Neutral Citation: [2016] IEHC 386

THE HIGH COURT

[2016 No. 3239 P]

BETWEEN

START MORTGAGES LIMITED

PLAINTIFF

AND

KIERAN DOYLE (ORSE KERAN DOYLE), DEREK MAY AND BRENDA MAY

DEFENDANTS

EX TEMPORE JUDGMENT of Ms. Justice Murphy delivered on 6th day of July, 2016.

1. This is the plaintiff's application for interlocutory relief against the first and second defendants restraining interference by them or either of them with the plaintiff's entitlement to possession of premises known as Number 1, Butterfield Meadow, Butterfield Crescent, Rathfarnham, Dublin 14. The plaintiff claims to be a mortgagee in possession of the premises and has sought a declaration to that effect in the underlying proceedings.

Background

2. Most of the salient facts are not in dispute. The second and third defendants mortgaged Number 1 Butterfield Meadow, Butterfield Crescent, Rathfarnham, Dublin 14 to Bank of Scotland in 2003 and 2004 as security for loans advanced by Bank of Scotland to them. The mortgage fell into arrears and Bank of Scotland plc issued a civil bill for possession of the property in 2012. On 16th July, 2014, a consent order for possession issued from the Circuit Court with a stay of execution for a period of 12 months. The second and third defendants were legally represented at the time of the making of the said order. It appears to be common case that the purpose of the stay was to allow the second and third defendants effect a voluntary sale of the property which was their family home. It was envisaged that the sale proceeds would be sufficient to discharge the sums due to Bank of Scotland plc and would leave a surplus for the plaintiffs with which they could make a fresh start. The plaintiffs engaged auctioneers and purchasers were found who signed a contract for the purchase of the property on 26th January, 2015 at a purchase price of €750,000. At the time of the signing of the contract, the redemption figures for the mortgage were such that after payment of all sums due the second and third defendants could have hoped for a surplus of a little short of €200,000. There was, however, a problem. It appears from the correspondence exhibited, that on conducting searches, the intended purchasers found that on 18th June, 2014, a month before the consent possession order in the Circuit Court, ACC Bank had registered a judgment mortgage against the second defendant's interest in the property in the sum of €1,388,645.55. The judgment mortgage was in respect of a judgment of 4th October, 2012 obtained by ACC Bank against Mr. May and others. Attempts to resolve the difficulties which the judgment mortgage posed were unsuccessful. A short time later, on 20th February, 2015, Bank of Scotland plc sold its loan and security to Start Mortgages Limited, the plaintiff.

3. The impediment presented by the ACC judgment mortgage was not resolved and as the period of the stay of execution elapsed, the second and third defendants, with the benefit of legal advice, entered into a deed of surrender of vacant possession. That deed recites the fact that the second and third defendants are the registered owners; that they had entered into a deed of mortgage or charge dated 13th January, 2003 whereby they mortgaged their interest in the property to the governor and company of the Bank of Scotland; that by a mortgage sale agreement dated 1st July, 2004 to the same bank they had assigned a portfolio of mortgages including the mortgage on this property to Bank of Scotland Ireland Limited. The deed further recites the order of the Scottish Court of Sessions made pursuant to the Companies (Cross-Border Mergers) Regulations 2007 (of the United Kingdom) the business of Bank of Scotland (Ireland) Limited became vested in Bank of Scotland plc with effect from 31st December, 2010. The deed then recites the conveyance and assignment dated 20th February, 2015 whereby Bank of Scotland plc conveyed and assigned all its rights, title, benefit, interest and obligation into and under the mortgage to Start Mortgages Limited absolutely. Lastly, the deed recites the fact of default in repayment of the secured monies and the entitlement of Start to exercise its powers under the mortgage including but not limited to, its power to take possession of the property. The second and third defendants confirmed their desire to surrender vacant possession of the property to Start to facilitate the exercise by Start of its powers as mortgagee in possession. They confirmed that they had been independently advised by their solicitor in relation to the terms, conditions and consequences of the surrender. They confirmed that they acted of their own free will and volition in surrendering vacant possession of the property to Start so that Start might take possession and control of the property so as to exercise its powers under the mortgage and that they formally consented to Start entering into possession of the property. They confirmed their awareness that Start, amongst other things, might let or sell the property and apply the income or sale proceeds in accordance with law towards the discharge of the secured monies or part thereof. The second and third defendants accepted and acknowledged that having given vacant possession of the property to Start they were debarred from returning or entering upon the property. Each of them also accepted, acknowledged and understood according to the deed that their liability for the sums due on foot of the mortgage remained notwithstanding the surrender and finally they confirmed that all personal effects and chattels had been removed from the property. Pursuant to the surrender of possession by the second and third defendants, the plaintiff, its servants or agents took physical possession of the property on 5th August, 2015 at 1pm without incident. At that time the property was vacant and was secured by changing the locks on the front, back and patio doors. A letter plate was fitted on the letter box. Power and appliances were turned off, mains water systems were drained and disabled by fitting a lock to the stop-cock. All external door locks were changed and all windows, doors and side entrances were secured. Padlocks were fitted to the shed and a side gate. As of that time the plaintiff was a mortgagee in possession by virtue of the deed of voluntary surrender having taken physical possession of the property and having secured physical possession by the changing of locks.

