

THE HIGH COURT

[2013 No. 7806 P]

BETWEEN

LIAM DOWDALL AND SEAN MCNAMARA

PLAINTIFFS

AND

PAT O'CONNOR AND JOAN O'CONNOR

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 11th day of September, 2013

1. In May 2006, the defendants, a married couple, purchased 9, Dalkey Avenue, Dalkey, County Dublin. In order to finance its purchase and development, Ulster Bank Ireland Ltd. provided a loan facility whereby the Bank made available a total of €2,680,000. Facility A of the loan was in the amount of €2,055,000 for the purpose of purchasing a site at 9, Dalkey Avenue for €1.3m and building two three-bedroomed houses on it at a cost of €600,000 each, to provide for the refinancing of a site deposit and to allow for interest rollup for one year. A moratorium on capital repayments was agreed and applied for two years. The second loan, Facility B, was for €625,000, the purpose of which was to clear an existing mortgage on a property in Monkstown, Dublin.

2. The terms of the loan facility were signed on behalf of the Bank by two of its managers and each of the defendants signed an acceptance of the offer and the terms upon which it was made on 17th July, 2006.

3. An additional loan facility was provided to the defendants by the Bank on 12th February, 2007, for €300,000 which was made available for the purpose of developing a site at Craughwell, County Galway.

4. By mortgage made on 19th May, 2006, between the defendants and the Bank, both of the loan facilities originally entered into were secured by way of a continuing security to the Bank for the discharge on demand of all present and/or future indebtedness of the defendants to the Bank. A further mortgage dated 19th April, 2007 over the Craughwell property provided added security.

5. The defendants constructed two separate dwellings on the site at 9, Dalkey Avenue known as 'The Laurels' and 'Pinehaven'. Mrs. O'Connor, the second named defendant, resides at 'Pinehaven' and Mr. O'Connor resides at Craughwell. 'The Laurels' was, for a time, leased to tenants (Mr. and Mrs. Glavin) by the defendants and that premises was not at any stage a family home of either of the defendants within the meaning of the provisions of the Family Home Protection Act 1976.

6. By letter dated 8th November, 2012, the Bank demanded payment of the total sum then due by the defendants on foot of the loan facilities which was claimed to be €2,075,221.27 due to accumulated arrears in respect of the first and second loan facilities since April 2010.

7. The plaintiffs claim that by Deed of Appointment dated 29th November, 2012, they were appointed as joint receivers by the Bank over 'The Laurels', 9, Dalkey Avenue, County Dublin. The court was informed that though receivers had been appointed over the Craughwell property, no order is currently being sought in respect of that property nor is any relief sought in respect of the adjacent property 'Pinehaven'.

8. By letter dated 29th November, 2012, the plaintiffs wrote to the defendants notifying them of their appointment as receivers in respect of 'The Laurels' enclosing a copy of the Deed of Appointment and seeking certain information to assist them in the receivership. The correspondence was directed to 'Pinehaven'. A further letter was sent on 21st December, 2012, seeking a reply to the earlier letter: none was forthcoming.

9. In an affidavit of 25th July, 2013, Mr. Liam Dowdall claims that the defendants, and in particular Mrs. Joan O'Connor, have failed to cooperate with the receivers and have actively sought to obstruct the receivership by taking physical possession of 'The Laurels' and intimidating the tenants. By letter dated 22nd July, 2013, the plaintiffs wrote to the second named defendant calling on her to vacate the premises immediately: she did not do so. A plenary summons issued on 26th July, 2013, seeking possession of the premises and other injunctive relief in respect of the defendants, their servants or agents. A notice of motion issued on 26th July, 2013, claiming the following interlocutory reliefs:

"1. An order restraining the defendants, their servants and agents and all persons acting in concert with them from interfering with and/or attempting to frustrate the activities of the plaintiffs as Joint Receivers over the premises known as 'The Laurels', 9 Dalkey Avenue, Dalkey, County Dublin (the Premises) pending further order of this honourable court or the determination of these proceedings;

2. an order restraining the defendants, their servants and agents and all persons acting in concert with them from entering onto or otherwise interfering with the Premises without the express consent of the plaintiff, pending further order of this honourable court or the determination of these proceedings;

3. an order restraining the defendants, their servants and agents and all persons acting in concert with them from harassing or intimidating any occupant of the Premises, pending further order of this honourable court or the determination of these proceedings;

4. an order for possession of the Premises, pending further order of this honourable court or the determination of these proceedings . . ."

