THE HIGH COURT

[2018 No. 4454P]

BETWEEN

PATRICK FARRELL

PLAINTIFF

AND

PROMONTORIA (ARAN) LIMITED and KEN FENNELL

DEFENDANTS

Judgment of Ms. Justice Pilkington delivered on the 18th day of December, 2018.

1. This is an application by the plaintiff for an interlocutory injunction. Pursuant to a notice of motion issued on the 18th May, 2018, the plaintiff seeks the following reliefs:

> a) An interlocutory injunction restraining the defendants, their servants, employees and/or agents and or persons having notice of the Order from taking any steps to sell and/or market the plaintiff's property at Belmont, Drumsna, Co. Leitrim, and/or to assign, transfer and or dispose of the property until further interlocutory order and/or final order from this Honourable Court.
>
> b) An interlocutory injunction directing the defendants, their servants, employees and/or agents to vacate the plaintiff's property at Belmont, Drumsna, Co. Leitrim forthwith.
>
> c) An interlocutory injunction restraining the defendants, their servants, employees and/or agents and all key persons having notice of the Order from trespassing on or interfering in any way with the plaintiff's ownership and quiet possession of the property at Belmont, Drumsna, Co. Leitrim.
>
> d) Further or other order and costs.

2. By order of McDonnell J. dated the 18th May, 2018, the order in terms of paragraph 1 above was granted until further interlocutory and/or final order of the Court.

3. Within this application there is:

> a) The grounding affidavit of the plaintiff sworn on the 18th May, 2018.
>
> b) An affidavit sworn by the plaintiff's solicitor on the 22nd May, 2018.
>
> c) Affidavit of Albert Prendiville sworn on behalf of the first named defendant on the 15th June, 2018.
>
> d) Affidavit of Caroline Shanahan sworn on behalf of the defendants on 20th September, 2018.
>
> e) Affidavit of the plaintiff's solicitor sworn on 19th October, 2018.
>
> f) Final affidavit sworn by the second named defendant on 23rd October, 2018.

4. In my view, the facts of this case are important to any order that might ultimately be made in the grant of injunctive relief and accordingly it is necessary to recite them in some detail.

The Background

5. On the 19th March, 2003, the plaintiff (a carpenter) sought an overdraft facility of €95,000. The terms of that offer state that:

> "Repayment is to come from sale of houses number 3, 8 and 9 based on €30,000 to be lodged from sale proceeds of the first two houses and the balance from the third house to clear the overdraft in full by 28th of August, 2003."

6. By letter dated 31st March, 2003, addressed to Messrs George Lynch and Company (Mr. Noel Farrell of that firm), the plaintiff's solicitors throughout, Ulster Bank wrote seeking execution and registration of a mortgage in favour of the bank in respect to the borrowings referred to above.

7. The mortgage is between the plaintiff of the one part and Ulster Bank Limited of the other part and it was executed on the 14th May, 2003 ('the 2003 mortgage'). The schedule to that document is clear that it relates to the hereditaments and premises contained in folio 37S in the Registrar of Freeholders County Leitrim.

8. Thereafter Ulster Bank wrote three letters to the plaintiff's solicitor dated the 25th July, 2003, 13th October, 2003 and 21st May, 2004 respectively. The letters refer specifically to house numbers 3, 8 and 9 which appears to mirror the matters within the initial facility letter above.

9. The first letter 25th July, 2003, acknowledges the receipt of the net proceeds of sale of no. 3 state:

> "I wish to confirm that your undertaking in relation to this particular site number is now discharged."

With regard to the proceeds of no. 8 their letter in October, 2003, states:

> "Your undertaking will be discharged in due course."

10. The final letter of 21st May, 2004, again acknowledging receipt of the net proceeds of sale in respect of no. 9 states:

"A formal letter of release will issue to you shortly."

11. It is noteworthy that nowhere within the documentation can I find any reference to the bank issuing any proceedings on foot of the €95,000 or any suggestion that the monies were not discharged in full.

