

THE HIGH COURT

COMMERCIAL

[2016 No. 51 COS]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 438 OF THE COMPANIES ACT 2014

AND IN THE MATTER OF HARCOURT LIFE ASSURANCE COMPANY LIMITED (IN RECEIVERSHIP)

AND IN THE MATTER OF AN APPLICATION BY TOM O'BRIEN, RECEIVER AND MANAGER

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 12th day of May, 2016.

1. The applicant is the receiver and manager of certain assets of Harcourt Life Assurance Company (in receivership) (the "*company*"). In this application before the court the applicant seeks the following reliefs:-

(i) a direction pursuant to s. 438(1) of the Companies Act 2014, confirming that he may sell the properties situate at and known as The Orchard Site, Dalkey Sound, Green Road, Dalkey, Co. Dublin (the "*secured properties*") over which he has been appointed by deed of appointment dated 29th January, 2016; and,

(ii) a direction pursuant to s. 438(1) of the Companies Act 2014, confirming that he may sell the secured properties to Mr. Karl O'Connell (the "*purchaser*") pursuant to contract for sale dated 1st February, 2016, and subject to the terms and conditions contained therein.

2. The receiver has brought this application because of competing claims made against the secured properties by Messrs. James Walsh and Thomas O'Mahony who, by way of correspondence in November and December 2015, called into question the receiver's ability to sell the secured properties with a clear title. Each of them asserted that they had entered into contracts for the purchase of sites nos. 3 and 4 respectively by contracts for sale dated 22nd December, 2004. The secured properties comprise sites nos. 3 and 4 on The Orchard Site. By the time this application for directions came before the court, Mr. James Walsh had withdrawn his opposition to the receiver proceeding with a proposed sale of the secured properties to the purchaser. Mr. Thomas O'Mahony maintained his opposition to the receiver selling the secured properties to the purchaser.

3. On foot of facility letters dated 20th August, 2001, and 14th June, 2002, Anglo Irish Bank Corporation plc (now Irish Bank Resolution Corporation Limited (in special liquidation) ("*IBRC*")) advanced funds to Anglo Irish Assurance Company Limited ("*AIAC*") for the purpose purchasing the secured properties. The loans were secured by a mortgage dated 23rd August, 2001, (the "*mortgage*") from AIAC in favour of Anglo Irish Bank Corporation plc ("*Anglo*") over the secured properties. AIAC subsequently became Harcourt Life Assurance Company now in receivership. The debt owed by the company to IBRC and the mortgage were acquired by Launceston Property Finance Limited ("*Launceston*") by deed of loan sale dated 28th March, 2014, and deed of conveyance and assignment of security dated 23rd May, 2014. The amount owed by the company to Launceston is in excess of €2,300,000.00 and this debt is admitted by the company.

4. Launceston appointed the receiver over the secured properties by deed of appointment dated 29th January, 2016. Mr. O'Mahony has not sought to impugn the validity of that deed but he does challenge the validity of the loan sale deed dated 28th March, 2014, and deed of conveyance and assignment of security dated 23rd May, 2014. He has not disputed that Anglo advanced funds to AIAC or that those loans were secured by the mortgage.

5. The receiver contends that AIAC conveyed to Anglo by way of the mortgage full legal and beneficial title to the secured properties. That title was transferred by IBRC, the successor to Anglo, to Launceston and the receiver now seeks to convey the same to the purchaser. Further to his appointment, the receiver has entered into two contracts for sale in respect of the secured properties, both dated 1st February, 2016, for the cumulative sum of €1,115,000.00.

