

**THE HIGH COURT**

**[2013 No. 7810 P]**

**BETWEEN**

**DAVID SWINBURNE**

**PLAINTIFF**

**AND**

**ERIC GEARY AND ANITA GEARY**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 19th day of August 2013**

1. This is an application for interlocutory relief by a receiver appointed on foot of a mortgage seeking to prevent the defendants from trespassing on a holiday home known as 'Everest' in Baltimore, County Cork. The plaintiff receiver has secured a buyer for the property and is required to answer a completion notice in early course. The defendants do not deny that they have recently changed the locks on the property.

2. The defendants consented to a judgment of €1,227,047.98 in summary proceedings entitled '*ACC Bank plc. v. Eric Geary and Anita Geary*' for monies owed to ACC Bank borrowed to buy properties in Cork including the holiday home which is the subject matter of these proceedings. The receiver did not object to the defendants using the holiday home during the recent winter months as it was not intended to place it on the market until the spring of 2013. The defendants gave keys of the property to the receiver to facilitate its sale.

3. In May 2013, the defendants employed a Mr. O'Driscoll to advise them about certain alleged overcharging by an unidentified financial institution. Mr. O'Driscoll has been referred to in these proceedings - wrongly - as 'a McKenzie friend'. My understanding is that a McKenzie friend assists a lay litigant in court. The defendants were represented by a solicitor and counsel in this application.

4. The receiver found a purchaser for the property and by letter of 11th July 2013, the first named defendant was asked to arrange for the removal of contents from the holiday home by Wednesday 17th July 2013. The contents were not removed. On 17th July 2013, Mr. O'Driscoll left a voice message with the receiver on behalf of the defendants warning against any "illegal eviction." By letter of 18th July 2013, the plaintiff receiver wrote to the defendants to say that they were not entitled to be in possession of the property. On 22nd July 2013, the first named defendant wrote to the plaintiff and alleged that the mortgage had been forged. The letter was signed by Mr. O'Driscoll. This allegation against could scarcely be more serious.

5. The Deed of Mortgage on foot of which the receiver was appointed is dated 2nd March 2007. The signing page is blank. However, an indenture supplemental to the Deed of Mortgage is signed by the defendants. Clause D thereof provides:

"In all other respects, the beneficiary hereby confirms and ratifies the within indenture of mortgage/charge."

The security created by the Deed of Mortgage and its supplemental indenture was registered as a burden on Folios 132808F and 43360, County Cork.

6. The amount owing in respect of the holiday home on 21st February 2011, was €661,799.67 with a daily accrual rate of €43.38. The summary proceedings to recover this sum came before the Master of the High Court on five occasions and no complaint was made about the efficacy of the mortgage.

7. The first named defendant swore a replying affidavit to argue that the receiver has no legal rights in respect of the holiday home because the Deed of Mortgage of 2nd March 2007 was not executed by the defendants. At the hearing of this application, I enquired why the defendants objected to the proposed sale of the holiday home by the receiver, apart from asserting that the mortgage deed was invalid. Counsel for the defendants, Mr. McEntagart B.L., informed me that the defendants were convinced that they could obtain a better price. No evidence as to attempts by the defendants to sell the property or investigate the market was put before the court. The defendants' belief is in the realm of speculation.

8. In an attempt to draw out the true attitude of the defendants to these proceedings, I enquired what might happen if the court permitted the defendants to sell the property. Arising from the fact that the defendants do not deny that they owe the outstanding loans, I enquired whether the defendants would use the sale proceeds to pay down the unpaid borrowings. Mr. McEntagart took instructions on this point and informed the court that if so permitted, their solicitor would have carriage of the sale of the property and would give the all the proceeds of sale directly to the bank. From this concession, it is clear that the defendants acknowledge, not only their indebtedness to the bank, but also the fact that the holiday home they purchased constitutes security for the loans. In other words, the defendants effectively accept the validity of the mortgage.

9. I should emphasise that even without such concession by the defendants, I accept that the Deed of Mortgage has been lawfully executed by the defendants by virtue of the signatures which appear on the supplemental Deed of Indenture incorporating an acknowledgement and an acceptance of the validity of the Deed of Mortgage to which it is attached. Therefore, I reject any argument as to the absence of an executed document for the purposes of the Statute of Frauds.

10. A second argument was addressed to me by counsel for the defendants to the effect that the charge created by the Deed of Mortgage refers to Folios 433860 and 11682. These folios, according to counsel, do not comprise the holiday home and therefore it is not charged.

11. The holiday home appears to be represented by Folio 132808F County Cork which has resulted from a merger transaction in respect of earlier folios. Folio 132808F records the defendants as full owners of the holiday home on 24th December 2007, and also

records a charge in favour of ACC Bank of the same date. Tracing the numbers from folio to folio, the plaintiff has persuaded me to the standard required in an application such as this, that the existing folio number of the holiday home (132808F) has been created from CK132806F which is created from CK132808F and from CK11682. For the purposes of this application I accept that the charge which exists on Folio 132808F is the same charge which was created in respect of folio 132682 by the Deed of Mortgage in March 2007.