12. Matters then move to 2005. By letter dated 14th July, 2005, Ulster Bank wrote to Pat Farrell Builders Drumsna Limited ('the company') offering a loan of €2,000,000. In respect of what is styled as the "site loan" repayments are again a fixed sum of money from the sale proceeds of each unit sold within the development. With regard to what is described as the "working capital loan" of €1,500,000 it is stated;

"Security:

It is understood that as security the bank will hold and/or continue to hold the following and that these securities will continue to be available for all of the borrower's liabilities to the bank:

To be held:

1. First legal charge over eight-acre site at Dromod, Co. Leitrim.

2. Solicitors undertaking over the sale proceeds from the 48 units of the Dromod development.

3. Debenture over company's assets.

4. Assignment of life cover for the sum of €2,000,000.

5. Letter of guarantee signed by Pat Farrell for €2,000,000 with the deeds of his PDH."

13. Thereafter, on the 30th August, 2005, the plaintiff executed a personal guarantee in respect of the company for a sum not exceeding €2,000,000. By letter of the same date the plaintiff executed an addendum to that guarantee, acknowledged the recommendation that he seek independent legal advice and indicated that he wished to proceed to execute the security without such advice.

14. By letter dated the 7th May, 2008, there is then a second loan facility from Ulster Bank to the company Pat Farrell Builders Drumsna Limited, including an overdraft facility and the two of the other facilities above. There is also an additional continuation loan with regards to one of the properties within the development and the following;

"Security:

The following,

Held:

1. Firstly, the charge over eight-acre site at Dromod, Co. Leitrim.

2. Solicitors undertaking over the sale of proceeds from the 48 units at the Dromod development.

3. Debenture of the company's assets.

4. Assignment of life cover for the sum of €2,000,000.

5. Letter of guarantee signed by Pat Farrell for €2,000,000 with the deeds of his PDH as collateral.

Security items above must be in place before utilisation of the Facilities"

15. On the 15th December, 2016, in a letter to the plaintiff personally Promonteria (Aran) Limited, 'PAL', seek repayment of sum €1,760,000 pursuant to the August 2005 guarantee.

16. By letter dated the 12th June, 2017, Messrs Mason Hayes and Curran on behalf of PAL, pursuant to the letter of demand on foot of the guarantee, seek and demand possession of the property at folio 37S Co. Leitrim, pursuant to the deed of mortgage dated 14th May, 2003, which was in turn registered on the 11th July, 2005.

17. On 13th February, 2018, a letter to the plaintiff from Chartered Assets on behalf of the receiver (the second named defendant) notifies him that the locks will be changed on the 16th February, 2018. The substantive letter from the plaintiff's solicitor to the defendants' solicitor is dated the 6th March, 2018, and it asserts:

a) There was never a default on the mortgage entered into on 14th May, 2005, (I presume this should properly read 18th May, 2003, and I am construing it accordingly.)

b) It queries the linkage of a personal mortgage from 2003 to a 2005 personal guarantee- in essence the letter questions how it can relate to the plaintiff's family home insofar as any reliance placed on the mortgage of 14th May, 2003 contends that the process is seriously flawed.

18. The substantive response of Messrs Mason Hayes and Curran of 19th April, 2018, discloses the following:

a) The two facility letters pointing to the security element of each was described as "held" in the latter 2008 facility letter. They say that it referable to the 2003 mortgage.

b) A copy of the letter of guarantee.

c) A copy of the deed of mortgage/charge executed on the 14th May, 2003,

d) They assert that the plaintiff's liabilities under the guarantee /demand having been made, thereafter their entitlement to rely upon the rights under the facility letter, letter of guarantee and the deed of mortgage/charge of 14th March, 2003.

In short, that is the position that the defendants maintain and have continued to maintain at the hearing of this matter.

19. There was additional and other correspondence which I will not set out in detail culminating in confirmation that the defendants were actively seeking the sale of the plaintiff's property.

