Neutral Citation [2016] IEHC 447

THE HIGH COURT

[2016 No. 2445 P]

BETWEEN

MICHAEL HARRINGTON

AND ANTHONY (OTHERWISE TONY) HARRINGTON

PLAINTIFFS

AND

GULLAND PROPERTY FINANCE LIMITED

AND STEPHEN TENNANT

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 29th day of July, 2016.

1. This judgment is given in an application by the plaintiffs for an interlocutory injunction restraining the second named defendant, a receiver appointed by the first named defendant, from acting as receiver of certain commercial units comprised in Folio 118347F, Co. Cork, and Folio 152304F, Co. Cork.

2. An interim injunction was granted on 18th March, 2016 and that order was made without notice having regard to the fact that it came on in the last day of term before the Easter vacation. By that order the receiver was restrained until after 11th April, 2016 or further order, from acting as receiver over the relevant assets, but by way of protection for the defendants and because the order was made *ex parte*, an order was made that any rent collected in respect of the properties would be retained by the solicitor for the plaintiffs until further order.

3. Several affidavits have been filed in furtherance of the claim and in response by the second defendant.

4. The facts may be briefly stated. The plaintiffs are brothers and the registered owners as tenants in common of commercial units contained on lands comprised in Folio 118347F and Folio 152304F, Co. Cork. In each case there is registered as a burden on the respective Folio a charge in favour of Anglo Irish Bank Corporation plc. ("Anglo").

5. The charge was created pursuant to an agreement entered into between Anglo and the defendants on 18th October, 2000 to secure a loan in the amount of £600,000 (€761,842) therein agreed to be advanced, and in pursuance of an agreement made in a later facility letter of 27th November, 2003 by which the further amount of €465,797 was agreed to be lent.

6. The facility letter of 18th October, 2000 provided for repayment on an interest only basis, and was to be cleared within two years from the proceeds of sale of each warehouse unit as they were released from Anglo's charge. The second facility was also an interest only facility but was stated to be repayable in full on or before July, 2012. I will return later to the detailed conditions in the facilities.

7. By agreement made on 14th December, 2014 the special liquidators of IRBC, the successor in title of Anglo, agreed to sell to Gulland Property Finance Limited ("Gulland") the benefit of the loan facilities of the plaintiffs and the security. By letter of 6th February, 2015 the special liquidators informed the plaintiffs of this fact and Gulland, through its agent Pepper by letter of 16th February, 2015 notified the plaintiffs of the transfer of the loan. No argument is made that the transfer of the debt was not effective.

8. By deed of transfer made on 6th February, 2015 IBRC, through its special liquidators, transferred the interest in the charge to Gulland, and the deed of transfer was in conformity with Form 56 of the Rules governing the transfer of interests in registered lands.

9. By deed of appointment made on 10th February, 2016 Gulland appointed Stephen Tennant, the second defendant, to be receiver of the lands comprised in the two Folios. The deed of appointment was made in pursuance of the power contained in the deed of charge made on 17th October, 2000 between the plaintiffs of the one part and Anglo of the other part, and recited that the interest of the lender and the interest in the indebtedness and other obligations of the borrowers to Anglo as secured thereby had been acquired by Gulland.

10. No argument is made that the charge was not effective to create a security in favour of Anglo in respect of the loans of the plaintiffs, and as noted above, the charge was registered as a burden on each of the Folios.

11. Clause 9 of the charge provides that the lender may, at any time after the liabilities thereby secured had become payable and the security thereby constituted had become enforceable, appoint a receiver, and no argument is made that this express and clearly stated power was not effective to vest in Anglo the power to appoint a receiver on the conditions therein stated.

12. The primary argument raised by the plaintiffs with regard to the power of Gulland to appoint a receiver arises from the undisputed fact that the instrument by which the charge was transferred from IBRC to Gulland, made on 6th February, 2015 has not been registered in the Land Registry, and has not yet been lodged for registration. It is argued in those circumstances that no interest in the charge has become vested in Gulland and that as a consequence it did not at the date of the appointment of the receiver have a power, whether contractual or statutory, to effect that appointment.

