Neutral Citation [2014] IEHC 415

**THE HIGH COURT**

**[2014 No. 6345P]**

**BETWEEN**

**LUKE CHARLETON AND MICHAEL COTTER**

**PLAINTIFFS**

**AND**

**GERARD SCRIVEN**

**DEFENDANT**

**Judgment of Mr. Justice David Keane delivered on the 22nd August 2014**

**Introduction**

1. The plaintiffs have issued the present proceedings as joint receivers over eight separate residential properties that are the subject of various mortgages between the defendant and Bank of Scotland plc ("the bank").

2. The reliefs sought in the plenary summons issued on the 23rd July 2014 include an order for possession of each of the mortgaged properties and various orders restraining the defendant from interfering with the receivership of the properties concerned. By notice of motion issued on the same date, the plaintiffs seek substantially the same orders by way of interlocutory injunction. Specifically, the plaintiffs now apply for the following reliefs:-

> 1. An order directing the defendant forthwith to deliver up to the receivers
>
> (a) physical possession of each of the mortgaged properties at issue in the proceedings;
>
> (b) possession of the entire of the defendant's right, title, benefit and interest in and to each of the mortgaged properties that is occupied;
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> (c) all keys, alarm codes and other security and access devices in the possession of the defendant, his servants or agents in relation to the mortgaged properties; and
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> (d) all documents creating or recording any agreement for the letting of the mortgaged properties.
>
> 2. An order restraining the defendant whether by himself, his servants or agents from entering upon or otherwise attending at the mortgaged properties.
>
> 3. An order restraining the defendant, his servants or agents from preventing, impeding or obstructing the receivers, their servants and agents from entering into, taking possession of, getting in and collecting the mortgaged properties and any rents or other income payable in respect thereof.
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> 4. An order restraining the defendant, his servants and agents from interfering with the functions and office of the receivers as joint receivers of the property to which they have been appointed by the eight deeds of appointment (each referring to a mortgaged property) made by Bank of Scotland plc on 4 June 2014 and accepted by the receivers on the same date.
>
> 5. An order giving the receivers liberty, directly or by their solicitors, to notify the making of the foregoing orders to the occupant of the mortgaged properties by telephone, e-mail and/or post.

**Background**

3. The plaintiffs' application is grounded on an affidavit of Luke Charleton, sworn on the 22nd July 2014. In that affidavit, Mr. Charleton avers to the plaintiffs' appointment as receivers on the 4th June 2014, pursuant to several deeds of appointment of that date, over eight identified residential properties, seven of which are located in Cork and the other in Dublin.

4. Mr. Charleton exhibits a copy of the deed of appointment of the plaintiffs as receivers in each case, together with a copy of each deed of mortgage and charge. By the mortgage deeds, the mortgaged properties are mortgaged or charged (as appropriate) by the defendant to the bank as security for the payment and discharge of all monies, obligations and liabilities at any time owing by the defendant to the bank.

5. Mr. Charleton further avers that the original mortgage loans were between the defendant and Bank of Scotland (Ireland) Limited, to whose rights and obligations the bank has now succeeded.

6. Mr. Charleton avers that the defendant is indebted to the bank to the extent of more than €3,690,000 on foot of two identified loan facilities that were made available to the plaintiff in 2007. The first concerns a loan facility of up to €2.5 million, governed by a facility letter of the 3rd April 2007, in respect of which the outstanding debt exceeds €2,364,000. The defendant fell into default on that loan on or about the 16th February 2009.

7. The second loan facility was one of up to €1.5 million. It is governed by a facility letter of the 21st August 2007. The outstanding debt in respect of that loan exceeds €1,326,000. The defendant defaulted on his obligation to repay principal and interest on that loan on or about the 2nd December 2009.

8. In the course of argument, the defendant accepted that he has not made any repayments whatsoever in respect of either loan since 2013.

9. The Bank's solicitors wrote to the defendant on the 26th May 2014 demanding the immediate repayment of all sums due and owing on foot of both facilities. That letter states, in relevant part:

> "We also give you notice that, failing payment by you of the sums herein demanded forthwith, the bank reserves the right without further notice to issue proceedings in the appropriate court or take such further action as it deems fit including the appointment of a receiver."

