

THE HIGH COURT

[2012 No. 5281P]

BETWEEN

JOHN O'MAHONY

PLAINTIFF

AND

KEITH LOWE AND DOUGLAS NEWMAN GOOD LIMITED

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 25th day of July, 2013.

The application and its procedural context

1. The plaintiff is a litigant in person.

2. On 17th July, 2013 the plaintiff made an application to the High Court (Laffoy J.) *ex parte* seeking the reliefs which he now seeks on notice to the defendants. The Court refused to deal with the matter *ex parte*, but gave the plaintiff leave to issue a notice of motion returnable on 23rd July, 2013.

3. The reliefs which the plaintiff seeks in the notice of motion which he issued on 17th July, 2013 pursuant to the foregoing leave are as follows:

(a) an order that the first defendant repair, renew and reinstate the property known as Abbey Street, Cahir, County Tipperary; and

(b) an order that the first defendant's appointment as receiver over the property known as Abbey Street, Cahir, County Tipperary be extinguished and deemed void, resulting from the defendants' negligent dereliction of his duties as receiver.

4. These proceedings were initiated by a plenary summons which issued on 28th May, 2012. In the general endorsement of claim the plaintiff's claim is outlined as follows:

"The plaintiff's claim is that the defendant's appointment as Receiver by Irish Life & Permanent Plc over properties in the ownership of the Plaintiff is both invalid and defective and require the Court to remove the receiver."

5. No statement of claim has been delivered in the proceedings. However, the plaintiff had brought a number of applications to the Court before bringing the application to which this judgment relates. First, he applied *ex parte* to the Court on 3rd July, 2012 for certain reliefs grounded on an affidavit filed by him on 29th June, 2012. That affidavit would appear to have been an affidavit sworn on 27th June, 2012 which was headed "Grounding Affidavit & Statement of Claim". By order of the Court (Murphy J.) made on 3rd July, 2012, the Court refused to grant the orders sought on the *ex parte* application. The second application was, apparently, on foot of a notice of motion dated 26th July, 2012 in which various orders were sought, the first of which was that various deeds of appointments in respect of the appointment of the first defendant as receiver over properties in the ownership of the plaintiff be declared invalid. By order of the Court (Murphy J.) made on 22nd October, 2012, the Court refused to grant the orders as sought and awarded costs to the defendants against the plaintiff.

The evidence on this application

6. On this application the evidence before the Court comprises:

(a) an affidavit of the plaintiff sworn on 9th July, 2013; and

(b) an affidavit of the first defendant sworn on 22nd July, 2013.

When the matter came on for hearing on 23rd July, 2013, the plaintiff did not seek an adjournment with a view to filing a further affidavit in reply to the affidavit of the first defendant.

7. In his affidavit, the plaintiff has exhibited four deeds whereby the first defendant was appointed receiver by Irish Life & Permanent Plc (the Bank). Only one of those deeds relates to the property at Abbey Street, Cahir, County Tipperary (the Mortgaged Property) referred to in the notice of motion. That deed was a deed of appointment made on 12th April, 2011 between the Bank and the first defendant (the Deed of Appointment). In the Deed of Appointment the first defendant is described as "Keith Lowe, Douglas Newman Good, 30, Leeson Park, Ranelagh, Dublin, 6". I mention that because in his replying affidavit the first defendant has asserted that the joinder of the second defendant in these proceedings is misconceived because, while he does work for Douglas Newman Good, his appointment as receiver by the Bank was in his personal capacity. It was recited in the Deed of Appointment that by a mortgage dated 1st October, 2008 made between the plaintiff and William O'Brien of the one part and the Bank of the other part (the Mortgage), *inter alia*, the Mortgaged Property, which was described at paragraph 2 in the second schedule to the Deed of Appointment, was mortgaged in favour of the Bank. On the hearing of this application the plaintiff stated that Mr. O'Brien, who is a co-owner of the Mortgaged Property, but who is not a party to these proceedings, is not resident in Ireland. In the operative part of the Deed of Appointment, the Bank, in exercise of the statutory powers incorporated in the Mortgage and the powers in the Mortgage, appointed the first defendant "to be the receiver of the income, rents and profits of the [Mortgaged Property]". Further, it was provided that the first defendant as receiver should be deemed in all respects to be the agent of Mr. O'Brien and the plaintiff under s. 24(2) of the Conveyancing Act 1881 (the Act of 1881) and that –

"... the Bank shall in no circumstances be liable or answerable for any acts or defaults of or any loss, misapplication or misappropriation of the rents and profits of the [Mortgaged Property] ... by the Receiver ..."