13. Section 64 of the Registration of Title Act, 1964 ("the Act of 1964") is engaged in the present case. That section deals with the means by which the interest in the charge may be assigned:

> "(1) The registered owner of a charge may transfer the charge to another person as owner thereof, and the transferee

shall be registered as owner of the charge.

(2) There shall be executed on the transfer of a charge an instrument of transfer in the prescribed form, or in such other form as may appear to the Registrar to be sufficient to transfer the charge, but until the transferee is registered as owner of the charge, that instrument shall not confer on the transferee any interest in the charge.

(3) The Registrar shall deliver to the registered transferee a certificate of charge in the prescribed form.

(4) On registration of the transferee of a charge, the instrument of transfer shall operate as a conveyance by deed within the meaning of the Conveyancing Acts, and the transferee shall—

(a) have the same title to the charge as a registered transferee of land under this Act has to the land, under a transfer for valuable consideration or without valuable consideration, as the case may be; and

(b) have for enforcing his charge the same rights and powers in respect of the land as if the charge had been originally created in his favour."

Appointment of receiver

14. The first issue on foot of which the application for the injunction is brought concerns the question of whether the receiver was validly appointed by Gulland, and no question arises as to whether Gulland is entitled to exercise any of the statutory powers, including the power to overreach puisne mortgages, pursuant to the powers contained in the Act of 1964.

15. The defendants argue that as the power to appoint a receiver is derived from the terms of the mortgage or charge, and was not done in the exercise of any statutory power, that no frailty can be found in the appointment. The defendants point to the decision of the Supreme Court in *Freeman v. Bank of Scotland Plc & Ors.* [2016] IESC 14 where Bank of Scotland was not the registered owner of the charge. With regard to the question of whether the bank, not being the registered owner of the charge, could appoint a receiver, Dunne J. said as follows:-

> *" … but the non registration of the Bank does not vitiate or invalidate the appointment of the Receiver. It simply creates a problem for the transferees of the properties concerned in perfecting their title. In the event that any transferee sought a remedy directly against the Appellants arising out of the problem caused by the non-registration of the Bank, it is inconceivable that the Appellants would not have a remedy against the Bank for any potential liability … The remote possibility that such liability could be asserted does not in my view have any bearing whatsoever on the validity of the appointment of the Receiver."*

16. A similar view is taken by O'Malley J. in *McAteer & Ors. v. Sheahan* [2013] IEHC 417, [2013] 2 I.R. 328 which dealt extensively with the provisions of the Act of 1964 and the consequences of the repeal of the statutory powers contained in the Conveyancing Act, 1881 to 1911 by the Land and Conveyancing Law Reform Act, 2009. She held that the power to appoint a receiver arose as a matter of contract and was not dependent for its exercise on any statutory power created by the Act of 1881, and relied on the High Court decision of Laffoy J. in *Kavanagh & Anor. v. Lynch & Anor.* [2011] IEHC 348 in support of the proposition that the repeal of the statutory provisions did not impact upon the contractual power. O'Malley J. also relied on the judgment of McGovern J. in *Moran v. AIB Mortgage Bank Limited & Ors*. [2012] IEHC 322 to the same effect. A similar decision was made by Kennedy J. in *Wallace v. Roche & Anor.* [2015] IEHC 521 in which she rejected the argument that the appointment of the receiver could be made only by the legal owner of a registered charge, and in which she held that the power did not derive from the Act of 1964 but under the relevant security instrument.

17. The authoritative judgment of Laffoy J. giving one of two judgments of the Supreme Court in *Kavanagh & Anor. v. McLaughlin & Anor.* [2015] IESC 27 dealt extensively with the question of whether the assignee of a charge over registered land could by deed effectively appoint a receiver. The facts of that case did not require the Court to engage the question of whether, in the absence of registration of the owner of the charge, it could be said to be entitled to exercise the statutory powers of the owner of a registered charge contained in s. 62 of the Act of 1964, although Laffoy J. did deal *obiter* with that question.