20. The 2003 mortgage is the only mortgage ever executed by the parties. That mortgage/charge was registered on the 11th July, 2005. The plaintiff's solicitor Noel Farrell avers in his second affidavit sworn on the 19th October, 2018 at paragraph 14;

> "In fact the reason for the delay in the registration of the charge pursuant to the 2003 mortgage over the plaintiff's PDH is entirely due to an administrative oversight on my part and also due to the delays of registering a charge then inherent in the system."

Thereafter, he continued:

> "From a review of my file, once I realised this oversight, I set about registering the mortgage straight away which is ultimately what happened. It is notable that there was also a significant delay between the registration of the mortgage and actually lodging the title deeds with the bank which arose from a delay on Leitrim County Council's part in there being unable to identify the relevant grant of planning permission for the construction of the house in the first instance. This caused a further delay of a number of years' duration. Ultimately the property was registered on the 11th June, 2005, with the process not completed on the 3rd June, 2009, until such time the deponent had complied with the undertaking to lodge the deeds of the property with the bank."

21. As set out above the defendants, with commendable clarity, state that the criteria for the grant of interlocutory relief cannot be met by this plaintiff. In their view there is a debt has been properly called in, that debt is underpinned by an 'all sums due' mortgage, a receiver is validly appointed pursuant to its terms and is thereafter entitled upon the default of the plaintiff arising from his personal guarantee to seek possession and an ultimate sale of the folio lands. That I would agree is the usual or normal position which any bank such as PAL takes in the execution of its security. However, in my view there are specific facts in this case that require closer attention.

Interlocutory relief

22. Clearly, the test is the well-known one set out in *Campus Oil, the Minister for Industry and Energy (2)* [1983] I.R. 88:

a) Is there a bona fide or serious issue to be tried?

b) Are damages an adequate remedy for this plaintiff? In particular, the entitlement of the defendant to resort to the plaintiffs undertaking on damages in the circumstances of his impecuniosity has been specifically raised by the defendant.

c) Whether the balance of convenience lies in favour of the award or refusal of the interlocutory injunction.

23. Moreover the defendants assert that the registration of the legal charge is conclusive evidence of its title pursuant to s.31 of the Registration of Title Act 1964. Thereafter, the deed of mortgage containing the power to appoint a receiver makes it entirely clear that the first named defendant is entitled to the relief that it seeks and accordingly, there is no serious issue to be tried.

24. In normal circumstances I would be in agreement with the proposition set out on behalf of counsel for the defendants. However, each case must be carefully considered on its facts. The facts that occasion my reservations are the three letters from Ulster Bank to the plaintiff's solicitor in respect of the €95,000 loan. In particular, the letter of the 21st of May, 2004, records that a "formal letter of release will issue to you shortly" [emphasis added]. There is also the terms of the security sought in the 2005 and 2008 loan offers.

25. That is not in any sense to impugn s.31 of the Registration of Title Act which is entirely clear in its terms, nor the fact of the registration of the mortgage. The system of land registration conducted by the Property Registration Authority underpinned by the Registration of Title Act 1964 is to ensure that matters entered on a folio are conclusive evidence of the matters within it. That is an unassailable proposition and underlies the entire system of land registration in this jurisdiction. The defendant cited the well known decision to any purchaser of land in *Guckian v. Brennan* [1981] 1 I.R. 478 which confirms this position.

26. The 2003 mortgage is clearly on its face what is colloquially referred to as an "all sums" mortgage and I accept that it is now held by the first named defendant. I further accept the validity of the appointment of a receiver, namely the second named defendant.

27. However, none of that in my view precludes the possibility in certain narrowly defined circumstances that issues might arise as to the ultimate enforceability of this registered charge over folio lands. That in no way impugns the system of registration, but occasionally (very occasionally) an issue may arise as to the enforceability of that registered interest.

28. On the facts of this case, in my view an arguable issue arises as to whether, at the date of the registration of the 2003 mortgage in 2005 there was at that point a registrable interest within that mortgage. I appreciate that the defendants will argue and point to the terms of their 2005 guarantee. The letters underpinning the advances to the company owned and operated by the plaintiff, in 2005, state that the security will be, in as far as this plaintiff concerned, "the deeds of his PDH as collateral". I find that a very odd phraseology, 'the deeds' can only refer to the deeds to his private dwelling house and appear to imply some form of equitable deposit of those title deeds (again highly unusual in respect of folio lands). I also note that any argument regarding equitable deposit of deeds was expressly excluded by counsel for the defendant. The letter of offer in 2008, in respect of that security changes the phraseology in that it appears that the security is "held" thus implying the "deeds of his PDH as collateral" is in place.