8. The plaintiff averred in his affidavit that South Tipperary County Council on 1st July, 2013 had notified David O'Sullivan, a Consulting Engineer, that the Mortgaged Property "was in a state of dereliction and was a source of danger to the public". The plaintiff further averred that Mr. O'Sullivan had inspected the property and prepared a report and he exhibited Mr. O'Sullivan's report. That report was dated 11th July, 2013 and it named the plaintiff as the client of Mr. O'Sullivan. It was headed:

"Visual inspection of premises at Lower Abbey Street, Cahir, County Tipperary."

In outlining his brief in the report, Mr. O'Sullivan stated that the plaintiff "is concerned with the deteriorating condition of the property as a result of break-ins and vandalism". Mr. O'Sullivan qualified his report as follows:

"The extent of the visual inspection and report is confined to an assessment of the damage to the property as a result of unauthorised entry to the property."

Mr. O'Sullivan stated that it appeared that the Mortgaged Property had been broken into on a number of occasions and had been used over a prolonged period of time for "unsocial activity involving the consumption of alcohol, that it is not secure and can be accessed by means of scaling a low street side boundary wall and that there is extensive damage and vandalism throughout", which he itemised. Mr. O'Sullivan's conclusion was that, given the extent of the damage, vandalism and squalor in the Mortgaged Property, it needs to be entirely refurbished in order for it to be habitable. Mr. O'Sullivan concluded with certain general remarks including that his "inspection should not be construed as an assessment of the structure of the building" and that it focused entirely on the damage to and vandalism of the property. Mr. O'Sullivan attached some photographs to the report which are helpful in identifying the damage to the property. Significantly, Mr. O'Sullivan made no reference to having been notified by South Tipperary County Council that the Mortgaged Property is a source of danger to the public.

9. The only other real averment of fact in the plaintiff's affidavit is a statement that the Mortgaged Property "was leased to *bona fide* tenants at the date of the receivership". The plaintiff has averred that the defendants had a duty of care to safeguard the property and that they failed in that duty and through a dereliction of their duties caused the property to be vandalised, damaged and become a source of danger to the public. The plaintiff has also asserted that the defendants have caused the property to become unlettable and/or unsaleable and that they have deprived him of rental income of the property, which was ultimately to be applied to his bank loans. There is an assertion at the end of the affidavit that "the continued appointment of the defendants as receiver" over the Mortgaged Property and other properties in his ownership is inequitable. It must be emphasised that the relief sought in the notice of motion relates only to the Mortgaged Property and, accordingly, only the allegations in relation to the Mortgaged Property are addressed in this judgment.

10. In his replying affidavit, the first defendant has emphasised that he was appointed a receiver of the "income, rent and profits" of the Mortgaged Property, in other words, "what is commonly known as a rent Receiver". He also stated that it was never intended that he would "actually take possession" of the Mortgaged Property and, thus, the rights of Mr. O'Brien and the plaintiff to repair and reinstate the Mortgaged Property remained.

11. The first defendant also averred that it was "rapidly determined", which I assume means shortly after his appointment, that the Mortgaged Property was uninhabitable, required extensive expenditure to render it suitable for a tenant to occupy it, and had no rent roll. Accordingly, there is a conflict of fact on the affidavits as to whether the property was let, as the plaintiff contends, when the receiver was appointed. The receiver has exhibited in his affidavit a letter dated 2nd April, 2012 from him to the Bank, which related to both the Mortgaged Property and another property owned by Mr. O'Brien and the plaintiff of which he was receiver located in Clonmel, County Tipperary, in which he stated:

"Due to the difficulties associated with these properties it has no longer become feasible for us to manage the properties going forward.

