

THE HIGH COURT

[2013 No. 885S]

BETWEEN

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

FRANCIS HARTE

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 9th day of November, 2018

1. This is an application on behalf of the defendant to extend the stay on execution of a money judgment granted by the High Court (Abbott J.) on 5th March, 2015. That stay was for a period of two years.
2. The motion now before the court seeking to extend the stay was issued on 14th March, 2017 and sought an extension for six months or such further period as the court might deem appropriate.
3. Following a number of adjournments, the application came on for hearing before me on 12th October, 2018 when counsel moved that the stay be extended for twelve months. If the court were to exceed to the application, the effect would be to stay execution to a date about two years and seven months beyond the date referred to in the order of Abbott J., and for a period altogether of four years and seven months.
4. This action was commenced by summary summons issued on 22nd March, 2013. It was tried with other proceedings (described as related proceedings) over five days in 2013 and 2014. Judgment was delivered on 19th December, 2014 and the action was thereafter listed for mention on four occasions for the purpose of finalising the orders to be made.
5. Eventually, on 6th March, 2015, an order was made that the plaintiff have judgment for €1,801,491.82 and it was ordered:
"that execution on foot of the said Judgment be and the same is hereby stayed for two years. The continuance of that stay is dependent on the Defendant cooperating with the Plaintiff in an orderly disposal of the properties, as set out in the Second Schedule hereto and to utilise the net proceeds of same (after deduction of reasonable auctioneering and conveyancing costs) to pay down the judgment debt. The defendant will have carriage of any sale during the stay period. In the event of there being non-cooperation, there shall be liberty to the Plaintiff to apply to the Judge having seisin for a lifting or variation of the stay."
6. With respect, there appears to me to be some confusion in the order. The condition that the defendant should co-operate with the plaintiff rather conveys that the plaintiff is to be in control of the process, but the provision that the defendant is to have carriage of any sale effectively puts the defendant in control.
7. The second schedule to the order of Abbott J. lists nine properties in Co. Meath. While this is not evident on the face of the order, seven of the nine properties were subject to a first registered charge in favour of the plaintiff; one was the subject of a charge which has been executed but not registered; and one was unsecured.
8. Although the action was a money claim by the bank, the effect of the stay (besides staying execution of the judgment otherwise) was to effectively prevent the bank from exercising its powers on foot of its securities.
9. Shortly after the order of Abbott J., the defendant's loans were assigned by Ulster Bank to Promontoria (Aran) Limited. There has been no formal application made on behalf of Promontoria (Aran) for leave to issue execution on foot of the order but the defendant has engaged in negotiations with Promontoria (Aran)'s agents and the defendant's solicitors' correspondence has recognised that the plaintiff's solicitors were acting on behalf of both Ulster Bank DAC and Promontoria (Aran). Having so engaged for about a year and having secured a number of consent extensions of the stay and adjournments of the motion, the defendant, in an affidavit filed on 10th May, 2018 questioned the transfer and now makes the argument that since Ulster Bank DAC has transferred the defendant's loan it cannot be heard to argue that it would be prejudiced by the further extension of the stay.
10. It seems to me that the defendant wants it both ways. He would have the court find that the transfer was effective to divest Ulster Bank of the loan but not to give rise to any rights on the part of Promontoria (Aran).
11. I propose to dispose of this argument by identifying Promontoria (Aran) as a person whose presence before the court may be necessary in order to enable the court to effectually adjudicate on the application and by making an order under O. 15, r. 13 joining Promontoria (Aran) Limited as a plaintiff.
12. When the motion was opened to the court I was inclined to doubt the jurisdiction to entertain it. The order of Abbott J. appeared to me prima facie to be a final order. I was not immediately convinced by the defendant's argument that jurisdiction is to be found in O. 42, r. 8; still less by the argument that the order of Abbot J. was an interlocutory order. The plaintiff, however, concedes that there is jurisdiction, albeit one that is to be exercised sparingly and only for good reason and I am content to deal with the matter on that basis.
13. The motion now before the court was grounded on an affidavit of the defendant sworn on 14th March, 2017. What was then said was that sales had been agreed of a number of properties and the sale of others was under negotiation. That affidavit was (as was contended on behalf of the plaintiff in a replying affidavit of its solicitor sworn on 21st March, 2017) rather light on detail but the bank was prepared to stay its hand to allow the defendant to complete the sales or at least to produce signed contracts.
14. The motion was adjourned by consent from time to time and the stay extended upon terms, noted in the several orders made along the way, that the defendant, through his solicitors, would keep the plaintiff's solicitors fully apprised of all steps taken by the defendant to dispose of the properties and provide copies of all contracts, correspondence, sales advice notes, advertising and liaison with sales agents etc.