12. I accept therefore that the plaintiff has presented a serious issue to be tried in respect of the rights of the receiver and the trespass of the defendants.

### **Are damages an adequate remedy?**

13. On an interlocutory application, where the court has decided that the plaintiff has established a serious issue to be tried, the next question is whether damages would be an adequate remedy for the plaintiff if successful at the trial of the action, and conversely, whether the defendant, if successful at the trial, would be adequately compensated by damages for having suffered the grant of an interlocutory injunction. Three authorities persuade me that the plaintiff's side of this argument must succeed. In *Metro International SA. v. Independent News and Media* [2006] 1 ILRM 414 at 43, Clarke J. said as follows:

"Thus the mere fact that a property right (or indeed a diminution in such a right) can be valued in monetary terms does not of itself mean that damages for an infringement of that property right can necessarily be said to be an adequate remedy ...

While fully accepting, therefore, that the primary consideration of the court in assessing the adequacy or otherwise of damages at the interlocutory stage is the loss that might be sustained in the period between the refusal of interlocutory injunction (or indeed its grant and the reliance by a defendant upon the undertaking as to damages given to secure it), on the trial, I am nonetheless of the view that in accessing the adequacy or otherwise of such damages as a remedy, the court can and should have regard to the question of whether the right sought to be enforced or protected by interlocutory injunction is one which is of a type which the court will normally protect by injunction even though it might, in one sense, be possible to value the extinguishment or diminution of that right in monetary terms."

14. Bearing in mind the receiver's claims that the property to which he is legally entitled is occupied by the defendants who, he says are trespassers, and that the right he wishes to enforce is his entitlement to sell the property, it seems to me there is much to be said for proposition that the defendants could not adequately compensate the receiver in damages if he was to be unfairly restrained from acting as he now wishes. He wishes to sell the property now. If he is prevented from so doing, and he succeeds in the proceedings, his legitimate objective will have been unfairly thwarted. How can one assess in monetary terms what compensation should be available to the receiver? The receiver sues to promote and protect his legal obligations. It is hard to see how a sum of money could match his being temporarily restricted. As Laffoy J. said in *Savill v. Byrne* [2012] IEHC 415:

"5.2 The second question is whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he could adequately be compensated by an award of damages. Given the nature of the plaintiff's claim, that he is entitled to possession of the Property and he is entitled to use it as he thinks fit, if he were to establish that entitlement as and from 5<sup>th</sup> January, 2012 at the trial, in my view, he could not be adequately compensated by an award of damages."

15. One further aspect of the adequacy of damages is relevant to these proceedings and that is the ability of the defendants to pay any award of damages. It is abundantly clear from these proceedings and from their related summary proceedings that the defendants are not in a healthy financial situation. In *McCann v. Morrissey & Ors.* [2013] IEHC, Laffoy J. said:

"43. As regards the second criterion, the adequacy of damages, the situation in this case, if anything, is more favourable to the plaintiff Receiver than the situation in *ICC Plc v. Verling* was to the plaintiff mortgagee in that case. Mr. Morrissey is indebted to the Bank in an amount in excess of €14m. He is 'connected', using that term in a non-technical sense, with Northbrook, Cyan and Mr. Lancaster in the context of the leases and tenancy affecting the Premises, none of whose financial status has been addressed in evidence. As counsel for the Receiver pointed out, in *Westman Holdings Ltd v. McCormack* [1992] 1 I.R. 151 (at p. 158), Finlay C.J. identified two limbs in the adequacy of damages criterion in relation to whether an interlocutory injunction should be granted: whether in fact damages were an adequate remedy for the plaintiff; and whether 'there is a defendant liable to pay such damages who is able to do so, and thus the appropriate compensation could be actually realised'.

44. The reality of the situation in this case is that there is no evidence before the Court that if an interlocutory injunction is refused, and following the hearing of the substantive action, the Receiver is found to be entitled to compensation for the period over which he has been deprived of possession and receipt of the rents and profits of the Premises, such compensation could be actually realised against any of the defendants. On the other hand, again by analogy to the decision of Lynch J. in *ICC Plc v Verling*, if the interlocutory relief sought by the Receiver is granted and it subsequently transpires that it should not have been granted, then the Receiver's undertaking as to damages will be capable of compensating each of the defendants who is able to establish that he or it suffered damage as a result of the grant of an interlocutory injunction."

16. In my opinion, those comments are apposite in this case also. My view is that damages would not be an adequate remedy for the receiver. Contrarily, damages would compensate the defendants should they ultimately succeed. They say they might get a better price from the sale of the property and if this is so and can be proved, the difference between the price secured by the receiver and the price which the defendants could secure would be the measure of damages which the plaintiff's undertaking as to damages would meet.

### **The balance of convenience**

17. The competing conveniences in this case relate to the entitlement of the receiver to take possession of and sell the holiday home further to legal obligation on one side and the defendants wish to sell the property because they believe they could secure a better price, on the other. The stark failure by the defendants to produce any evidence in support of this speculation has the effect of easily tipping the balance in favour of the receiver.

18. The plaintiff is entitled to interlocutory injunctions in the terms sought in paragraphs 1 to 5 of the Notice of Motion.