18. Laffoy J. held that the appointment of the first plaintiff as receiver in that case was effective because it was made in pursuance of the contractual powers contained in the charge and was not dependent on the registration of the deed of assignment of the charge nor require that the assignee be registered as owner of the charge.

19. Laffoy J. noted in that case that the transfer of the securities between Bank of Scotland (Ireland) Ltd. ("BOSI"), the original owner of the charge, and the second plaintiff, Bank of Scotland ("BOS"), had been effected by operation of law by virtue of the operation of the European Communities (Cross-Border Mergers) Regulations, 2008 and the Companies (Cross-Border Mergers) Regulations, 2007. The High Court had made an order approving the mergers as a result of which the assets and liabilities of BOSI were transferred to BOS on the operative date and thereafter BOSI was dissolved without liquidation and ceased to exist.

20. In simple terms, the Regulations and the court order had the effect that the relevant security had been effectively assigned by operation of law.

21. Laffoy J. was considering the argument of the defendants arising from the fact that the registered owner of the charge was BOSI and not the entity BOS which had by deed appointed the first plaintiff as receiver over the relevant premises. The Court took the view that the contractual power arising by virtue of the charge to appoint a receiver was not dependent on any of the statutory powers contained in the Act of 1964, as amended. The contractual right was vested in BOS by operation of law and was properly exercised.

22. Laffoy J. based her conclusion on the fact that legislative provision had been made for the transfer of the securities, and she pointed by way of illustration to other legislative provisions with the same effect such as the Central Bank Act, 1971 by which the legislature dispensed with the need to register a transfer of securities between licensed banks made in pursuance of the statutory power in that Act. A licensed bank taking an assignment pursuant to that legislation does not need to register the assignment under the Act of 1964 in the case of registered land, or otherwise registered in accordance with the provisions relevant to unregistered land.

23. Laffoy J. went on to take the view, albeit *obiter,* that unless the legislation expressly removed the necessity for the registration of the successor in title of the original owner of the charge, as in the case of a transfer of a security under the Central Bank Act,

1971 the assignee of the charge did require to be registered as owner if it wished to rely on any of the statutory powers contained in s. 62 of the Act of 1964 to enforce the charge. Those powers, especially the power of overreaching puisne mortgages are exercisable in the clear terms of s. 62(9) by the registered owner of the charge.

> "62(9) If the registered owner of a charge on land sells the land in pursuance of the powers referred to in subsection (6), his transferee shall be registered as owner of the land, and thereupon the registration shall have the same effect as registration on a transfer for valuable consideration by a registered owner."

Analysis
24. None of the judgments relied on by the defendants deal with the precise question at issue in this case. The judgments of the Supreme Court in *Kavanagh & Anor. v. McLaughlin & Anor.* and in *Freeman v. Bank of Scotland Plc & Ors*. relate to a different legal context, where the transmission of the security interest was effected by operation of law. In neither *Wallace v. Roche & Anor.* nor *McAteer & Ors. v. Sheahan* did any question arise with regard to the transfer of the interest of the mortgagee.

25. The legal issue raised by the plaintiff in the present case is the net question of the effect of s. 64(2) of the Act of 1964 in circumstances where no statutory provision such as that contained in the Central Bank Act, 1971 obviates the requirement of registration, as Gulland is not a licensed bank, and no transmission by operation of law can be shown.

26. Instead, the transfer of the interest of the mortgagee was made by an instrument in the statutory form provided by the Land Registry Rules for the transfer of an interest in a charge. The provisions of s. 64(2) are unambiguous and while it is not necessary that the interest of the mortgagee be transferred by means of a transfer in the prescribed form, and a different suitable form may be used, the instrument of assignment does not confer on the transferee any interest in the charge until the transferee is registered as owner of the charge. The statutory provisions are clear and the transferee does not take "any interest" in the charge, be that a security interest or a contractual entitlement.