15. The motion came back into the list on 18th January, 2018. That was four months beyond the six months' extension sought by the notice of motion.

16. In an affidavit filed on that date the defendant exhibited a letter of the previous day from his solicitors to the plaintiff's solicitors. None of the sales previously said to have been agreed had got to the point of signed contracts, never mind being completed but two new sales were said to have been agreed and booking deposits paid. There were said to be a number of firm offers for other parcels of land: which offers the defendant considered to be inadequate. The defendant was said to have engaged a planning consultant to ascertain the development potential of one of the properties, and was said to be in discussion with an unidentified major national developer who had a development close by.

17. On 18th January, 2018 the stay was extended by consent and the motion was adjourned for mention until 15th February, 2018. On the eve of the adjourned date a further affidavit of the defendant was filed, exhibiting a letter of the previous day from his solicitors to the plaintiff's solicitors.

18. By letter dated 14th February, 2018 the defendant was said to be in negotiation with an unidentified major development company, which operated internationally as well as nationally, and which had a wide array of major residential, commercial and industrial building projects under way at any given time. It was not said whether the major national and international developer was the same as the major national developer with whom the defendant had been in discussions in January, but whoever it was was said to have made an unspecified offer for part of the defendant's land, in response to which the defendant was said to have made an unspecified counter proposal. It was said that those negotiations had reached a critical stage and that it was extremely important that the defendant could continue to negotiate with the development company.

19. In an affidavit of filed on behalf of the plaintiff on 13th March, 2018 Mr. Albert Prendiville of Promontoria (Aran) chronicled the history of the motion and summarised the correspondence. He pointed out that the stay on the order of Abbott J. had by then been extended by eleven months. He recalled that the purpose of the two year stay had been to allow an orderly disposal of properties but protested that no sales had been made and he suggested that the court could not be confident that the defendant could achieve any sales in the near future.

20. On 10th May, 2018 the defendant filed a further affidavit. To my mind, what was then said sits uneasily with what had been said in January, 2018. The defendant said in his affidavit in May, 2018 that in mid-2017 he had "*changed tack somewhat*" from trying to sell individual properties to selling a block of development land on the periphery of Navan town. He said that he was in negotiation with a major national developer which also had overseas operations but could not disclose the identity of the major developer as this "*could put an end to this nascent sale.*" If the sale referred to in this affidavit was nascent, the major developer must have been the second or third major developer. The defendant said that the value of the security underlying the loans had increased significantly during the previous three years.

21. In his affidavit of 10th May, 2018 the defendant, besides saying what he said about the sale of the properties, agitated a number of issues in relation to the transfer of the loan to Promontoria (Aran). This gave rise to a further exchange of affidavits but nothing more was said about the disposal of the properties.

22. On 17th September, 2018 the defendant's solicitors wrote to the plaintiff's solicitors to say that the defendant was concentrating on the sale of two of the properties, one of about 16 acres and the other of about 12 acres on the Trim road. It was anticipated that the defendant would be in a position to dispose of those lands "*in the near future*". In a further letter of 6th October, 2018 there was talk of a meeting with the County Council and recent sales of other lands in the Navan area. It was said that the value of the defendant's assets greatly exceeded his liabilities to the plaintiff and "*that any sales should be conducted by him for appropriate prices.*" [My emphasis.] The letter proposed a further adjournment of the motion: not to allow any sales to be made but pending the disposal of a tracker complaint which had been made to the plaintiff.

23. In his affidavit filed on 13th March, 2018 Mr. Prendiville of Promontoria (Aran) protested the inadequacy of the information provided by the defendant and expressed concern that the defendant might have unrealistic ideas about prices and that every offer appeared to be met with an instinctive reaction to hold out for more. That may or may not be so but it seems to me that at the heart of this application is an issue as to who is to have the final say as to whether, and when, and at what price, the property is to be sold.

24. Counsel for the defendant opening the application limited the application to extend the stay to the two parcels of land referred to in the letter of 17th September, 2018 which are held on different titles but adjacent and which, perhaps, have some commercial synergy. One of these parcels, measuring about 12 acres, is the subject of a first registered charge in favour of the plaintiff. The other, measuring about 16 acres, is said to be unencumbered. Counsel said that the court was not asked to extend the stay other than in relation to these parcels.

