted but the plaintiffs are not successful in the substantive action, which undertaking was given on behalf of both plaintiffs. I am satisfied that that undertaking will protect the defendant against any loss he incurs, if the injunctions sought are granted, and it ultimately transpires that they should not have been.

23. Although it is not strictly necessary to consider it, nonetheless I am of the view that the third criterion is also met, in that the balance of convenience and, indeed, the balance of justice, favours the grant of the injunctions sought, rather than their refusal.

Orders on the plaintiffs' application
24. Noting the plaintiffs' undertaking as to damages, the Court will make orders in the terms sought by the plaintiffs as outlined at paragraph 1 above, pending the determination of the substantive action or until further order.

The defendant's cross-application
25. On 20th August, 2013, with the leave of the Court, the defendant issued a notice of motion. The notice of motion did not claim any relief. It merely recorded the existence of the Plenary Proceedings by the defendant against Allied Irish Banks Plc (Record No. 2013/6974P), that the grounds for the defendant's case was based on "the Masters Court judgement" against the company referred to earlier, suggesting a link with Allied Irish Banks Plc in its alleged wrongdoing against him. While it is obvious that the defendant has a grievance against Allied Irish Banks Plc, in that he believes that it in some way contributed to the loss he has incurred in relation to the intended property investment in the United Kingdom, which in turn has contributed to serious ill-health on his part in the recent past, I have already found that he has not demonstrated that the plaintiffs should be refused the reliefs they seek. Of course, it is open to the defendant to pursue the Plenary Proceedings against Allied Irish Banks Plc. Finally, the defendant has stated in the notice of motion that "he is questioning the validity of all agreements and contracts made on" certain bank accounts which are listed. Apart from the issues with which I have dealt, the defendant has advanced no grounds for the assertion of invalidity. In fact, his affidavit in support of his notice of motion is a verbatim replication of his affidavit in response to the plaintiffs' application.

26. I am satisfied that the notice of motion is misconceived. There will be an order striking it out.