27. Accordingly, it seems to me that the plaintiffs have made out an arguable case that in the absence of registration, or some other means by which the interest in the charge has been transmitted or is deemed by statute not to require registration, that the contractual interest in the charge has not become transferred and therefore Gulland may not, in pursuance of the contractual power contained in that mortgage or charge appoint a receiver. It has not taken in the interest of the mortgagee because of s. 64(2).

28. Accordingly, I consider that the plaintiffs have made out an arguable case that the power to appoint a receiver had not vested in Gulland at the date of the deed of appointment of the second named defendant as receiver.

Other arguments
29. The plaintiffs make a number of other arguments in the application for an injunction the plaintiffs have continued to meet the interest only payments on the loans at all times, and have continued to do so since the interim injunction was granted. It is argued that the plaintiffs were consumers and the effect of the Unfair Terms in Consumer Contract Regulations, 1995 must bear on the argument as to whether Gulland was entitled to call in the loan. The plaintiffs also make the argument that Gulland is not entitled to call in the loans having regard to the approach that Anglo, and after it IBRC, took to the facilities up to at least 2013. I do not propose in this judgment dealing with the argument that the elements necessary to found an estoppel, or a representation that might sound in equity have arisen. Nor do I intend to consider the other argument made by the plaintiffs, namely that the letters of demand were inadequate to call in the loans and that as a result no default entitling Gulland to appoint a receiver had arisen, because it is sufficient at this juncture that the plaintiffs have raised an arguable case that the appointment of the receiver was not effective and that the receiver must be seen therefore as a trespasser.

30. I turn now to consider whether the exercise of my discretion ought to weigh against the grant of an injunction.

Principles of law applicable to the granting of an interlocutory injunction
31. The plaintiffs argue that as the issue they have raised relates to their title and right to possession of the property, the principles of law which must guide my determination are established, and that where a plaintiff makes a claim that propriety property rights have been infringed, the court will usually intervene on an interlocutory basis. Reliance is placed on the judgment of Irvine J. in *O'Flynn v. Carbon Finance Ltd. & Ors*. [2014] IEHC 458 that:

> *"172. It is well established that in circumstances where a plaintiff makes a claim that certain of their property rights have been infringed the Court will usually intervene on an interlocutory basis. In this regard, the decision of Clarke J. in Metro International SA v. Independent News and Media Plc [2006] 1 ILRM 414 is relevant. In that decision, Clarke J. stated:-*
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> > *"I am nonetheless of the view that in assessing the adequacy or otherwise of such damages as a remedy, the Court can and should have regard to the question of whether the right sought to be enforced or protected by interlocutory injunction is one which is of a type which the Court will normally protect by injunction even though it might, in one sense, be possible to value the extinguishment or diminution of that right in monetary terms.""*

32. As Irvine J. said, the class of circumstances in which the court would view favourably the granting of an injunction includes claims where the plaintiff alleges an infringement of a property right and she quoted from paras. 4.3 and 4.4 of the judgment of Clarke J. in *Metro International SA v. Independent News and Media plc.*

> *"4.3 The same test was applied by Laffoy J. in Symonds Cider & Anor. v Showerings (Ireland) Ltd [1997] 1 I.L.R.M. 481 while possibly, by inference, querying whether it was open to this court to have regard to the fifth item identified by McCracken J. (i.e. the possibility of assessing the strength of the case on the affidavit evidence in an otherwise equally balanced case) having regard to the judgment of the Supreme Court in Westman Holdings Ltd v McCormack [1992] 1 I.R. 151; [1991] I.L.R.M. 833. Whether one views the above set of criteria as identifying a single test of the balance of convenience (of which the adequacy of damages is a potentially significant part) or as two separate tests whereby one first considers the adequacy of damages and only then moves on to weighing the balance of convenience, seems to be more a matter of semantics than substance in that it is clear from the judgment of McCracken J. in Irish Autotrader that in a case where the plaintiff can be adequately compensated in damages and the defendant is a mark for such damages the balance of convenience will inevitably favour the rejection of the application for an injunction.*
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> *4.4 It is also, perhaps, important to note the nature of the type of loss which must be assessed as to whether it might be compensatable in damages. As is pointed out by McCracken J. at item 1 of the test set out above it is the loss which*