10. The nature of the alleged interference by the defendants, and in particular, Mrs. O'Connor, with the receivers in the execution of

their duty relates, in part, to their behaviour towards the tenants of 'The Laurels' who occupied the premises at the time of the appointment of the receivers. The tenants, Mr. Patrick Glavin and Mrs. Phyllis Glavin, were notified of the receivers' intention to terminate their tenancy with twelve months' notice on 27th May, 2014 by notice of termination dated 20th May, 2013. The Glavins, for their part, cooperated fully with the receivers both in respect of the timely payment of rent and in accepting the termination of their tenancy. Although the notice of termination of the tenancy would not have expired until May 2014, the receivers were informed by Mr. and Mrs. Glavin on 17th June, 2013, that they had found alternative accommodation and intended to vacate the premises on 20th July, 2013.

11. In his affidavit, Mr. Dowdall states that Mr. Patrick Glavin, on 17th July, 2013, informed the receivers' office that the second named defendant, Mrs. O'Connor, had requested that the keys to the premises be returned to her upon their departure. The receivers then engaged K-Tech Security Ltd. to monitor the premises. The Glavins cooperated with the receivers and agreed to allow K-Tech Security access to the premises on 19th July, 2013, to install a security camera. It is alleged that K-Tech Security were prevented from carrying out this task by Mrs. O'Connor and her associates who took control of the premises. A report compiled by K-Tech Security describing the events of 19th July, 2013, at 'The Laurels' was exhibited in Mr. Dowdall's affidavit. The report indicates that a chain was placed across the driveway of the premises on the instructions of Mrs. O'Connor who shouted at the staff of K-Tech Security Ltd. When Mr. Patrick Glavin arrived at the premises with the keys, he entered 'The Laurels' in order to remove a number of items. He was not prevented from doing so, but when leaving the premises, it is alleged that he was pushed away from the door by Mrs. O'Connor who prevented him locking the front door whereupon Mrs. O'Connor entered the premises. Another man arrived at the premises and shouted at the two security men that they were blocking the footpath and to move on. The gardaí were contacted but did not engage any further in the matter. The Glavins later contacted the receivers indicating what they believed to be the items of property belonging to them which remained in 'The Laurels'. They described the whole experience as "horrendous and frightening for both of us".

12. By letter dated 22nd July, 2013, delivered by hand and sent by email, the receivers complained that "you and other persons who would appear to be coordinated under your charge forced the exclusion of the lawful tenants, Mr. Patrick and Mrs. Phyllis Glavin - from the property. At the time of taking this illegal and unilateral action, I am satisfied that you were aware that the tenants were *in situ* since the date of our appointment and that the lease terms were adopted during the receivership". It was alleged in the letter that Mrs. O'Connor had refused to allow the lawful tenants to access and occupy the property, as was their right; refused to allow the tenants to remove their personal belongings from the property and threw or allowed clothes belonging to the tenants to be thrown into the street outside the property and was assisted in her actions by a number of unknown individuals who behaved in what was described as a "threatening manner towards the tenants" (who are an elderly couple) and to agents engaged on behalf of the joint receivers. It was also alleged in this letter that Mrs. O'Connor personally threatened or allowed the tenants to be personally threatened, putting them in fear for their personal safety and that she changed or allowed locks to be changed on the premises and caused cars and other obstructions to block the entrance to the property. She was informed that the tenants had described their experience as "horrendous and frightening".

13. On 20th July, 2013, it was noted by K-Tech Security Ltd. and a member of the receivers' staff that the locks on the premises had been changed overnight, that cars were blocking the entrance and that a metal chain blocked pedestrians.

14. In a separate letter of 22nd July, 2013, to Mr. Pat O'Connor at Craughwell, County Galway, the receivers furnished him with a copy of the letters sent to Mrs. O'Connor. The letter indicated that the receivers were unaware as to whether Mr. O'Connor was aware or condoned or was a party to the actions and events that had taken place at the property and asked for an indication of what his position was on these matters.

