THE HIGH COURT

[2016 10373 P]

BETWEEN

KEN TYRELL

PLAINTIFF

AND

KEVIN MAHON AND AIDAN MAHON

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 20th day of June, 2017.

1. By this application the plaintiff seeks an injunction restraining the defendants, their servants or agents, and all other persons having notice of the making of such order, from preventing, impeding and/or obstructing the plaintiff and his servants or agents from securing, taking possession of, getting in and collecting vacant possession of the property at unit No. 4 the Diamond, Malahide, Co. Dublin ("the Property"), over which the plaintiff is appointed as receiver. The plaintiff also seeks an injunction restraining the defendants, their servants or agents, and all other persons having notice of the making of the order, from interfering in any manner whatsoever with the functions and office of the plaintiff as receiver of the property.

2. The plaintiff was appointed as receiver of the Property pursuant to a deed of appointment made on 2nd June, 2016, which appointment the plaintiff accepted on 3rd June, 2016. That deed of appointment was made by Gulland Property Finance Limited ("Gulland") following upon the acquisition by Gulland of certain loans from Irish Bank Resolution Corporation Limited ("IBRC") pursuant to a loan sale agreement dated 17th December, 2017, following upon which IBRC completed a deed of conveyance and assignment of the properties the subject of the loan sale agreement, on 6th February, 2015.

3. At the outset it may be observed that, in resisting this application, the defendants did not dispute that they had borrowed monies from Anglo Irish Bank ("the Bank") (which of course subsequently became IBRC), that they had created security over the Property in favour of the Bank or that they were in default of the loan repayment terms which they had entered into with the Bank. Rather, in resisting this application, the defendants put the plaintiff on strict proof of all matters required to be proven by him to satisfy the court that he was properly appointed and otherwise had sufficient title and entitlement to bring forward these proceedings, as the defendants are entitled to do.

4. In his affidavit grounding the application, the plaintiff exhibits a deed of mortgage executed by the defendants on 25th July, 2000 ("the deed of mortgage") in favour of the Bank. The deed of mortgage identifies the defendants as the mortgagors, who have executed the deed in favour of the Bank and identifies the property secured as:

> "*all that and those the residential and business premises situated at the Diamond, Malahide, Co. Dublin as in more particularly described in the lease dated 29th March, 2010 between Lord [illegible] del Malahide of the one part and James Kavanagh of the other part and therein described as all that and those the plot or piece of ground being part of the lands at Malahide with house and gardens situated at the east corner of the Diamond at Malahide now in the tenancy and occupation of the lessee as more particularly delineated on the map or plan annexed thereto and coloured red and green thereon and which said premises are situated in the parish of Malahide, Barony of Coolock and County of Dublin*."

At paragraph 10 of the deed of mortgage, the power was given to the Bank to appoint a receiver in the event that the liabilities secured by the deed become payable. In the concluding paragraph of the deed of mortgage (the paragraph number is illegible on the copy furnished to the court) it is stated that the Bank may assign its interest under the mortgage deed to any person without the consent of or the requirement to give notice to the mortgagor.

5. In response to the grounding affidavit of the plaintiff, the first named defendant swore an affidavit dated 24th November, 2016. In this affidavit he implicitly acknowledges the completion of the deed of mortgage in favour of the Bank. However, he goes on to say that that deed of mortgage, and the loan secured thereby, was the subject of certain charges completed by the Bank in favour of the Central Bank of Ireland on or about 15th February, 2008 ("the Charges") and he exhibits copies of certain filings made on behalf of the Bank in the companies registration office in support of that proposition. He avers that the Charges were either fixed charges, or, if floating charges, had crystallised on or before 1st December, 2010, before or not later than the liquidation of IBRC in February 2013. Mr. Mahon also argues that the Bank should have sought his consent or notified him of the assignment or transfer of the mortgage.

6. Mr. Mahon further avers that the property described in the deed of mortgage was redeveloped, resulting in the creation of five units, three on the ground floor and two on the first floor (the latter being Units 4 and 5). The plaintiff has already taken possession of unit numbers 1, 2, 3, and 5. The first defendant in his affidavit argues that Unit 4 was excluded when the loan facilities were renegotiated in 2005 and in that regard relies upon a copy of a facility letter exhibited by him to his affidavit and dated 8th April, 2005 from the Bank to the defendants. The security referred to in that facility letter is "first legal charge over a commercial property with three retail units and office accommodation overhead known as the Diamond Building, Malahide, Co. Dublin".

