Neutral Citation: [2017] IEHC 155

THE HIGH COURT

[2015 No. 129 P]

BETWEEN

PATRICK J. WOODS

PLAINTIFF

AND

ULSTER BANK IRELAND LIMITED, JAMES MEAGHER AND ADRIAN TRUEICK

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 21st day of February, 2017.

1. The plaintiff has instituted these proceedings seeking various reliefs, and the defendants have sought by motion to strike out the claims on the grounds that they are bound to fail. This judgment is given in regard to the legal bases of the claims.

2. The relevant facts are as follows.

3. By charge made on 3rd March, 2006 the plaintiff charged his interest in certain registered lands at Unit 3, Milltown Business Park, Milltown, Monaghan, Co. Monaghan ("the Milltown Unit") to Ulster Bank Ireland Limited ("the Bank"). The charge was registered on folio 1052L, Co. Monaghan on 31st May, 2013 and the first defendant is the registered owner of the charge.

4. By deed of appointment made on 26th March, 2013 the Bank appointed the second and third defendants joint receivers over the Milltown Unit.

5. By deed of mortgage made on 7th February, 2007 the plaintiff demised to the Bank by way of security the hereditaments and premises described in the schedule thereto, situate and known as 1 Old Cross Square, Monaghan, Co. Monaghan, ("Old Cross") held by the plaintiff in fee simple.

6. By deed of appointment made on 22nd November, 2013 the Bank in pursuance of the power contained in that mortgage appointed the second and third defendants as joint receivers over Old Cross.

7. By charge made on 27th June, 2007 the plaintiff charged his interest in the lands comprised in folio 2872 and part of folio 23347, Co. Wexford ("the Wexford lands") to the Bank. The charge is registered as a burden on new folio 48902F, Co. Wexford and the Bank is registered owner of the charge.

8. By deed of appointment made on 29th August, 2013 the Bank appointed the second and third defendants joint receivers over the Wexford lands which have since been sold by them, and the new purchaser was registered as full owner on 14th January, 2015.

The issue in the proceedings

9. The three mortgages and charges were in the same form, and for convenience I will refer to them collectively as the security instruments, albeit in some cases different arguments are made regarding the mortgage on the unregistered lands, and the charges registered on the folio lands.

10. The plaintiff has brought proceedings to set aside the appointment of the joint receivers, and for damages against the first defendant for breach of contract and breach of fiduciary duty, and against the second and third defendants for breach of fiduciary duty.

11. The plaintiff argues that the Bank acted wrongly in appointing the joint receivers as the security instruments made no express provision for the appointment of a receiver, or in regard to other matters which might have governed the right of the Bank to appoint a receiver by way of enforcement. The statement of claim had articulated a number of other claims, that the receivers and or the Bank were guilty of fraud, conspiracy or deceit, and these claims have since been abandoned.

12. The Bank and the receivers have brought separate motions to dismiss the claim of the plaintiff as being an abuse of process or having no reasonable prospects of success. An ancillary order is also sought pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 ("the Act of 2009"), directing the plaintiff to take all steps as are necessary to vacate the *lis pendens* registered on the Milltown Unit and on Old Cross.

13. At the time the proceedings were drafted Mr. Woods did not have the benefit of legal representation, but subsequently came to be represented by solicitor who instructed junior and senior counsel. Submissions were directed on four legal issues arising from the arguments of the parties concerning the security instruments. These are as follows:

(a) Whether the security instruments contained a power on the part of the Bank to appoint a receiver;

(b) Whether the power to appoint a receiver is dependent upon the continuation in force at the date of appointment of the relevant provisions of the Conveyancing and Law of Property Act 1881 ("the Act of 1881");

(c) Whether the Bank was entitled to appoint a receiver before it was registered as owner of the charge on the Milltown Unit;

(d) Whether the deeds of appointment were properly executed.

The power to appoint a receiver: construction of the contract

14. The first two questions may be dealt with together, and the plaintiff makes the argument that the security instruments are deficient in a number of respects.