29. That proposition cannot be correct as the plaintiff's solicitor, Mr Farrell, has sworn an affidavit confirming that whilst he was only in a position (due to inadvertence and other reasons) to register the 2003 mortgage in 2005, that he was not in a position to lodge the mortgage with the bank as there was outstanding difficulties with Leitrim County Council in procuring the grant of planning permission for the erection of the dwelling in the first place. That is not an unusual scenario. Mr Farrell clearly asserts that, at

paragraph 17 of his affidavit sworn on the 19th October, 2018, that the process was not completed until the 3rd June, 2009, and it was only at that point that the plaintiff's solicitor was in a position to comply with his undertaking to lodge the deeds of the property undertaking with the bank.

30. It therefore follows in my view that there was no lodgement of any mortgage with the mortgagee prior to that date and there is no averment to the contrary. The letters of offer and the phraseology used as to the deeds of the PDH as collateral is in itself unusual in the circumstances. If reliance was being placed on the 2003 mortgage (and there is no other) then in my view reference should properly have been made to that mortgage, not to simply require some form of equitable deposit as the terms suggest within both facility letters.

31. The 2008 letter, within the section headed 'Security' after reciting the items required states;

> "Security items above must be in place before utilisation of the Facilities"

On the facts of this case it is very difficult to see how any security was in place before the draw down of these facilities.

32. Solicitors of course are by now well aware of the legal difficulties they will encounter if they do not honour their undertakings to deal with all aspects of the mortgage security and ensure that they finalise its registration and thereafter the deposit of that security with the mortgagee. Both case law and the direction of their professional body put that matter beyond doubt. In this case the question as to whether a Deed of Release ought also to have been lodged immediately after the 2005 registration is a moot point.

33. In the context of the equity of redemption in the case of *Harrington & Anor v. Gulland Property Finance Limited & Anor* [2018] I.E.H.C. 445 Baker J. stated:

> "The general approach of the court to mortgage security has been to recognise that the equity of redemption carries with it a corresponding obligation on the part of the mortgagee not to engage in any action that might prevent the mortgagor redeeming the loan and freeing the property from the security."

Certain duties of good faith that are said to be important in the relationship of the mortgager and mortgagee find expression in the dicta of Templeman L.J. in *Downsview Nominee v. First City Corporation Limited* [1993] A.C. 295 where he said the following:

> "Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower."

The principles thus explained does not mean that a mortgagee must exercise its power to the benefit of the borrower or with the borrowers own commercial interests in mind. The duty is not fiduciary. However, the interplay between the rights conferred on both mortgagor and mortgagee, and the rights of the borrower to have the security released on repayment, offers protection for the borrower and a right which must not be ignored.

34. At a minimum the case cited above (albeit in the context of the equity of redemption) is a timely reminder of the duty of good faith imposed upon any mortgagee.

35. Clarke J. in *Danske Bank T/A National Irish Bank v. McFadden* [2010] I.E.H.C. 116 stated:

> "The fundamental principles of construction are, in my view, the same in all cases and in respect in all types of contract (and indeed other documents having legal effect). Those principles have been explored in many recent cases, most especially the decision of the Supreme Court in *Analog Devices BV & Ors v. Zurich Insurance Company & Anor* [2005] 1 I.R. 274. The requirement is to interpret the intention of the parties from the words which they used to formulate their contract but taking those words in context. That general principle has been applied in many different ways in many different cases. The *contra proferentem* rule, is in my view, simply an aspect of that general principle. To the extent that a party might be expected (particularly if it has a significant degree of control over the drafting of the contract concerned) to make clear any entitlement which it would wish to assert, then the court is likely to assume that the relevant language was not intended to confer a benefit in favour of the party having such control, which the relevant party did not make clear in the text of the contract concerned."