7. On the first date on which this application was heard, counsel on behalf of the defendants urged upon the Court that the Charges may well have embraced the loan facilities advanced by the Bank to the defendants and that the Charges may well have crystallised; to the extent that these issues are uncertain, counsel argued that it is a matter for the plaintiff to prove his case and any uncertainty in this regard could and should only be determined by way of full plenary hearing. He also argued that the loan sale agreement and/or the deed of conveyance and assignment completed pursuant thereto were stampable instruments and that the copies of the same before the Court were clearly not stamped and as such could not be relied upon by the plaintiff to support his application. Moreover, the agreement did not of itself give effect to any assignment or transfer of loans or securities, but was merely an agreement to do the same.

8. The affidavit of the first named defendant gave rise to a replying affidavit by Ms. Elaine Long, solicitor of Matheson, representing the plaintiff, dated 25th November, 2016. In this affidavit she explains the background to the granting of the Charges by IBRC to the Central Bank. She states that the securities the subject of the Charges do not include loans or loan security, such as those loans advanced to the borrowers, or the securities given by them to the Bank in connection with the same. Furthermore, it is submitted that even if the Charges did embrace the defendants' loan facilities, that would make no difference because the contractual relations of the defendants remained with IBRC up to the point that the loan and related security were sold to Gulland.

9. In relation to the suggestion by Mr. Mahon that Unit 4 of the Diamond Building, which is the subject of this application, is excluded from the security by reason of the facility letter referred to be Mr. Mahon in his affidavit, she makes the point that the facility letter could not operate so as to alter the nature or scope of the security provided by the defendants to the Bank in the deed of mortgage of 25th July, 2000; and in any event she argues that it is clear that the facility letter does not do so.

10. Since there was uncertainty as to whether or not the loan sale agreement or the deed of conveyance and assignment completed by IBRC in favour of Gulland on 6th February, 2015 to give effect to the loan sale agreement, were liable to stamp duty, and since I further considered that it remained unclear as to whether or not the Charges incorporated the defendants' loan from the Bank, and the security created by the defendants by the deed of mortgage, I adjourned the matter to enable the plaintiff to adduce further evidence and to advance arguments in relation to these matters.

11. Before dealing with the resumed hearing however, I should say at this juncture that I was satisfied on the first day of the hearing as to the following matters:-

> (1) That the defendants had received the loans relied upon by the plaintiff in support of this application;
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> (2) that those loans were secured by the defendants to the plaintiff pursuant to the deed of mortgage;
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> (3) that the Property is part of the property the subject of the deed of mortgage, and that possession of the other units within the same development i.e. Unit Nos. 1-3 and Unit No. 5 had already been delivered to the plaintiff;
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> (4) that Unit No. 4 was occupied by the second named defendant. In this regard there was a suggestion that the second named defendant had a lease of the Property which was subject to statutory protection, but no evidence was advanced in this regard and in any case the deed of mortgage required the prior consent in writing of the Bank to the creation of a lease, and no evidence of such a consent was forthcoming;
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> (5) that even if the Property was excluded from the facility letter of 8th April, 2005, there was no variation to the deed of mortgage to exclude the Property from the security given by the defendants to the Bank and
>
> (6) that subject to being satisfied as to the enforceability of the loan sale agreement between IBRC and Gulland, and/or the deed of conveyance and assignment executed pursuant thereto between the same parties, and subject also to being satisfied that the Charges did not operate so as to prevent the sale of the defendants' loans to Gulland, the plaintiff was duly appointed as a receiver over the Property.

12. At the resumed hearing the Court was addressed by counsel for the plaintiff in relation to the question as to whether or not the loan sale agreement or the deed of conveyance were liable to stamp duty, and also as to whether or not the Property was affected by the Charges. Affidavits were sworn on behalf of the plaintiff addressing these issues. In relation to stamp duty, I have been satisfied beyond any doubt that, pursuant to s. 100(1) and (2) of the Finance Act, 2007, stamp duty that had hitherto been payable on mortgages or assignment of mortgages was abolished. The same applies to agreements to create such instruments. However, counsel for the defendants argued that it was not clear that the deed of conveyance and assignment of 6th February, 2015 was a document to which s. 100(1) and (2) of the Finance Act, 2007 applied, since, on its face, it is a deed of conveyance and assignment and not an assignment of a mortgage. However, where unregistered title is concerned, a deed of mortgage was, until the Conveyancing and Law Reform Act 2009, always expressed as a grant of conveyance subject to a proviso for redemption. It is clear that the deed of mortgage and assignment of 6th February, 2015 merely reflects that practice, as is apparent from the habendum in the deed which states:-