15. The security instruments were made in the Bank's standard form and it is common case that they contain no express power to appoint a receiver, and no express incorporation by reference of the relevant provisions of the Act of 1881. Certain references to a "receiver" are found, as follows.

16. Clause 8 of the security instruments expressly excludes the provisions of ss. 17 and 20 of the Act of 1881, such that the statutory power of sale and other powers are exercisable at any time after demand, and states as follows:

> "8. Sections 17 and 20 of the Conveyancing Act 1881 shall not apply to this Mortgage and the statutory power of sale and other powers shall be exercisable at any time after demand."

17. The security instruments contain a number of references to any receiver appointed "hereunder". Clause 11 provides that at any time after the power of sale had become exercisable, the Bank, or any receiver appointed under the mortgage, may enter and manage the mortgage property or any part thereof, and provision is made as to the works that might be carried out and the fixing of liability for any expenditure so incurred on the mortgagor.

18. There is also a provision at clause 12 that any receiver appointed by the Bank should be deemed to be the agent of the mortgagor who was thereby deemed to be solely responsible for any acts, defaults and remuneration of the receiver.

19. The plaintiff points to the fact that the deeds by which the receivers were appointed as joint receivers on foot of each of the securities were purported to be exercised by the Bank "in pursuance of the powers contained" in the deeds of mortgage or charge. There was not included any saver provision in the form of a phrase such as "in the exercise of any other power in that behalf it enabling", a saver provision frequently found and which might expressly import the statutory power of appointment. The plaintiff therefore rests his case on the argument that the security instruments did not contain an express power to appoint a receiver, and that none may be implied as a matter of contract.

Relevant recent authorities

20. McDermott J. considered precisely the terms of the Ulster Bank mortgage in *Dowdall & Anor. v. O'Connor & Anor*. [2013] IEHC 423, and the argument of the defendants arising from the fact that no express power existed in the mortgage to appoint a receiver.

21. McDermott J. dealt with the matter by construing the deed of mortgage and said the following at para. 25:

> "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. 19(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. …"

22. McDermott J. also made reference to Section 19 (1)(iii) of the Act of 1881 which vests a statutory power in the holder of a mortgage to appoint a receiver:

> "19. (1)— A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):
>
> …
>
> (iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof;"

23. He also said as follows at para. 25:

> "I am satisfied that the provisions of s. 19(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."

24. With regard to the argument that the repeal s. 19 of the Act of 1881 had the contractual effect that the power to appoint a receiver no longer existed, McDermott J. relied on a judgment of Laffoy J. in *Kavanagh & Anor. v. Lynch & Anor.* [2011] IEHC 348, where she held that:

> "The fact that since the commencement of the Act of 2009, on the 1st December, 2009, ss. 15 to 24 of the Act of 1881 have 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." (para. 3.5)

25. The incorporation of a statutory power by reference in a deed or other document in writing is, as Laffoy J. identified, a drafting device and the applicability of those provisions is not dependent on the continuation in force of those statutory provisions.

26. Mc Dermott J. followed the dicta of Laffoy J. and at para. 25 said:

> "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."

27. The judgment of McDermott J. is consistent also with the judgment of Feeney J. in *McEnery v. Sheahan* [2012] IEHC 331, the Supreme Court decision of *Kavanagh & Anor. v. McLaughlin* [2015] IESC 27, [2016] 2 I.L.R.M. 44, and the decision of O'Malley J. in *McAteer & Anor. v. Sheahan.* [2013] IEHC 417, [2013] 2 I.R. 328.

28. Mc Dermott J. also said that the power to appoint a receiver crystallised at the date of the execution of the mortgage and not at the date of appointment or default:

> "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." (para. 25)

29. The express terms of the security documents provide that they operate by way of security "for the discharge on demand of … all present and/or future indebtedness" of the plaintiff to the Bank. Several demands had been made of the defendant before the joint receivers were appointed. The power to appoint a receiver was exercisable and an act of default giving rise to the contractual entitlement to appoint a receiver had arisen.