10. As already noted above, the plaintiffs were appointed as receivers of the mortgaged properties on the 4th June 2014.

11. The plaintiffs initiated a correspondence with the defendant on the 5th June 2014, which prior to the issue of the motion at hand rested with the defendant's letter of the 9th July 2014. In the course of that correspondence, the plaintiffs furnished the applicant with a copy of the deed appointing them in respect of each property and subsequently, at the defendant's request, with a copy of the mortgage deed in relation to each. The plaintiffs requested the defendant to furnish them with details concerning the mortgaged properties to include copies of all leases, and details of the tenants and rental income in respect of each.

12. The defendant responded that he had been incorrectly notified of the appointment of the receivers and that he did not accept the validity of their appointment. The defendant has asserted that he is entitled to continue to exercise all of his rights as owner of each of the properties concerned, and that the receivers are not entitled to exercise any such rights, until –as the defendant puts it - he has validated their appointment. The defendant acknowledges that he has written to the tenants of each of the mortgaged properties to the effect that the receivers' appointment is invalid and that the receivers are not, in consequence, entitled to collect rents or exercise any other rights in respect of any of those properties.

13. Mr. Charleton avers specifically to the letter that the plaintiffs' solicitors wrote to the defendant on the 2nd July 2014. In relevant part that letter states as follows:

> "Notwithstanding [the receivership], we are instructed that you have persisted to make contact and correspond with occupants of the [mortgaged properties] and have told the tenants that they are to pay the rents to you and not pay the rents to our clients. Please note that as and from their appointment our clients are the only persons legally entitled to deal with these properties. Our clients are the only parties entitled to receive the rent form the tenants of these properties.
>
> Our clients explained to you that on their appointment they, as it were, stood in your shoes, in relation to dealing with the properties and that you ceased to have any legal entitlement of any nature to deal with the [mortgaged properties].
>
> Accordingly, we formally call upon you to desist from any further interference or trespass and in particular to cease asking the tenants to pay rent to you.
>
> If it comes to our clients notice that you have not ceased to interfere, proceedings including injunctive proceedings will immediately be issued against you without further notice and this letter will be produced in Court in support of our application and, further, our clients costs."

14. On the 9th July 2014, the defendant wrote to the plaintiffs' solicitors in the following terms:

> "All rentals due under tenancy agreements at my properties are due solely to me. It is in no way acceptable that any payments under any circumstances are made to anyone other than myself.
>
> The occupants have been notified to contact the local garda station should you or any of your agents try in any way to interfere with my property or indeed further look to intimidate them in their home which includes trying to solicit monies in any fashion from them."

15. In reliance upon the contents of the said correspondence, Mr. Charleton avers that the defendant has:

> (a) refused to recognise the receivers appointment and authority as joint receivers over the mortgaged property;
>
> (b) denied the receivers' appointment and authority to the occupants of the mortgaged properties;
>
> (c) refused to yield up possession of the mortgaged properties to the receivers; and
>
> (d) interfered with and undermined the receivers in their lawful efforts to take possession of and to get in the defendants' interest in the mortgaged properties and in particular to collect the rents payable for the mortgaged properties.

16. Mr. Charleton avers that, because the defendant has not co-operated with the receivers by accepting the validity of their appointment; or by yielding up possession of the mortgaged properties; or by providing them with the information they require concerning the leases that are in place, the tenants who are *in situ*, and the rents that have been agreed, the receivers have been obliged to crudely estimate the aggregate gross annual rental income of the mortgaged properties. Mr. Charleton avers that the sum concerned is in the range between €80,000 and €82,000.

17. In both his original grounding affidavit sworn on the 22nd July 2014 and a supplemental affidavit sworn on the 23rd July 2014, Mr. Charleton has exhibited correspondence with the occupants of certain of the mortgaged properties. The said correspondence confirms that the defendant has informed those occupants that the receivers' appointment is invalid; that the receivers are not entitled to receive rents; and that rent must continue to be paid by those occupants directly to the defendant. This, of course, places the affected tenants in an invidious position in respect of whatever legitimate dispute there may be between the defendant and the plaintiffs.

