

THE HIGH COURT

CHANCERY

[2016 No. 3224P]

BETWEEN:

BRIAN MURPHY AND MICHAEL JENNINGS

PLAINTIFFS

-AND-

PAUL NEILL

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on 6th December, 2017

Summary

1. This case involves a claim by Mr. Neill, a business man, that he should not have to give up possession of a property in Baltimore, County Cork which he gave as security for a bank's loan to him of €2,000,000. In these interlocutory proceedings, Mr. Neill is seeking to have a trial on two preliminary points of law before the hearing of the substantive matter. For the reasons set out below, Mr. Neill's application is rejected by this Court.

2. Costs of these unsuccessful proceedings are being awarded against Mr. Neill. Furthermore the application to have that costs order stayed until the resolution of the substantive hearing is rejected on the grounds that that it is important in interlocutory applications that are unsuccessful, that litigants appreciate the level of costs involved in High Court litigation and the fact that there is a risk of those costs being awarded against them. This is preferable to having the costs deferred until the resolution of the whole litigation which can be many years later, particularly if there is an appeal, since the level of costs may then only be fully appreciated by litigants when it is too late.

Factual background

3. In this case, the plaintiffs are joint receivers ("the Receivers") of a property at the Grainery, Baltimore, County Cork ("the property"), which is owned by the defendant. The Receivers are seeking possession of that property.

4. Mr. Neill borrowed €2,000,000 from Bank of Ireland on the security of the property and has failed to repay that loan. He now seeks to dispute the right of the Receivers to the possession of that property.

5. There are two motions before this Court brought by the defendant in which he seeks a trial on two preliminary points of law pursuant to Order 34 of the RSC, namely whether this Court has jurisdiction to enter upon these proceedings since they are claimed to concern a property which is subject to a housing loan and also whether the plaintiffs have *locus standi* to bring these proceedings pursuant to the relevant mortgage, a Mortgage dated 24th August, 2010.

6. Under Order 34, if there is any question of law which the Court determines it is convenient to have decided before evidence is given or any question or issue of fact is tried, it may make an order accordingly. It is clear therefore that there must not be any factual dispute which impacts upon the preliminary issue to be tried before this Court can make an order for a trial of that preliminary issue.

7. In relation to the first preliminary point, the defendant relies upon s. 3 of the Land and Conveyancing Reform Act, 2009, to claim that the loan in this case is a housing loan and therefore subject to the jurisdiction of the Circuit Court, rather than the High Court. The 2004 Act defines a housing loan as follows:

"an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is constructed where the house is to be used or to continue to be used as the principal residence of the person or the person's dependants."

8. It is common case that the mortgaged property in this case was not "*to continue to be used*" as a principal residence by Mr. Neill at the time of the loan facility letter on the 24th June, 2008, since it was not used at that time as a principal residence of Mr. Neill.

9. Equally, no evidence was produced to this Court to indicate that at that time the intention of Mr. Neill was that it was "*to be used*" as his principal residence. For their part, the plaintiffs have claimed that at the time of the loan in 2008, Mr. Neill made representations that he was not resident in Ireland for tax purposes, but was resident in Gibraltar.

10. It is particularly significant that the facility letter itself is addressed to Mr. Neill at an address in Lisburn, Northern Ireland and the loan is described as a loan to provide funding against a "*residential investment property known as The Grainery, Baltimore, County Cork*". Thus, the loan which is now alleged by Mr. Neill to be a housing loan was in fact described in the facility letter as a loan for an investment property.

11. It is clear therefore from this evidence alone that there is a factual dispute between the parties, since Mr. Neill claims that he satisfies the definition of housing loan and therefore falls within the jurisdiction of the Circuit Court, although based on the wording of the relevant section and the evidence produced to this Court, this seems at best an arguable point.

12. For this reason, this Court does not believe that it is convenient for this matter to be decided as a preliminary issue.

13. As regards the second matter, which it is sought to have dealt with by means of a trial of a preliminary issue, it is claimed that the wording of Clause 11 of the Mortgage Deed is such that the plaintiffs do not have *locus standi* to bring proceedings seeking the possession of the mortgaged property on the basis that ejectment proceedings can only be taken in the name of the mortgagor, which was not done in this case and also on the basis that a receiver is an agent of the mortgagor and there is therefore a conflict of interest in the Receivers seeking to take possession of the property from Mr. Neill, the person for whom they are agent.

14. Clause 11, insofar as relevant, states:

"The Bank may at any time hereafter without any further consent on the part of the Mortgagor enter into possession or [...] appoint at the sole risk and cost of the Mortgagor a person to collect and receive such rents and profits for the use and benefit of the Bank at such commission as the Bank shall think fit and any such person shall have power in the name of the Mortgagor to give notice to quit and bring and bring and take actions or proceedings for ejectment or recovery of possession of the Mortgaged Premises on the expiration or determination or forfeiture of any tenancy or otherwise[...]"

15. Before considering the wording of this clause, it is relevant to bear in mind that it is clear from the judgment of Dunne J. in *Tritton Development Fund Ltd v. Markin AG* [2007] IEHC 21, that a trial on a preliminary issue is something that is only done in exceptional cases.

16. It is this Court's preliminary view that the interpretation being urged upon this Court of Clause 11 is one that is not consistent with business common sense since it would mean that a receiver could not seek possession from a borrower in default who happens to be in occupation of the mortgaged premises.

17. A common sense approach has been taken by the Courts to similar issues of interpretation regarding the rights of receivers in the past. For example in *Kavanagh and Lowe v. Lynch* [2011] IEHC 348, Laffoy J. dealt with a claim that a 'rent receiver' was not entitled to possession since his deed of appointment made no reference to his being appointed in respect of '*possession*' of the property. Laffoy J. held that while it was not stated that the receiver had power to take possession, such a right must be implied since without it, "*he effectively would not be able to do his job*".

18. It is also the case that the opening words of Clause 11 make clear that Bank of Ireland is entitled to seek possession of the property in its own right and the joint receivers' position is that this power has been delegated to them by the Bank of Ireland. Furthermore Bank of Ireland has agreed to be joined as a plaintiff to the within proceedings.

19. For all of these reasons there is a clear risk that there would not be a saving of time and cost by the trial of this issue regarding *locus standi* as a preliminary matter. On this basis, this Court concludes that the default position, namely of a unitary trial, is the most appropriate and convenient manner in which this action should proceed.