30. Feeney J. in *McEnery v. Sheahan* took the view that the "right to appoint a receiver was conferred immediately upon the creation of the mortgage" and that the repeal of the legislative provisions did not impact on the contractual power

31. Therefore, there is a recent authoritative and considered judgment of the High Court which has found that on a construction of a mortgage in precisely the same form as the security instruments in issue in the present case that the security instruments do contain a contractual power on the part of the Bank to appoint a receiver.

32. The plaintiff accepts that the Bank did not seek to rely on a statutory power in the appointment of a receiver. The plaintiff also accepts that the entitlement to appoint a receiver contained in s. 19 of the Act of 1881 was restored by the Land and Conveyancing Law Reform Act 2013 which came into operation on 31st July, 2013. Therefore, no arguable ground of claim exists that the power to appoint a receiver is dependent on the continuation in force of the Act of 1881.

Is the judgment of McDermott J. in Dowdall & Anor. v. O'Connor & Anor. to be followed?
33. Counsel argues that McDermott J. in *Dowdall & Anor. v. O'Connor & Anor*. was considering an application for interlocutory relief, and as the decision was based on the threshold test explained in *Campus Oil Limited & Ors. v. Minister for Industry and Commerce & Ors. (No. 2)* [1983] I.R. 88, that I ought not rely on the decision in coming to a conclusion on the present application.

34. A number of observations ought to be made. The decision of Laffoy J. in *Kavanagh and Anor. v. Lynch & Anor*. was also made in the context of an application for an interlocutory injunction, and in giving his judgment, McDermott J. expressed a view that the plaintiffs have established a strong case that they were validly appointed as receivers and he unequivocally accepted the arguments for injunctive relief. (paras. 29 to 32)

35. I consider that the decision of McDermott J. in *Dowdall & Anor. v. O'Connor & Anor*. is dispositive of the argument of the plaintiff concerning the power of the Bank to appoint a receiver. No factors have been identified which might require me to reconsider the judgment of McDermott J., as might arise from the decision of Clarke J. in *Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189. The point has been definitively decided by McDermott J. in Dowdall & Anor. v. O'Connor, and the plaintiff has not identified an error of law, not opened any relevant case law, nor can it be said that the decision is so old as to need to be revisited.

36. I find myself in agreement with the analysis of McDermott J., but irrespective of that I am also bound by his decision.

37. The first two questions must be answered against the plaintiff for these reasons.

The registration of the charge on the folio
38. Section 62 of the Registration of Title Act 1964 provides for the creation of a charge on land and the means by which an instrument of charge is to be executed. Section 62(2) provides that:

> "…until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land."

39. Section 62(6) provides:

> "On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge."

40. An application to register the charge on the lands comprised in folio MN1052L (the Milltown Unit) was made on 23rd March, 2009 and the charge became registered as a burden on the folio on 31st May, 2013. The second and third defendants were appointed joint receivers on 26th March, 2013, two months before the Bank was registered as owner of the charge.

41. Counsel for the plaintiff now accepts that the effect of Rule 63 of the Land Registration Rules 1972 is that registration is deemed to be completed on the day on which the instrument or application is received for registration, Rule 63 provides as follows:

> "Except as otherwise provided by statute, or as provided in rules 51, 65(3) and 191, registration shall be completed as of the day on which the instrument or application is received for registration."

42. The application for registration was made on the 23rd March, 2009.

43. The charge on the Milltown Unit was originally granted in respect of three land registry freehold titles. Folio 1052L was carved from these parent folios following the creation of leases for 999 years of which the plaintiff and Mr. Danny Woods are the registered owners. It was in that context that on the opening of the leasehold folio the registration of the Bank's charge was dated, that being the date when the leasehold folio was opened.