6. This application for directions was originally listed for hearing before another judge of the High Court on 27th April, 2016. The learned judge felt obliged to recuse himself in view of a connection with one of the parties with an interest in the matter. On the following day, an open letter was sent on behalf of Mr. O'Mahony by his solicitors to the solicitors for the receiver. The letter contained an open offer of €1,200,000.00 for the purchase of the secured properties, that is to say the two remaining sites nos. 3 and 4. The letter also stated that Mr. O'Mahony was in funds and would be in a position to close the sales within thirty days of agreement. This offer was rejected by the receiver through his solicitors. The application for directions was heard by this Court on 5th May, 2016. The receiver argues that the open offer amounts to a complete contradiction of the position heretofore adopted by Mr. O'Mahony. Having challenged the receiver's entitlement to sell the property, he is now making an open offer to the receiver to purchase the property from him. Furthermore, the receiver argues that Mr. O'Mahony, in other High Court proceedings, claims to have a contract since December 2004 for the purchase of one of the sites (site no. 4) for a sum of €600,000.00 whereas he is now making a different offer, namely, to purchase both sites nos. 3 and 4 for a sum which is marginally in excess of the contract price for the sale by the receiver to the purchaser. Mr. O'Mahony denies that this open offer is, in effect, a repudiation of the position he has previously adopted and he maintains that the receiver cannot sell the secured properties to another party in circumstances where he contends that he has a contract to purchase it since 2004.

7. The evidence clearly establishes that, while Messrs. Walsh and O'Mahony originally intended to purchase the Orchard site in their own names, they ultimately entered into an arrangement whereby the Orchard site was acquired by AIAC which financed the acquisition and development of the property by way of a loan from Anglo which was limited in recourse to the secured assets only. The documentation relied on by the receiver clearly establishes that Messrs. O'Mahony and Walsh invested in a bond issued by AIAC, the underlying asset of the bond being the Orchard site.

8. Counsel for Mr. O'Mahony says there are disputed issues of fact and that, having regard to other proceedings commenced by him in 2005 [2005 No. 3743 P] relating to the secured properties, the court should not give the directions sought by the receiver in this application on the basis that it would effectively deprive him of the relief sought in those proceedings. It is worth noting that the other proceedings were commenced on 8th August, 2005, and have proceeded at an extremely slow pace. Counsel for Mr. O'Mahony argues that the court must have regard to the fact that one of the parties to those proceedings is Anglo and that the winding up of

that entity necessarily involved significant delay. While it might explain some delay, I cannot accept that it affords an excuse for the extreme delay which has occurred. It is now almost eleven years since those proceedings commenced. Furthermore, the proceedings do not refer to any 2004 contract contended for by Mr. O'Mahony whereby he was to purchase site no. 4. Nor do the proceedings maintain that the mortgage by AIAC in favour of Anglo is invalid. I am satisfied that, in view of the unreasonable delay by Mr. O'Mahony in prosecuting those proceedings and having regard to the other matters mentioned in para. 7 above, the existence of those proceedings should not be a bar to the court considering the application for directions brought by the receiver herein.

9. Mr. O'Mahony claims that there are disputed issues of fact in this case. I am not satisfied that this is so. I have considered the evidence which has been adduced from which it is possible to establish that the following relevant matters are not in dispute:-

(i) The Orchard site was bought by AIAC which is clearly described as the "*Borrower*" in the facility letter of 20th August, 2001, offering funding in respect of the purchase of the site. The company became the successor in title to AIAC.

(ii) AIAC borrowed money from Anglo to purchase the secured properties.

(iii) AIAC mortgaged the secured properties in favour of Anglo.

(iv) IBRC sold the Anglo loan and security to Launceston.

(v) The company owes Launceston approximately €2,300,000.00.

10. It is important to note that the deed of mortgage and charge dated 23rd August, 2001, between AIAC and Anglo recites that the deed of mortgage and charge is in respect of the premises which is described as "*Orchard Site, The Green Road, Dalkey, Co. Dublin*" and personal investment bonds described as "*Contract Number. INB000151-Effective Date: 4th July, 2001, (Choice of Funds UP PTY 222)*". The third and fifth schedules to the mortgage deed make it clear that the holders of the bond are Messrs. James Walsh and Thomas O'Mahony. The third schedule refers to the personal investment bond that can be linked to the facility letter from Anglo granting the loan to AIAC. In that facility letter, para. 2, referring to the purpose of the facility, states:-

"To enable the Borrowers to part-finance the purchase of 0.833 acre site with planning permission known as the Orchard site at the Green Road, Dalkey, Co. Dublin, ('assets') part of which assets to be utilised by AIAC as the asset backing the performance of a unit linked fund PTY 222 ('unit linked fund')."