would flow between an injunction being granted at the interlocutory stage on the basis of the plaintiff having established a fair issue to be tried up to the time of trial where that issue was ultimately found against the plaintiff. There are, of course, cases where even at trial damages would be an adequate remedy and where, in accordance with the established jurisprudence of the courts, an injunction will not normally be granted even though the plaintiff succeeds in establishing wrongdoing. There are, however, on the other hand, cases where the courts have traditionally not been prepared to award damages even though there is a sense in which any relevant loss could be calculated in monetary terms. Thus in many cases where a plaintiff alleges an infringement of his property rights the court will intervene by injunction where those property rights have been established rather than compensate the plaintiff for the loss of those property rights. … Thus the mere fact that a property right (or indeed a diminution in such a right) can be valued in monetary terms does not of itself mean that damages for an infringement of that property right can necessarily be said to be an adequate remedy."

33. In *Keating & Co. Limited v. Jervis Shopping Centre Limited & Anor.* [1997] 1 I.R. 512 where the plaintiff sought an injunction restraining the defendants from trespass by the operation of a tower crane which moved into the airspace above the licensed premises owned by the plaintiff, Keane J. stated as follows:

> *"It is clear that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only. However, that principle is subject to the following qualification explained by Balcombe L.J. in the English Court of Appeal in* Patel v. W. H. Smith (Eziot) Ltd. *[1987] 1 WLR 853 at p. 859*: –
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> *'However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application of the principles set out in* American Cyanamid Co. v. Ethicon Ltd. *[1975] AC 396 in relation to the grant or refusal of an interlocutory injunction.'"*

34. Laffoy J., giving the judgment in the High Court in the interlocutory application in *Kavanagh & Anor. v. Lynch & Anor.,* also referred to *Patel v. W. H. Smith (Eziot) Ltd*. and took the view that while the defendants had raised issues about the title of the plaintiffs as receivers and their powers, and while the defendants were entitled to the beneficial interest in the relevant properties, the interest of the plaintiffs was burdened with the security interest of the bank which had appointed the receiver, which took priority over that beneficial interest such that the action of the receivers taking possession of the property the subject matter of the securities was considered by her not to arguably amount to a trespass.

35. I consider that in the present case that the interest to be protected is the undisputed title of the plaintiffs to the land to which they are registered as owners, and one in which, as pointed out by Laffoy J. in *Pasture Properties v. Evans* [1999] IEHC 214 is essentially one where damages are not an adequate remedy and that:

> *"It is axiomatic in trespass cases that damages are not an adequate remedy".*

36. While Clarke J. in *Jacob Fruitfield Food Group Limited & Anor. v. United Biscuits (UK) Limited* [2007] IEHC 368 cautioned that this proposition did not establish a rule of law, he considered that the approach of the court has been that an injunction is more likely than not to be granted in a case where a property right is asserted against a trespasser. The judgment of Keane J. and that of Laffoy J. in *Kavanagh & Anor. v. Lynch & Anor*. relate to circumstances where the property right has been displaced by another claim. The plaintiffs in this case have established to my satisfaction an arguable basis on which the receiver is a trespasser with no right to possession.

37. Keane J. in the recent judgment of *Szabo v. Kavanagh* [2013] IEHC 491 preferred the proposition that the courts would look at the facts of each case as evidenced in the approach adopted by Finlay Geoghegan J. in *Contech Building Products Limited v. Walsh & Ors*. [2006] IEHC 45. Keane J. came to the conclusion in the case before him, which related to possession of real property, that he was not satisfied that damages would not be an adequate remedy for the alleged trespass and breach of constitutional rights of which the plaintiff complained.