44. Feeney J. considered precisely this point in McEnery v. Sheahan where he dealt with the operative date on which registration is deemed to be effective. At para. 10.1 he said as follows:

> "The facts are that an application for registration of the charge over the mortgaged property was made on the 15th June, 2009 and that charge was ultimately registered in August 2011. Since the charge is now registered, the issue which the defendant raises in relation to non-registration is moot due to the fact that the registration of the charge, which is now complete, is deemed effective from the date of application which is the 15th June, 2009. The Court must proceed on the basis that the registration was effective from 15th June, 2009, which is prior to the appointment of a receiver."

45. This is a recent and authoritative judgment of the High Court, with which I agree and by which I am bound.

46. Furthermore, the joint receivers were appointed under a contractual power and did not require that at the time of the exercise of that power the charge be registered, as the Bank was not seeking to engage a power dependent on its being the registered owner of

the charge.

47. Therefore this point cannot succeed as a matter of law.

Execution of the Appointments
48. The plaintiff contends that the deeds of appointment were not executed in the manner prescribed by s. 24(1) of the Act of 1881, i.e. "by writing under … hand". The deeds of appointment were executed in each case by donees of a power of attorney.

49. Cregan J. considered the requirements of execution in his judgment in *McCleary v. McPhillips* [2015] IEHC 591 where he said as follows at para. 133:

> "This phrase - "by writing under its hand" - has, in my view, three constituent elements. These are (i) that the appointment of the receiver is "by writing"; (ii) that it is "under its hand" and (iii) the use of the pronoun "its" means that it must be the signature of a person duly authorised by the Bank to sign such documents, under hand, on behalf of the Bank".

50. Cregan J. also said "is also clear from the authorities that "under hand" or "under the hand of" or "under its hand" means "with the signature of"." (Para. 134)

51. Michael McNaughton executed the deed in respect of the Milltown Unit and Old Cross acting on foot of a power of attorney made on 22nd November 2012. Brian Farrell executed the deed of appointment in respect of the Wexford lands acting on foot of a power of attorney made on 21st June, 2013.

52. In each case the donees were authorised "to sign or otherwise execute and deliver" a range of documents and instruments, including all documents relating to the exercise of the powers of the Bank on foot of any security held by it.

53. The application of the correct test of due execution as outlined by Cregan J. in *McCleary v. McPhillips* has the result that both Mr. McNaughton and Mr. Farrell were persons duly authorised to execute the documents, the appointment of the receivers were done by writing, and with the signature of those attorneys.

54. There is no requirement the documents be sealed by the affixing of the corporate seal of the Bank by the persons appointing the receivers, as no such requirement is contained in the security instruments, which permit the appointment of a receiver by writing under the hand of the appointer, with no requirement for sealing.

55. This point cannot succeed.

Conclusion
56. I therefore answer the legal questions in this case as follows:

> (1) The Bank had a contractual power to appoint a receiver, and therefore the appointment of the joint receivers is a valid exercise of a contractual power. That power was exercisable at any time after demand, and sufficient demand has been shown to have been made.
>
> (2) The exercise of this contractual power is not dependent on the continuation in force of the provisions of s. 19 of the Act of 1881.
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> (3) The contractual power to appoint a receiver was not dependent on registration of the Bank as owner of the charge in respect of the registered land. The Bank lodged an application for registration of the charge over the registered land some years before the joint receivers were appointed to that land, and furthermore the Bank did not require as a matter of law to be registered as owner of the charge in order to exercise a contractual right to appoint a receiver. This argument has no force in respect of the unregistered land, and no requirement exists as a matter of law that a mortgage of unregistered land must be registered in the Registry of Deeds.
>
> (4) The instruments of appointment were validly executed.

57. The statement of claim is predicated on the plaintiff succeeding in some or all of these arguments. The plaintiff has not established to my satisfaction that these are stateable bases on which he may maintain the action. In those circumstances, I consider that the plaintiff's claim is bound to fail and ought in the exercise of my discretion be struck out.