15. It is noteworthy that in her replying affidavit of 26th August, 2013, Mrs. O'Connor replied to these allegations in very short form by simply stating that she disputed the claims of Mr. Liam Dowdall "as set out from paragraphs 1 to 25 (in his affidavit) as . . . he is incorrectly appointed, and as such, is a trespasser in law". The court is fully aware that Mrs. O'Connor is not legally advised or represented in the course of these proceedings but the court also notes that her replying affidavit, while dealing in some considerable detail with the formalities of the procedures adopted by Ulster Bank Ireland Ltd. in the appointment of the receivers, failed to engage with the facts of the case in any detail. Though some reference was made in submissions to the court to disagreements she had with some details of the reports exhibited in Mr. Dowdall's affidavit, it was made clear to the court that the main point of opposition to this application was a contention that the receivers were not lawfully appointed and therefore had no lawful authority to take any actions in relation to 'The Laurels'.

16. It should be noted that Mrs. O'Connor was assisted during the course of the proceedings by a 'McKenzie' friend and that an affidavit was also submitted on behalf of Mr. Pat O'Connor in almost identical terms to that of Mrs. O'Connor.

17. The first point made by Mrs. O'Connor was that the demand letter issued to both of the defendants dated 8th November, 2012, was not served upon the defendants at their home address as required by the provisions of the loan facility agreement. She claimed that, consequently, the loan facilities had not been properly "called in" and that the appointment of the receivers was premature. The court is satisfied that the letter was sent to both defendants at 'Meridien', Hainault Road, Foxrock, County Dublin. Paragraph 11.36 of the loan facility provides that:

"Any notice, request or demand (a 'communication') arising under this agreement . . . or any other related document or agreement may be delivered as follows:

(a) by hand or by ordinary prepaid post to the borrower . . . at their respective addresses set out in the Facility letter or to such other address as may be notified by the Borrower or the Bank to the other . . .

Any communication from the Bank to the Borrower will be deemed to have been validly given or made:

(i) when delivered by hand or

(ii) 24 hours after despatch by ordinary prepaid post or

(iii) at the time of despatch by fax . . ."

18. The court is satisfied that the letter of 8th November, 2012, was sent to the address set out in the facility letter as required by paragraph 11.36. No evidence has been offered to suggest that an alternative address for communication was notified to the Bank by the defendants for this purpose. An affidavit of Mr. Ted Mahon of Ulster Bank Ireland Ltd. states that on 14th November, 2012, he received a telephone call from Mrs. O'Connor in which she acknowledged receipt of the letter of demand and arranged a meeting with

the Bank for Tuesday 20th November, 2012. At the meeting on 20th November, from which Mr. Pat O'Connor was absent through illness, Mrs. O'Connor explained how she and her husband had been obliged to move out of their dwelling at 'Meridien', Foxrock, and move to her nephew's house in Tallaght. From there, they moved to 'Pinehaven', Dalkey, where she has lived since. The court is satisfied that there is no evidence to suggest that an alternative address had been notified to the Bank for correspondence other than that of 'Meridien'. I am satisfied that the Bank fully complied with its obligations under paragraph 11.36, and further, that Mr. and Mrs. O'Connor were fully aware of the letter of demand delivered to that address as appears from the contact which was made with the Bank shortly thereafter.

19. The defendants submit that the Bank has acted ultra vires the Articles of Association of Ulster Bank Ireland Ltd. in purporting to appoint receivers pursuant to a Deed which has not been sealed in accordance with Article 31 of the Articles of Association. Article 31 provides:

"The Seal shall be used only by the authority of the Directors or of a Sealing Committee authorised by the Directors on that behalf and every Instrument to which the Seal shall be affixed shall be signed by any two Directors or Director and Secretary or any two members of such Sealing Committee or any two members from a combination of the foregoing . . ."

The defendants claim that it is clear that no seal was attached to the Deed and that the requisite two signatories are absent contrary to Article 31. They rely upon s. 64(2)(b)(ii) of the Land and Conveyancing Law Reform Act 2009, which provides that an instrument executed after the commencement of s. 64:

"is a Deed if it is -

(b) executed in the following manner:

(ii) if made by a company registered in the State, it is executed under the seal of the company in accordance with its Articles of Association . . ."