36. In my view, the reference above in respect of the *contra proferentem* rule of Clarke J. is apposite on the facts of this case with regard to the facility letters issued in 2005 and 2008 in respect of this plaintiff. On my reading of each document it is not at all clear to me on the face of the documentation that the security was to comprise the existing "all sums due" 2003 mortgage, which in any event, had not been lodged with the mortgagee until 2009. Nor had it been registered in advance of the initial facility letter in 2005 or the execution of the guarantee on foot of that document.

37. In my view, the test articulated in *Campus Oil* is satisfied on the facts of this case. There is a serious issue to be tried and that is the question of the enforceability of the 2003 mortgage. There are strong arguments to be advanced as to whether it is enforceable on the facts of this case and whether as a consequence an estoppel operates against the defendants in seeking its enforcement.

38. In my view the issue of enforceability of the 2003 morgage exceeds any *Campus Oil* criteria and the defendants would need to consider their position in this regard with great care and circumspection.

39. As to the adequacy of damages; the defendant's counsel points to the clear lack of resources of this plaintiff and accordingly, if this defendant succeeded at trial that they would in essence not be able to recover any award of costs in their favour. It does appear that this plaintiff lacks resources. However, in my view he has raised a significant issue that requires adjudication. Not to do so would be to ensure that his family home (and I do accept it is his family home) would be sold and dealt with in the manner contended for by the defendants. I also note the authorities and in particular those authorities cited by Feeney J. in the case of Mc*Keever v. Hay and Ors and (by Order) the County Council of the County of Donegal* [2008] I.E.H.C. 145 when he in turn quotes from the decision of Keane J. in *Keating & Company v. Jervis Shopping Centre* [1997] 1 I.R. 512, where he stated at p.518 that:

> "It is clear that a landowner, whose title is not an issue, is *prima facie* entitled to an injunction to restrain a trespass and

> that this is also the case where the claim is for an interlocutory injunction only."

40. I appreciate that the defendant in this case could well take issue with the applicability of the quotation where it would contend that the title may not be an issue, but in my view the plaintiff is presently the registered owner of this property. I accept the validity of the appointment of the receiver, but that again goes to the question in my view of enforceability and not title in the sense set out within this paragraph.

41. In the case of *Pasture Properties Limited v. Evans*, (Unreported, High Court, Laffoy J., 5th February, 1999) the Court stated:

> "The next issue which has to be decided is whether damages would be an adequate remedy for the plaintiff if the Court refused to grant an injunction and it subsequently transpired at the hearing of the action that the plaintiff was entitled to an injunction. I think it is axiomatic in trespass cases that damages are not an adequate remedy. Again, that is not an end of the matter.

The plaintiff cannot get an injunction unless it can give an undertaking as to damages. If an injunction is wrongly granted at this stage and it so transpires at the hearing of the action, the plaintiff must undertake to adequately indemnify the defendant against any loss incurred by the defendant by reason of the injunction being wrongly granted."

42. In my view, the question of the adequacy of damages both as to his finances and as an adequate remedy as regards this plaintiff's family home is rejected. Notwithstanding the submissions by counsel for the defendants that the plaintiff no longer resides at the family home (a point that the plaintiff himself explains within his affidavits) nevertheless, it is the only property in which he has an economic interest and in my view that ensures that damages are not an adequate remedy on the facts of this case. In any event (and to the defendant's point regarding the finances of this plaintiff), should the defendants ultimately succeed at trial or if their proceedings against this plaintiff lie elsewhere then they still retain the security of this property should they be required to utilise it at any point in the future.

43. For the reasons set out above, in my view, the balance of convenience also favours the maintenance of the status quo in that if that property is now being marketed and sold and in my view it cannot be something that can subsequently be properly compensated for, as regards this plaintiff.

44. In my view, the terms of this injunction are to be granted as having satisfied the criteria for the grant of interlocutory relief. I will hear the parties with regard to the final orders sought and also on the question of costs.