In view of this we confirm that we are resigning as Receiver."

It was not suggested that the plaintiff was informed of the resignation of the first defendant, which took place just short of a year after his appointment as receiver.

12. The first defendant agrees that the Mortgaged Property is in a state of dereliction, but states his belief that that was the case prior to his appointment. He has exhibited a copy of the Mortgage, which incorporates the Bank's Mortgage Conditions 2002 and he has specifically referred to the conditions in the Mortgage Conditions 2002 under which the mortgagors (Mr. O'Brien and the plaintiff) covenanted that, so long as the Mortgage was outstanding, they would keep the Mortgage Property in good and substantial repair. The first defendant has averred that the plaintiff is free to carry out whatever repairs he wishes, subject to his obligations under the Mortgage, and that he is free to submit a proposed schedule of works to the Bank.

13. In summary proceedings in this Court between the Bank, as plaintiff, and the plaintiff in these proceedings, as defendant (Record No. 2010 No. 5634S), by order of the Court (Ryan J.) dated 30th July, 2012 the Bank obtained judgment against the defendant in the sum of €927,463.08 and costs. This Court was informed that the order of Ryan J. is under appeal to the Supreme Court and that recently the Supreme Court gave the plaintiff three weeks within which to serve an amended notice of appeal.

The nature of the reliefs claimed by the plaintiff

14. Although not expressed in appropriate terms, the reliefs sought by the plaintiff can only be regarded as interlocutory reliefs, that is to say, reliefs which would be in place pending the determination of the substantive proceedings after the exchange of pleadings, the setting down of the action for hearing and a hearing based on oral evidence. In essence, what the plaintiff is seeking in pursuing the relief referred to at (a) in paragraph 3 above is an interlocutory mandatory injunction directing the first defendant to refurbish the Mortgaged Property pending the trial of the action. I will outline the criteria which the Court has to apply in determining whether such an order should be made on an interlocutory basis and their application to the facts of this case later. As regards the second relief sought by the plaintiff, as outlined at (b) in paragraph 3 above, the order sought, which would bring finality to the plaintiff's claim in relation to the validity of the appointment of the first defendant as receiver over the Mortgaged Property, is not an issue which it would be appropriate for the Court to consider on an interlocutory application. Therefore, I do not propose to consider that element of the plaintiff's application further. That decision is not informed in any way by the contention of the first defendant that he resigned the receivership and that he did so because there was no rent roll out of the derelict Mortgaged Property.

Relevant criteria for the grant of an interlocutory mandatory injunction and their application

15. In support of his contention that the plaintiff has not established any triable issue or, alternatively, a sufficiently strong case to support his claim for mandatory injunctive relief, counsel for the Bank relied on the following passage from the judgment of Megarry J.

"In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

The approach of the courts in this jurisdiction to that proposition was analysed by the Supreme Court in *Okunade v. Minister for Justice* [2013] 1 ILRM 1 in the judgment of Clarke J. Clarke J. stated (at p. 25) that, where the substance of the order sought involves something which, in substance, is a mandatory order, the courts in this jurisdiction have required the plaintiff to establish not just a fair or arguable case but rather the higher standard noted by the Supreme Court in *Maha Lingham v. Health Service Executive* [2006] 17 ELR 137. That standard necessitates the applicant showing at least "that he has a strong case that he is likely to succeed at the hearing of the action" (*per* Fennelly J. at p. 140). As to the manner in which the Court should approach the determination as to whether the higher standard has been met, Clarke J. stated as follows in the *Okunade* case (at p. 26):

"However, even in those cases where a higher threshold may need to be met that requirement does not involve the court in a detailed analysis of the facts or complex questions of law. Rather it obliges the plaintiff to put forward, in a straightforward way, a case which meets the higher threshold."