4. Having completed what it described as its internal processes, the plaintiff was ready to sell the property at the beginning of 2016. Their agent attended at the property on 10th February, 2016 to find that the locks had been changed. A man was noted to be residing in the property. The Court is satisfied on the evidence before it that the man in question was Derek May, the second defendant, though he refused to identify himself to the plaintiff's agent on the day. His occupation of the property was confirmed during the course of this application and has been admitted by him on affidavit. The Court is also satisfied on the evidence that Start Mortgages had not given permission to anyone to occupy the property and that the occupation of the property by Derek May prima facie constitutes a trespass.

5. There was a flurry of correspondence addressed to the occupant of the property to the Gardaí and to the solicitor who acted for the second and third defendants during the possession proceedings in the Circuit Court and at the time of the execution of the deed of voluntary surrender. On 4th March, 2016, the first defendant, Kieran Doyle, identified himself to the solicitors for the plaintiff as the occupant of the property and claimed that he was in occupation pursuant to a lease agreement. No lease was produced by him. The first defendant was given an opportunity to vacate the property but failed to respond to correspondence sent to the occupier of the property. Having received no response the plaintiff issued its plenary summons on 13th April, 2016. Not surprisingly, having regard to the fact that the first defendant had specifically phoned the solicitors for the plaintiff, identifying himself as the occupant, the thrust of the claims made in the plenary summons and the reliefs sought in the notice of motion for interlocutory relief are directed against him. However, there is also a claim in the plenary summons for a declaration that the plaintiff is a mortgagee in possession and relief is sought in the notice of motion against any persons having notice of the making of the court order. The Court is satisfied on the basis of the evidence before it and indeed on the averment of the second defendant himself that he is a person who was at all material times in occupation. The Court is satisfied on the basis of the evidence as it has evolved over the course of this application that it should give liberty to the plaintiff to amend its plenary summons and notice of motion where appropriate by the insertion of the words "*and/or second defendant"* wherever the words "*first defendant"* appear therein, and the Court so orders.

6. All correspondence addressed to the occupier having been ignored, on the morning of the return date of the motion on 21st April, 2016 an email was received by the plaintiff's solicitors which apparently came from the first defendant. The email had an attachment headed "*re: Start Mortgages v. Kieran Doyle, Derek May and Brenda May 2016/3239P High Court Dublin",* wrongly dated 23rd May, 2016, which reads:-

> *"To whom its may concern, I am currently unwell and receiving medical treatment. I have no longer an interest in the property subject to this case. And I will not be contesting proceedings in court. Signed, Keran Doyle"*

The attachment has a signature. Since then, nothing further has been heard from Mr. Doyle, the first defendant, but by order of the Court made 3rd May, 2016 before Gilligan J. the service of the proceedings and the notice of motion and affidavits were deemed good and sufficient service upon him. Appearances to the proceedings were entered on behalf of the second defendant by Herbert Kilcline Solicitor and on behalf of the third defendant by Martin Moran and Company Solicitors who had previously represented both second and third defendants in the possession proceedings and in dealings leading to the deed of voluntary surrender.