38. It seems to me that damages are not an adequate remedy for these plaintiffs but on the other hand do provide an adequate remedy in respect of the claim of the receiver, and the subject property has the benefit of a relatively substantial rent roll which, if the defendants are correct, may ultimately come to be payable to Gulland and/or the receiver. Furthermore, as Gulland has not at the date of the hearing before me lodged the transfer for registration, Gulland is not in a position to make title to the premises should it propose to sell, until registration is complete. As Laffoy J. said in her judgment in the Supreme Court in *Kavanagh & Anor. v. McLaughlin & Anor.,* absent registration, and by virtue of s. 62(2) of the Act of 1964, the owner of the charge does not have any interest in the land until that owner is registered in the Land Registry, and the "*crucial requirement for enforcement of a charge on registered land imposed by an Act of the Oireachtas*" requires registration in order to exercise the powers contained in particular in s. 62(9) and (10).

39. The evidence points to the fact that the loan to value ratio of the property burdened with the charge has not been of concern to the special liquidators of IBRC, and that the plaintiffs have an unencumbered interest in other commercial units held through a corporate vehicle. Further, Gulland may register the charge in the Land Registry and therefore has in its control the means by which it can rectify the problem here identified. The balance of interest in the circumstances favours the plaintiffs.

Non-disclosure of material facts

40. The defendants make an argument that the plaintiffs failed in a material respect to disclose relevant circumstances to the Court at the hearing of the interim injunction. As I noted above, the interim injunction was intended to inure for a short period of some weeks, but in the events there followed a further exchange of affidavits and the requirement for written legal submissions, and the application took three further months after its first return date to be heard.

41. The defendants argue that certain material non-disclosure ought to influence my determination of this application. In particular, the second facility letter of 27th November, 2003 and the demand letters of 14th October, 2015 and 2nd February, 2016 were not brought to the attention of the Court on the interim application. The second facility letter had a clear cut-off date, by which the money became repayable in July, 2012. The plaintiffs say that they did not receive the demand letters and that the appointment of the receiver came as a "complete surprise" to them.

42. The non-disclosure of material facts is a relevant consideration as has been explained in a number of cases. In *Bambrick v. Cobley* [2005] IEHC 43, Clarke J. identified certain factors as relevant when non-disclosure is alleged, including whether the facts disclosed were material, whether a plaintiff is culpable in respect of the failure to disclose, and the "overall circumstances of the case".

43. I consider that the non-disclosure of the second facility letter is material, but is not so significant as to weigh the balance against the plaintiffs in the present application because the plaintiffs did identify in the grounding affidavit a course of dealings with Anglo, and later with the special liquidators of IBRC, which showed that while the second facility was repayable in July, 2012, that the Bank and the liquidators, arguably at least, continued to operate as if that date had either been pushed out or was not binding on the parties. Furthermore, the plaintiffs did put before the Court a demand letter of 2nd February, 2016 and the documentation by which Gulland had taken the assignment of the debt and the security.

44. While the circumstances suggest that it is at least arguable that the appointment of a receiver was not a "complete surprise", the plaintiffs did put sufficient circumstances before the Court on the interim application to justify the granting of relief for a short period and in the circumstances where the rent was directed to be held by the solicitor for the plaintiffs for what was expected to be a short period of time.

45. As the interest in respect of which the claim is brought is a proprietary right and because I am satisfied that the non-disclosure is not of a type that is sufficiently egregious, I propose making an interlocutory injunction restraining the second defendant from acting as receiver of the Folio lands.

46. The question of rent is unresolved and I am conscious of the somewhat unusual circumstances where a State body has declined to pay the rent to the solicitors for the plaintiff notwithstanding my order made on 18th March, 2016. I am not certain that this arose from a choice not to pay the rent and may have been an error. I will hear counsel as to the appropriate approach to the ongoing payment of rents.