16. I am not satisfied that the plaintiff has put forward a case on the basis of which this Court could conclude that he has a strong case that he is likely to succeed at the hearing of the action in seeking an order compelling the first defendant to refurbish the Mortgaged Property. Having regard to the provisions of the Mortgage under which the first defendant was appointed as receiver and the terms of the Deed of Appointment under which he was appointed, the first defendant, as receiver, is a receiver of the income of the Mortgaged Property by the combined operation of s. 19(1)(iii) and s. 24 of the Act of 1881. By virtue of s. 24(2), which is referred to in the Deed of Appointment, he is deemed to be the agent of Mr. O'Brien and the plaintiff. That, of course, does not mean that the plaintiff, as receiver, does not owe a duty of care to Mr. O'Brien and, indeed, the plaintiff has articulated in his affidavit that he is owed such a duty of care. Whether the first defendant does or does not owe Mr. O'Brien and the plaintiff a duty of care and, if he does, the extent of the duty of care is not something the Court should express a view on, as the point was not adequately argued on the application. For present purposes, it is sufficient to note that there is no evidence that the first defendant was entitled to, or did, take physical possession of the Mortgaged Property. There is a factual dispute as to whether the Mortgaged Property was tenanted when the receivership commenced. Further, it is the first defendant's case that he resigned as a receiver more than fifteen months before this application was initiated, although there is likely to be a factual dispute in relation to that. For all of the foregoing reasons, I am not satisfied that the plaintiff has reached what Clarke J. referred to as the "higher threshold". However, lest he has, I propose considering the other criteria.

17. The next criterion is the adequacy of damages as a remedy for the plaintiff. This criterion was explained as follows in the following passage from the judgment of McCracken J. in *B & S Ltd. v. Irish Auto Trader Ltd.* [1995] 2 I.R. 142, which is quoted by Clarke J. in his judgment in the *Okunade* case (at p. 23), as follows:

"First, the court must consider whether, if it does not grant an injunction at the interlocutory stage, a plaintiff who succeeds at the trial of the substantive action will be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action. If the plaintiff would be adequately compensated by damages the interlocutory injunction should be refused subject to the proviso that it appears likely that the relevant defendant would be able to discharge any damages likely to arise."

In this case, as outlined at paragraph 9 above, the loss and damage which the plaintiff contends he is incurring by reason of the condition of the Mortgaged Property is that it has become unlettable and unsaleable and that he has been deprived of the rental income of the property. In my view, even if the plaintiff were to succeed at the trial of the substantive action, he would be adequately compensated by an award of damages for the loss suffered between the hearing of the interlocutory injunction and the trial of the action. No question can arise as to the ability of the first defendant, who obviously has the backing of the Bank, which he has averred "is a mark for any award of damages", to meet any damages eventually awarded to the plaintiff.

18. There is another aspect to the adequacy of damages criterion which was explained as follows by McCracken J. in the *B. & S. Ltd.* case:

". . . the court must consider whether, if it does grant an injunction at the interlocutory stage, a plaintiff's undertaking as to damages will adequately compensate the defendant, should the latter be successful at the trial of the action, in respect of any loss suffered by him due to the injunction being enforced pending the trial. If the defendant would be adequately compensated by damages then the injunction will normally be granted. The last matter is also subject to the proviso that the plaintiff would be in a position to meet the undertaking as to damages in the event that it is called on."

In this case, at the hearing of the application, counsel for the first defendant pointed to the fact that the plaintiff had not proffered any undertaking as to damages and that remains the position. In any event, the first defendant has averred that he does not believe that the Court could have confidence that the plaintiff is a mark for any undertaking as to damages he might offer, given the existence of the judgment referred to at paragraph 13 above. Although that judgment is under appeal to the Supreme Court, nonetheless, even if the plaintiff gave the Court an undertaking as to damages, it would be difficult to conclude that the plaintiff would be in a position to meet it, if it was called on.

19. While, strictly speaking, it is not necessary to address this criterion, I am of the view that the balance of convenience favours the refusal, rather than the grant, of the interlocutory injunctive relief sought by the plaintiff.

20. In summary, therefore, I have come to the conclusion that the plaintiff has not met any of the criteria necessary for the granting of an interlocutory injunction in the terms sought.

Order

21. There will be an order dismissing the plaintiff's application.