18. The defendant swore a replying affidavit on either the 5th or the 8th August 2014 – the handwritten date in the jurat is unclear. Nothing turns on the point. In that affidavit, the defendant avers to a number of matters in support of his contention that the plaintiffs' application for an interlocutory injunction against him should be refused.

19. The defendant first objects to the plaintiffs' reliance on the documentation exhibited to Mr. Charleton's affidavit that evidences both the relevant mortgages and their own appointment. The defendant does so on the ground that it constitutes inadmissible hearsay evidence. However, that averment is made without regard to the provision of Order 40, rule 4 of the Rules of the Superior Courts, whereby interlocutory motions constitute an exception to the general rule that affidavits must be confined to facts within the direct knowledge of the deponent concerned.

20. The defendant next takes issue with the assertion that he has been obstructive or uncooperative. In that regard, the defendant refers to what he describes as the extensive negotiations that he has had with the Bank. The defendant appears to misunderstand the case that is being made against him. The evidence adduced on behalf of the plaintiffs and summarised above is clearly directed to the proposition that the defendant has refused to co-operate with, and has obstructed, the receivership. It does not purport to address the issue of the defendant's conduct in respect of whatever negotiations he has had with the bank concerning the underlying loan transactions.

21. The defendant next identifies the "very serious concerns" that he has about the validity of the documentation relied upon by the plaintiffs to prove their appointment as such by the bank. The first such concern stems from the fact that the deed of appointment records on its face that it was executed on behalf of the bank at Edinburgh, Scotland on the 4th June 2014 and that the acknowledgment of receipt of the deed and acceptance of the appointment is signed by each of the plaintiffs in Cork at 4 p.m. on the same date. However, it is not clear how the defendant contends that this state of affairs calls into question the validity of the said deed, particularly in circumstances where it includes the following recital:

> "This deed may be executed in one or more parts by the parties on separate counterparts each of which when so executed by any party shall be an original but all executed counterparts shall together when signed and delivered constitute one deed of appointment."

22. In the course of argument, the defendant identified a further alleged infirmity in the said deed of appointment in that it recites that "the receivers hereunto set their hand and seal by way of receipt and acknowledgment of this appointment," whereas it is clear on the face of the document that, while the plaintiffs have each signed their name to the deed (which signature has been witnessed in each case), they have not set any seal upon it. Of course, this submission depends for its success upon the proposition that the setting of the receivers' seal upon the document (in addition to the witnessed signature of each) is necessary for the validity of the said deed and, by extension, the validity of the receivers' appointment.

23. In response to that argument, the plaintiffs point to the specific term in each of the relevant mortgage deeds (at paragraph 8.1), whereby the bank is empowered to appoint a receiver. The plaintiffs submit that there is nothing in the said term that requires the receivers' acceptance of their appointment to be recorded at all, much less recorded in a particular form or manner, as a condition of the validity of their appointment. The plaintiffs point out that each of the said mortgage deeds reflects the terms of the agreement to which the defendant is a party in each case, by which terms the defendant is therefore bound.

24. The plaintiffs further submit that, as the terms of each relevant mortgage deed acknowledge (at paragraph 8.2) that the bank's power to appoint a receiver under paragraph 8.1 is, in any event, in addition to (and not to be to the prejudice of) all statutory and other powers of the bank under the Conveyancing Act 1881, the appointment of the receivers is valid once either the requirements of the relevant term of each mortgage deed or those of the 1881 Act are complied with. Under s. 24 of the said Act, a mortgagee entitled to exercise the power of sale conferred thereunder, may by writing under his hand, appoint such person as he thinks fit to be receiver. The plaintiffs submit that their appointment is therefore valid under both the terms of the mortgage deed and the provisions of the 1881 Act, although either would be sufficient on its own. As regards the latter, the plaintiffs rely upon the decision of Laffoy J. in *Maloney v. O'Shea* [2013] IEHC 354, in which the Court concluded that the effect of the incorporation by reference of s. 24(1) of the 1881 Act into a mortgage agreement is, as the language used suggests, that the appointment of a receiver does not have to made by deed; it is sufficient that it be in writing.