25. The substance of what is now proposed is that the court should re-write the order of Abbott J.; should further suspend the powers given to the charge holder to enforce its security; and should further restrain the judgment creditor from executing a judgment against an encumbered property which would be available to any other judgment creditor or which might be offered by the plaintiff as security for further borrowings.

26. I can easily see that the defendant may have his own ideas about the value of his properties and the direction of the market, but the outstanding money judgment against him and *a fortiori* the first legal charge he gave in support of his borrowing has the effect that he is not entitled to the final say.

27. To the extent that commercial considerations are relevant, I observe that the rate of interest now prescribed by the Debtors (Ireland) Act is fixed at 2% so that the practical effect of what is sought would be to compel the bank to extend credit to the defendant at that rate until it could secure sales of the other properties.

28. The most recent update as to the progress of the disposal of the properties was in letters from the defendant's solicitor to the plaintiff's solicitor of 17th September and 6th October, 2018. On 17th September, 2018 the defendant was said to be in negotiation with an unspecified number of unidentified prospective purchasers at much higher unspecified prices than the previously unspecified prices. It was said that it was anticipated that the defendant would be in a position to dispose of the sixteen acre and twelve acre sites "*in the near future*".

29. On 6th October, 2018 the defendant was said to be engaged in a series of meetings with Meath County Council "*to ease the planning process for imminent development*". The land was said to be "*at the heart of a new development hub*" so that the

defendant's liabilities "are matched many times over by his assets and any sales should be conducted for appropriate prices." This conveys to me that sometime after February, 2018 the defendant abandoned his negotiations with the unidentified major property development company and decided instead to go to the market; and in the second half of September, 2018 decided to abandon the market in favour of trying to progress a planning application. So having secured a two year stay on execution of the judgment to facilitate the orderly disposal of the properties and extension of that stay for a further 19 months for the same purpose, the defendant has now decided to direct his efforts to attempting to enhance the value of the lands rather than disposing of them. It seems to me that the application now made for an extension (and variation) of the stay for twelve months is inconsistent with the defendant's declared intention in September, 2018 that he would dispose of the land "in the near future".

30. On the morning of 16th October, probably prompted by an observation by the court in the course of argument on the previous Friday that there appeared to be no evidence of the value of any of the properties, the defendant swore another affidavit. He exhibited valuations described as recent valuations of some of the properties and an undated sales brochure in respect of a 6.45 acre residential development site on the way into Navan. The so-called recent valuations were dated 24th May, 2018 and 3rd

February, 2017. The suggestion was that the properties other than those which the defendant does not wish to see sold have a combined value of €2.26 million. The judgment debt was reduced by a payment from funds in court by €594,834.29 and so, it is said, the judgment can be satisfied without recourse to the 16 acre and 12 acre parcels.

31. I find none of this persuasive. If these properties are so valuable and readily realisable I can see no good reason why the defendant should not have achieved sales long ago.

32. I was referred in argument to s. 94 of the Land and Conveyancing Law Reform Act, 2009. This allows the court, in an action brought by a mortgagor for redemption or sale, or the raising and payment of the mortgage debt, to direct a sale of the mortgaged property on such terms as it thinks fit. In particular, it allows the court to allow time for redemption and payment and give conduct of the sale to a particular party. The 2009 Act does not apply to pre-2009 mortgages but counsel, citing the commentary of Professor Wylie, argued that s. 94 was declaratory of a jurisdiction which already existed.

33. If such a jurisdiction exists (as the order of Abbott J. rather tends to suggest it does); and if it is exercisable in a money action by a mortgagee (which the order of Abbott J. rather tends to suggest it is); and if it was not exhausted by the stay granted on the order of 5th March, 2015; I think that it is a jurisdiction that should be exercised only in exceptional circumstances. In my view the order of Abbott J., the effect of which was to enjoin the mortgagee from realising any of the securities it held, was at the very outer end of what the court might be persuaded to do.

34. In my view the defendant has been afforded extraordinary latitude to achieve an orderly disposal of the secured properties. He has not availed of the opportunity so afforded to him. In substance the defendant does not ask for further time to pay, or to sell, but asks that the plaintiff should be denied recourse to what the defendant himself says is the most valuable security and which the defendant himself says has generated considerable interest from a series of major national and international developers.

35. The application is refused.