> "*TO HOLD the same unto the purchaser of all the residue or respective residues of the terms or respective terms of years demised (or if applicable assigned) by the Mortgages (the Mortgage Terms) subject to the rent reserved by and the conveyance on the part of the mortgagee contained in the Mortgage and to the proviso for redemption as contained in the Mortgages and all the estate, right, title and interest of the vendor [IBRC] in the reversion expectant on the determination of the Mortgage Terms in respect of the Properties whatsoever or howsoever arising TO HOLD the same onto the Purchaser subject to the proviso for redemption as contained in the Mortgages, together with all rights, title, benefit, entitlements and interests of the Vendor arising in and under and in connection with the Properties and the Mortgages TO HOLD unto the Purchaser absolutely*."

13. It could not be more clear from the habendum that, while expressed as a deed of conveyance and assignment, it is no more than the mechanism chosen by the parties to the deed to give effect to the purchase by Gulland from IBRC of the security enjoyed by IBRC in the form of mortgages over the properties therein described. While it is true that it is expressed in the same terms as deeds of mortgage prior to the Conveyancing and Law Reform Act 2009, this is appropriate in circumstances where the deed of mortgage itself predates the Act of 2009. Accordingly, I am fully satisfied that neither the loan sale agreement nor the deed of conveyance and assignment of 6th February, 2015 were liable to stamp duty.

14. Counsel for the defendant also submitted that there was an inconsistency of description of the property, purporting to be the defendants' property, in the loan sale agreement and the deed of conveyance and assignment and that it could not be certain that either referred to the property secured by the defendants in the deed of mortgage. It is true that in the loan sale agreement there is no description of the property at all. The defendants are identified by name and a loan account number is stated. However, in the deed of conveyance and assignment, there is reference to the defendants, the date of 25th July, 2000; the business name Morris Mahon Newsagents, address: the Diamond, Malahide, Co. Dublin; and also the following numbers 2000156035. These digits, it transpired, comprised an extract from the registry of deeds stamp endorsed on the deed of mortgage which states: registered in the registry of deeds (Dublin) at 3:05 on 10th October, 2000, Book 156 No. 35. So it can be seen that the sequence of digits represents the year, the book number and the entry number as endorsed by the registry of deeds on the face of the deed of mortgage. I am therefore satisfied that the property assured by the deed of conveyance and assignment completed by IBRC in favour of Gulland, included the Property.

15. The only other issue to be determined is whether or not there is a possibility that the Charges may have crystallised before the date on which IBRC executed the deed of conveyance and assignment in favour of Gulland, the date of which was 6th February, 2015, and if so, what impact, if any, this may have had on the entitlement of Gulland to appoint the plaintiff as receiver over the Property. In his affidavit of 24th November, 2016, the first named defendant exhibited the Companies Registration Form C1 filed on behalf of the Bank for the purpose of registration of the Charges in that office. The following are the particulars of the property charged by the Bank in favour of the Central Bank and Financial Services Authority of Ireland as recorded in the CRO Form C1:-

> *"The company, as legal and beneficial owner, and subject to Clause 4 of the deed of Charge, as a continuing security for the discharge and payment of the Secured obligations, thereby charged by way of first floating charge to the Bank all of its right, title, interest and benefit, present and future, in and to the balances now or at any time standing to the credit of its PM Account,*
>
> *where:*
>
> > *'Secured Obligations' means all present and future liabilities whatsoever of the Company to the Bank or to the European Central Bank or to the national Central Bank of a Member State that has adopted the euro in respect of its participation in TARGET 2 – Ireland which become due, owing or payable by the Company to the Bank and/or such other party under or in respect of, and subject to the terms and conditions of, the Deed of Charge and the Terms and Conditions, including without limitation, all obligations of the Company to an AL NCB under an AL Agreement entered into pursuant to (and as defined in) the Terms and Conditions and all other obligations and liabilities of the Company from time to time arising under the Deed of Charge.'"*