25. Accordingly, the plaintiffs contend that the apparent error on the face of the said deed whereby it records that the receivers have set their hand and seal to it by way of receipt and acknowledgment of their appointment, although no seal is evident on the deed, is incapable of affecting the validity of that appointment.

26. The defendant next submits that the bank did not validly call in his loans. Although he does not expressly say so, it would seem that the potential significance of the point is as follows. Under each of the relevant mortgage deeds, the bank's power to appoint a receiver does not arise until a power of sale in respect of each of the relevant mortgaged properties has become exercisable by the bank. Under the said deeds, the bank's power of sale arises only after an event of default. On behalf of the plaintiffs, Mr. Charleton has exhibited the relevant loan facility letters to each of which is appended a copy of the bank's general conditions. Paragraph 9 of that document is headed "Events of Default." The first such event specified at paragraph 9(i) is:

> "If the Borrower fails to pay on the due date any monies payable or due by it from time to time to the Bank in the currency and manner specified in the Loan Agreement or fails to discharge or perform any obligation or liability to the Bank, or if the Borrower or any Guarantor fails to comply with any term or condition under any of the Finance Documents (including without limitation, the Loan Agreement) or if any representation, warranty or undertaking from time to time made (or deemed to be made) to the Bank by the Borrower or any Guarantor is or becomes incorrect or misleading."

27. Having enumerated a further nineteen separate events of default, paragraph 9 of the said general conditions continues in the following terms:

> "…then, and in such case and at any time thereafter, the Bank may, in its absolute discretion:-
>
> (i) by written notice to the Borrower declare all Drawings to be immediately due and payable and call for the repayment thereof whereupon the same shall become immediately repayable together with accrued interest thereon and any other sums due and payable by the Borrower under the Finance Documents…".

28. As noted earlier in this judgment, the Bank's solicitors wrote to the defendant on the 26th May 2014 demanding the immediate repayment of all sums due and owing on foot of both facilities. It seems, therefore, that the defendant's argument is that a demand by the bank's solicitors on the bank's behalf is not a demand by the bank; that without a demand by the bank there could not have been an event of default; that without an event of default no power of sale could have arisen; that without the occurrence of a power of sale, there could not have been the power to appoint a receiver; and that, if all of that is so, the appointment of the plaintiffs in this case is therefore invalid.

29. However, the receivers point out that Birmingham J. addressed a very similar argument in *Kavanagh v. McLaughlin* [2013] IEHC 453 and concluded as follows:

> "8. In my view the suggestion that because the letter was written by [the bank's solicitors] rather than by [the bank] is without substance. Just as a solicitor may, when authorised demand money on behalf of the bank so, when authorised it can act on foot of the bank in declaring an act of default and specifying what requires to bring the borrower into compliance.
>
> 9. I can see no basis for contending that the necessary procedures have not been complied with. This is a case where the maxim *qui facit per alium facit per se* applies."

30. For the particular assistance of the defendant as a litigant in person, I should add that the Latin phrase just quoted translates roughly as "he who acts through another does the act himself."

31. The defendant's next argument is that the plaintiffs have failed to establish that the bank is the owner of the defendant's loans, and that this is a necessary condition precedent to the bank's entitlement to appoint receivers under the relevant mortgage agreements. This argument appears to be based on three propositions. The first is that the relevant documentary evidence before the Court amounts to inadmissible hearsay. That submission has already been addressed (and rejected) earlier in this judgment.

32. The second proposition, raised during oral argument, is that there is insufficient evidence before the Court that Bank of Scotland plc has properly assumed the rights and liabilities of Bank of Scotland (Ireland) Ltd and that accordingly, there is insufficient evidence before the Court that the former is entitled to assert any right or interest against the defendant in respect of the particular loan and mortgage agreements at issue in these proceedings.