20. Reliance is also placed on the judgment of Morris J. in *Safeera Ltd v. Fintan Wallace and Hugh O'Regan* (Unreported, High Court, 12th July 1994), in which it was held that an indenture purportedly issued on behalf of a company in order to effect conveyance of the company's interest in property was not executed in accordance with the Articles of Association and was therefore not effective.

21. The plaintiffs contend that this argument is misconceived in that the Deed of Appointment of the receivers on 29th November, 2012, was signed and delivered by Sean Cotter under a power of attorney on behalf of Ulster Bank Ireland Ltd. witnessed by Mr. Ted Mahon, a Bank official on the same date. Mr. Cotter was conferred with a power of attorney made on 25th June, 2012, by Ulster Bank Ireland Ltd. That Deed bears the company seal and two signatories. The terms of the power of attorney vested in Mr. Cotter the power to sign or otherwise execute Deeds relating to "rights and remedies under security documents and/or a facility letter of loan agreement . . ."

22. The appointment of the plaintiffs as receivers in this case was made by Mr. Cotter acting under a power of attorney vested in him by Ulster Bank Ireland Ltd. Therefore, it was submitted the Deed of Appointment was not made by the company but by an individual acting under a power of attorney. It was submitted by the plaintiffs that the appointments were duly made by Deed executed by Mr. Cotter acting as an individual in the presence of a witness (Mr. Mahon) who attested his signature and consequently, the Deed of Appointment was lawful in accordance with the provisions of s. 64(2)(b)(i)(I) which states that an instrument executed after the commencement of s. 64 is a Deed if it is:

"(b) executed in the following manner:-

(i) if made by an individual:-

(I) it is signed by the individual in the presence of a witness who attests the signature..."

Further, s. 64(3) of the Act provided that "any Deed executed under this section has effect as if it were a document executed under seal". I am satisfied that the decision in the *Safeera Ltd.* case does not apply to these circumstances.

23. I am satisfied, for the reasons submitted by counsel for the plaintiffs that their appointment as receivers was duly made under the Deed of Appointment of 29th November, 2012. In that regard, s. 17(1) of the Powers of Attorney Act 1996, provides that:

"(i) The donee of a power of attorney may-

(a) execute any Instrument with his or her own signature and, where sealing is required, with his or her own seal and

(b) do any other thing in his or her own name

by the authority of the donor of the power; and any Instrument executed or thing done in that manner shall be as effective as if executed or done by the donee with a signature or seal or, as the case may be, in the name of the donor of the power."

I am satisfied that the plaintiffs have established a strong case that they were lawfully appointed as receivers of the property in issue in this case pursuant to this Deed of Appointment.

24. The defendants also submit that because s. 19 of the Conveyancing and Law of Property Act 1881 was repealed by s. 8 of the Land and Conveyancing Law Reform Act 2009, the provision of the mortgage which enabled the Bank to appoint a receiver under s. 19 of the 1881 Act no longer has the force of law, and that consequently, no power existed under s. 19(1)(iii) to appoint a receiver and that any terms of the mortgage agreement concerning the appointment of a receiver were null and void. Apart from the statutory powers conferred by sections 15 to 24 of the 1881 Act, there are a number of references to statutory powers (including the appointment of a receiver) in the mortgage agreement. Clause 8 provides that though sections 17 and 20 of the Conveyancing Act 1881 do not apply to the mortgage, the statutory power of sale and "other powers" shall be exercisable at any time after demand. I am satisfied that the power to appoint a receiver under s. 19(1)(iii) is one of the powers contemplated by "other powers" in clause 8. Clauses 11 and 12 also make specific reference to the appointment of a receiver.

25. I am satisfied that having regard to the provisions of the Conveyancing Act 1881 and the mortgage conditions agreed and acknowledged between the parties that rights, remedies and powers were given to the Bank by reference to the provisions of the Conveyancing and Law of Property Act 1881 at a time when the Act was of full force and effect. The proper construction of the mortgage and the rights and remedies and powers created by its terms requires that the relevant provisions of the Act of 1881, including s. 9(1)(iii), must be read into the mortgage agreement and conditions where this is appropriate and where, as a matter of proper construction, the court can be satisfied that they have been incorporated as part of the terms of the agreement. As a matter of law, the fact that sections 15 to 24 of the 1881 Act have been repealed does not have an effect on the proper interpretation of the contract. In *Kavanagh and Lowe v. Lynch and St. Angela's Student Residences Ltd.* [2011] IEHC 348, Laffoy J., in considering the same argument, in similar circumstances, involving the appointment of receivers to property which had been mortgaged in accordance with an agreement which specifically referred to the application of the provisions of the 1881 Act to the contract, held that:

"The fact that since the commencement of the Act of 2009, on 1st December, 2009, sections 15 to 24 of the Act of 1881 had been repealed cannot vary the proper construction of the 2007 mortgage or impact on the contractual relationship of the mortgagors and Permanent, as mortgagee, thereby created. The rights, remedies and powers conferred on Permanent *ab initio* in the 2007 mortgage still apply (par. 3.5)."

I am satisfied that the provisions of s. 9(1)(iii), on the proper construction of the mortgage agreement, apply to the agreement made between the defendants and the bank notwithstanding the repeal of that section after the making of the mortgage agreement.

26. The defendants also submit that the mortgage said to have been made on 19th May, 2006, was not signed or sealed on behalf of the Bank but has only been signed by each of the defendants whose signature is witnessed. Section 2 of the Statute of Frauds (Ireland) 1695 requires that a memorandum or note in writing required under the section must be signed but it does not require the signature of both parties. The court is satisfied that a signature is required only by "the party to be charged therewith". In this instance, it is only required to be signed by each of the defendants.

Injunctive Relief

27. The test to be applied to the granting of an interlocutory injunction is that laid down in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88.

28. I am satisfied that the defendants have entered into an agreement for loan facilities and a mortgage in respect of 'The Laurels' which included provision for the appointment of a receiver if the defendants failed to comply with the demand made for the monies advanced. A lawful demand was made: the defendants did not comply with it. The receiver was appointed. The essence of the plaintiffs' case is that the defendants have attempted to and obstructed the receiver and their agents from entering and taking possession of 'The Laurels' and carrying out their lawful duties as receivers.

29. The first element of the *Campus Oil* test is whether the plaintiffs' have established a fair issue to be tried that they, as receivers, duly appointed have established an entitlement to enter upon and take possession of the lands and to the receipt of the rents and profits of 'The Laurels' pending the determination of the substantive proceedings. I am completely satisfied that they have done so.

30. The second element to be considered is whether damages would be an adequate remedy for the plaintiffs if, ultimately, they were to establish their entitlement to the injunctions claimed at the full hearing of the action but had been refused an interlocutory injunction. I have no doubt that if the defendants are allowed to continue to occupy the premises, the receivers would continue to be at a loss of any potential rental income from the premises and the bank would incur further loss to add to that accumulated already in respect of arrears and interest to date and in circumstances where it has been demonstrated that the defendants are unable to discharge their liability. I am satisfied that any further loss will not be recuperable from the defendants by the plaintiffs. Indeed any action taken by the receivers will likely reduce the ongoing losses to the bank and also reduce the growing debt of the defendants. On the other hand, the defendants have the benefit of an undertaking as to damages for any loss that they may sustain pending the hearing of the substantive case, if it is shown at that stage that an injunction should not have issued. In addition, the receivers have adduced significant evidence that they have been lawfully appointed and have legal rights and duties as receivers which should not be the subject of continuing interference and obstruction. I am, therefore, satisfied that damages would not be an adequate remedy for the plaintiffs in this case.

31. The third element of the test concerns the balance of convenience and whether it lies in favour of granting the interlocutory injunctions sought. It is clear that payment has not been made in respect of the demand made and, as already stated, the defendants' liability to the bank continues to grow. It is clear from the evidence adduced that neither of the defendants are willing or able to discharge the liability.

32. The behaviour of the defendants and in particular Mrs. O'Connor is calculated to undermine the proper execution by the receivers of their duties and if there is a continuing occupation of 'The Laurels' or interference with the receivers or any tenants who might be introduced by them to the premises, the receivers will not be able to secure the premises or rents from their use. I am satisfied that the balance of convenience favours the granting of the relief sought.

Decision

33. I am, therefore, satisfied that the relevant tests in *Campus Oil* have been met by the plaintiffs and that an interlocutory injunction should be granted to the plaintiffs in terms of paras. 1, 2 and 3 of the notice of motion.