16. It will be apparent from the above that there is a significant number of defined terms within the particulars of the property charged. These are addressed on behalf of the plaintiff in an affidavit sworn on behalf of the plaintiff by Mr. Patrick Molloy of Matheson, sworn on 8th December 2016. At the resumed hearing, senior counsel on behalf of the plaintiff took the court on a tour of these defined terms as explained in this affidavit and as out in various documents This is a matter of some considerable complexity and it would be quite simply impossible to attempt to summarise here either the submissions of counsel in this regard or the affidavit of Mr. Molloy. Suffice to say that I have been satisfied, on the balance of probability, that the defendants' loan facilities and the deed of mortgage do not form part of the security granted by the Bank to the Central Bank pursuant to the Charges.

17. Additionally, it should be noted that the annex to the Form C1 filed for the purpose of registration of the Charges, states at Clause 2.4 thereof:-

> *"If an event of default occurs, the Floating Charge created pursuant to Clause 3.1 of the Deed of Charge (the 'Floating Charge') shall be converted into a fixed charge upon the service by the Bank of a notice to that effect upon the Company."*

18. This clause is of some significance because it makes it clear that if an event of default on the part of the Bank occurs (such as the insolvency of the Bank which actually did occur) it does not necessarily follow by operation of law that crystallisation of the Charges occurs. Crystallisation, which will result in the Charges being converted from fixed into floating charges will (in such circumstances) only occur upon the service of a notice by the Central Bank upon the Bank. It is not for the plaintiff to prove that this did not occur, in circumstances where the plaintiff has otherwise proven that Gulland purchased the defendants' loans and the securities relating to the same from IBRC and thereafter, appointed the plaintiff as receiver over the Property. If the defendants contend that the Charges crystallised, it is a matter for the defendants to advance evidence to that effect to the court, and they have not done so.

19. Moreover, even if the Charges have crystallised, all this means is that IBRC has acquired the defendants' loans and the securities relating to the same, subject to a fixed charge in favour of the Central Bank. While this could interfere with Gulland's capacity to sell the property, it does not affect the ability of Gulland to deal with the loans and related securities unless and until such time as the Central Bank intervenes to act upon the security of the Charges, and in particular to exercise its power to appoint a receiver over the Property.

20. It is now necessary to consider all of the above in the light of the well-established principles laid down by the Supreme Court in *Campus Oil v. Minister for Industry and Commerce and Others (No. 2)* [1984] ILRM 45. There can scarcely be any doubt that the plaintiff has established that there is a fair issue to be tried. As to damages, the plaintiff, who is a well-established chartered accountant in the firm of PriceWaterhouseCoopers, has offered an undertaking as to damages. According to the defendants, the Property is occupied by the second named defendant and used as a gymnasium. No more is said by the defendants in this regard save as to assert that the second named defendant has acquired a business equity in the property under the terms of the Landlord and Tenant Act, 1980. No evidence of any kind was furnished to the Court to support such a proposition. Neither of the defendants suggests that the undertaking of the plaintiff as to damages offered by the plaintiff is inadequate to meet any losses that may be sustained by the second named defendant, or that the plaintiff would not have the means to comply with such an undertaking. Nor have the defendants offered any undertaking of their own to the plaintiff in respect of any damages that he may suffer by reason of delay in recovering possession of the property, if it is established that he is entitled to do so. Moreover, the plaintiff has averred that as of the date of his grounding affidavit (21st of November, 2016) the defendants are indebted to Gulland in the sum of €2,671,165.82.

21. As to the balance of convenience, the plaintiff submits that the inability of the defendants to meet an award as to damages, coupled with the fact that the plaintiff is unable to collect rents from the Property for as long as he is not in possession of the same, demonstrates that the balance of convenience lies in favour of granting the relief sought. To that may be added the point that the plaintiff remains inhibited from marketing for sale all of the units within the development at the Diamond as one lot for as long as the defendants remain in possession of the Property.

22. I am satisfied that the plaintiff's undertaking as to damages constitutes sufficient protection to the defendants in the event that they should succeed following a full trial of the proceedings. I am also satisfied that the balance of convenience strongly favours the granting of the reliefs sought; indeed the defendants have not even put forward an argument as to why the balance of convenience lies in their favour.

23. For all of these reasons, therefore, I am of the opinion that the plaintiff is entitled to succeed with his application and that an injunction should be granted in the terms of the notice of motion herein.