33. In reply to that argument, the plaintiffs make several points. The first is that Mr. Charleton has deposed to the matter at paragraph 4 of the affidavit that he swore on the 22nd July 2014 in the following terms:

> "I am advised by the Bank that the Mortgage Deeds and indebtedness thereby secured were originally obligations of the Defendant to Bank of Scotland (Ireland) Limited. However, the Bank has succeeded to the rights and obligations of Bank of Scotland (Ireland) Limited in that regard. By cross-border merger pursuant to the European (Cross-Border Mergers) Regulations 2008 of Ireland and the Companies (Cross Border Mergers) Regulations 2007 of the United Kingdom, approved by the High Court of Ireland on 22nd October 2010 and approved by the Scottish Court of Session on the 10th December 2010, all the assets and liabilities of Bank of Scotland (Ireland) Limited, including all of the aforesaid indebtedness and other liabilities and all related security to which these proceedings relate, transferred to the Bank by operation of law on 31st December 2010, at which time the Bank became entitled to exercise all rights under the Mortgage Deeds and in relation to the indebtedness thereby secured in place of Bank of Scotland (Ireland) Limited."

34. Insofar as the relevant averment contains hearsay evidence, it should be noted that Mr. Charleton's affidavit commences with the usual averment as to the basis upon which it is sworn *i.e.* from facts within his own knowledge save where otherwise appears and, where it does appear otherwise, from facts that he believes to be true. As has already been noted, Order 40, rule 4 of the Rules of the Superior Courts provides that, on interlocutory motions, a statement of belief may be admitted in evidence, once it is accompanied by a statement of the grounds on which it is based. The grounds for Mr. Charleton's belief appear to be very clearly set out in the paragraph quoted above.

35. The plaintiffs also rely upon the judgment of Kelly J. in *Bank of Scotland plc v. Beades* [2013] IEHC 328. In the first paragraph of that judgment it is expressly acknowledged that, as of the 31st December 2010, Bank of Scotland (Ireland) Limited merged with Bank of Scotland plc in a cross-border merger by absorption pursuant to EU Directive 2005/56. Kelly J. then observed:

> "Under the terms of that merger and on foot of an order of the Court of Session in Scotland made pursuant to that Directive and its implementing Regulations in this jurisdiction and in the United Kingdom, all of the assets and liabilities of Bank of Scotland (Ireland) Limited transferred to [Bank of Scotland plc]."

36. The plaintiffs also produced in Court a copy of both the Order of the High Court made on the 22nd October 2010 and a copy of the Order of the Court of Session of Scotland made on the 10th December 2010 approving the said merger. Further, the plaintiffs produced a copy of the Companies Registration Office company printout in respect of Bank of Scotland (Ireland) Limited, which records receipt of a notice confirming a cross-border merger with effect from the 31st December 2010, together with a copy of that notice, dated the 15th December 2010, which confirms on its face the merger of the Irish company Bank of Scotland (Ireland) Limited into the UK company Bank of Scotland plc with effect from the 31st December 2010, enclosed with which is a copy of the relevant order of the Scottish Court of Session.

37. Regulation 19 of the European Communities (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008) provides in relevant part:

> "(1) …[T]he consequences of a cross-border merger are that, on the effective date-
>
> (a) all the assets and liabilities of the transferor companies are transferred to the successor company,
>
> …
>
> (g) every contract, agreement or instrument to which the transferor company is a party shall, notwithstanding anything to the contrary contained in that contract, agreement or instrument, be construed and have effect as if-
>
> (i) the successor company had been a party thereto instead of the transferor company,
>
> (ii) for any reference (however worded and whether express or implied) to the transferor company there were substituted a reference to the successor company, and
>
> (iii) any reference (however worded and whether express or implied) to the directors, officers, representatives or employees of the transferor company, or any of them, were, respectively, a reference to the directors, officers, representatives or employees of the successor company or to such director, officer, representative or employee of

> the successor company as the successor company nominates for that purpose or, in default of nomination, to the director, officer, representative or employee of the successor company who corresponds as nearly as may be to the first-mentioned director, officer, representative or employee.
>
> (h) every contract, agreement or instrument to which a transferor company is a party becomes a contract, agreement or instrument between the successor company and the counterparty with the same rights, and subject to the same obligations, liabilities and incidents (including rights of set-off), as would have been applicable thereto if that contract, agreement or instrument had continued in force between the transferor company and the counterparty, and any money due and owing (or payable) by or to the transferor company under or by virtue of any such contract, agreement or instrument shall become due and owing (or payable) by or to the successor company instead of the transferor company…."