11. While Mr. O'Mahony claims that he has an equitable interest in the secured properties, he has adduced no evidence of a trust. He does not refer to a trust in his affidavit in these proceedings nor is the existence of a trust to be found anywhere among the documents produced to the court in this application. If a trust in respect of lands exists it must be evidenced in writing. (Section IV of the Statute of Frauds 1695.) While Mr. O'Mahony relies on the doctrine of conversion, he never sought specific performance of the alleged agreement of 2004, nor did he ever pay a deposit or return the contract within the time period stipulated as being necessary to form the basis of a contract. The doctrine of conversion does not apply in circumstances where a party could not rely on specific performance. Even if his subsequent execution of the contract for sale in 2004 was effective, it is clear from *Tempany v. Hynes* [1976] 1 IR 101 that a purchaser obtains a beneficial interest "*to the extent only to which the purchase price is paid*". But in this case it is accepted by Mr. O'Mahony, that he never paid a deposit in respect of site no. 4.

12. All the evidence in this case points clearly to the fact that Mr. O'Mahony does not have an interest in the secured properties but rather an investment in a bond which he held with Mr. Walsh. There is no evidence of a trust.

13. The receiver has been validly appointed and his appointment has been accepted by the company. The receiver has exhibited his deed of appointment and Mr. O'Mahony has not adduced any evidence or legal argument that would call his appointment into question. Mr. O'Mahony is not a creditor of the company and has no standing to challenge the receiver's appointment in circumstances where the company, itself, as mortgagor, has not raised any objection to that appointment.

14. Mr. O'Mahony also takes issue with the fact that the second special liquidator of IBRC did not execute the deed of assignment and conveyance of the loan and security to Launceston. However, Article 3 of the Irish Bank Resolution Corporation Act 2013 (Special Liquidation) Order 2013 (S.I. No. 36 of 2013) provides that each of the joint special liquidators shall be at liberty to act immediately in the capacity of special liquidator and that each power and duty conferred and imposed upon a special liquidator by the Act may be exercised and fulfilled "*...by either or both of the joint special liquidators acting jointly or individually.*" The assignment of the debt and security to Launceston was a valid assignment.

15. Mr. O'Mahony argues that the court should not give directions to the receiver approving the sale of the secured properties to the purchaser because the receiver has not acted in accordance with his obligations to obtain a fair and reasonable price for the property. I reject that argument because the receiver has exhibited extensive evidence of valuations sought by him from a number of different sources as to the proper value of the secured properties and the proposed sale to the purchaser is well within the upper range of the valuations offered. The fact that Mr. O'Mahony has now offered a sum marginally in excess of the contract price in the proposed contract between the receiver and the purchaser is not a good reason for the court not to sanction the proposed sale. If the court was to refuse to accede to the receiver's application for directions, he might have to incur further costs in defending proceedings against the disappointed purchaser in circumstances where the other offer is not significantly greater and appears to have been made as a purely tactical exercise with a view to frustrating the proposed agreement for sale of the secured properties. Mr. O'Mahony has not offered satisfactory evidence of his ability to fund the purchase other than a bald assertion that he will be in a position to do so. On the other hand, the receiver is satisfied that he can close the contract with the purchaser if the court gives him direction to do so and that this can be done without delay. Indeed, there is a deadline on the proposed sale insofar as the special conditions in the contract for sale state that the sale is conditional upon it being approved by the court on or before 31st May, 2016.

Decision

16. Having regard to the undisputed facts set out at para. 9 above and for the other reasons set out above, I am satisfied that the receiver is entitled to the following:-

(i) a direction pursuant to s. 438(1) of the Companies Act 2014, confirming that he may sell the secured properties over which he has been appointed by deed of appointment dated 29th January, 2016.

(ii) a direction pursuant to s. 438(1) of the Companies Act 2014, confirming that the receiver may sell the secured properties to Mr. Karl O'Connell pursuant to the contract for sale dated 1st February, 2016 and subject to the terms and conditions contained therein.