38. The third proposition upon which the defendant relies in challenging (or, at least, questioning) the bank's entitlement to enforce the particular loan and mortgage agreements at issue in these proceedings and, by extension, the bank's entitlement to appoint receivers, is the defendant's professed concern that the bank may not be the beneficial owner of the defendant's loans at this point. That proposition derives from the defendant's averment that: "I am aware from my own knowledge that Bank of Scotland plc have securitised and sold many of their loans." The defendant does not explain the basis upon which he claims to have direct knowledge of the bank's dealings with third parties, nor does he provide any detail of the securitisation transactions upon which he relies in advancing this argument.

39. In response, the plaintiffs rely on the decision of Peart J. in *Wellstead v Judge White* [2011] IEHC 438. In that case the proposed applicant for judicial review sought leave to argue that a bank that had obtained an order for possession against him no longer had any entitlement to benefit from that order because, the proposed applicant contended, it had sold his mortgage as part of some unspecified securitisation agreement. Peart J. rejected that argument by reference to a specific term of the particular mortgage deed at issue in that case, before continuing:

> "But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors."

**The test for interlocutory injunctive relief**

40. In determining whether the plaintiffs are entitled to the interlocutory injunctions that they seek against the defendant, I must have regard to the guidelines set out in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88.

41. The first principle to consider is whether the plaintiffs have established that there is a fair/*bona fide*/serious question to be tried. I am quite satisfied that they have. The defendant does not deny that the relevant loans were drawn down or that he has had the benefit of those monies. He does not deny that he has failed to repay those loans in accordance with their terms. He has raised a number of technical arguments concerning the validity of the plaintiffs' appointment as receivers notwithstanding his own default but I have come to the conclusion that those arguments are insufficient - whether taken individually or considered cumulatively - to persuade me that the plaintiffs have failed to raise a fair/*bona fide*/serious question to be tried in respect of the validity of their appointment as receivers and of their consequent entitlement to take possession of the mortgaged properties unimpeded and unobstructed by the defendant. Indeed, in so far as the first order sought by the plaintiffs may be characterized as a mandatory, rather than prohibitory, injunction, I am satisfied that the plaintiffs have made out a clear and strong *prima facie* case both directly and in response to the various technical arguments relied upon by the defendant.

42. The second principle I must consider is the extent to which damages are an adequate remedy for the plaintiffs if an injunction is wrongly withheld or for the defendant if the injunctions sought are wrongly granted. I am satisfied that, in the former instance, the defendant's failure to honour his substantial loan commitments provides persuasive evidence that he would not be in a position to compensate the plaintiffs for any losses suffered by them if the injunctions they seek were refused. On the other hand, Mr. Charleton, in his grounding affidavit on behalf of the plaintiffs, has averred to their willingness to provide the necessary undertaking to compensate the defendant for any damage or loss sustained by him should the injunction sought ultimately prove to have been wrongly granted.

43. Insofar as it may be necessary to consider the balance of convenience, I am satisfied that it also militates in favour of the grant of the injunctions sought.

45. The final argument put forward by the defendant in opposition to the plaintiffs' application for the injunctions they seek, is that it is somehow premature or unnecessary and should, therefore, be refused. In circumstances where the defendant accepts that he has been in default on his loans since 2009 and has not made any repayment in respect of them since 2013, yet has consistently refused to accept the validity of the plaintiffs' appointment as receivers over the mortgaged properties since the 4th June 2014 and has continued since then to collect all rents accruing from those properties for his own sole benefit, that argument is difficult to understand. It seems to me very much in the interest of all of the parties to resolve any issue there may be concerning the validity of the plaintiffs' appointment as receivers sooner rather than later. In that regard, I am particularly conscious of the invidious position in which the tenants of those properties find themselves for as long as any dispute exists concerning the validity of the plaintiffs' appointment.

46. I will therefore make orders in terms of paragraphs 1 to 5 (inclusive) of the plaintiff's notice of motion.