7. The current position appears to be that the second defendant remains in occupation of the property, notwithstanding his execution of the deed of voluntary surrender on 9th July, 2015. The third defendant, his now estranged wife, filed an affidavit on 16th May, 2016 to the effect that she has at all times abided by the deed of surrender executed by her on 9th July, 2015 and that she has had no hand, act or part in the re-entry into the property by her estranged spouse subsequent to the surrender. It is clear to the Court that the actions of her spouse are in fact, contrary to her interests in that she, unlike her husband, has a potential equity in the property which is potentially being diminished by her husband's actions.

Test

8. At this stage it is beyond argument that the principles governing the grant of interlocutory injunctive relief is *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88. The test is as follows:-

> 1. Whether the parties seeking relief have established a serious issue to be tried.
>
> 2. Whether damages would be an adequate remedy for the plaintiff seeking the injunction if he was successful at trial; and conversely whether if the defendant was successful at trial damages would be an adequate remedy for him as to the consequences borne by him of the grant of the interlocutory injunction. For the latter purpose the plaintiff seeking interlocutory injunctive relief must give an undertaking in damages.
>
> 3. Whether the balance of convenience requires the granting or refusing of the injunction at the interlocutory stage.

Applying that test to this application

9. The Court is satisfied that on the established facts of this case the plaintiff has met the *Campus Oil* test. The serious issue to be tried is the plaintiff's entitlement to possession of Number 1, Butterfield Meadow, Butterfield Crescent, Rathfarnham, Dublin 14. The plaintiff has further demonstrated a strong *prima facie* case as to its entitlement to possession. On 9th July, 2015, the second defendant executed a deed of surrender of that property in favour of the plaintiff. At the time he did so he was legally advised. At some as yet undetermined point, the second defendant resiled from his undertaking and re-entered the property. He seeks to justify his *prima facie* trespass by asserting that he was duped into executing the deed of surrender but has not produced one shred of evidence to support that proposition. Alternatively he asserts that at the time of entering the deed of voluntary surrender he did not have the mental capacity to execute the deed. A plethora of medical documents and reports has been exhibited by the second defendant, all of which the Court has read. They detail a number of complaints, many of which would be common to many men of his age. He undoubtedly did have heart surgery in late July, 2015 which no doubt was a source of worry and concern to him. The Court notes, however, that the admission notes from St. James' Hospital indicate that this surgery was elective surgery. As such, he would have been required to give informed consent prior to the procedure. If he had the capacity to consent to cardiac surgery, then it appears to the Court to follow that he had the capacity to consent to the execution of a voluntary deed of surrender. There is not a scintilla of evidence in the medical documentation furnished to the Court to suggest that his mental capacity was impaired at the time of the execution of the deed. Deeds such as this deed of voluntary surrender, executed by parties with the benefit of legal advice, cannot be set at naught in the absence of compelling evidence as to their invalidity. There is no such evidence before the Court.

Damages as an adequate remedy

10. Applying the *Campus Oil* test, the next issue which the Court must consider is whether damages would be an adequate remedy for the plaintiff. The Court is persuaded that damages would not be an adequate remedy in this case. What is being asserted here by the plaintiff are property rights. This application is brought for the purpose of restraining a trespass on the plaintiff's property. There is a strong line of jurisprudence to the effect that in trespass cases damages are not an adequate remedy. This is a logical consequence of the particular status of property rights within our constitutional framework. The Court is cognisant of the dicta of Laffoy J. in *Pasture Properties v. Evans* [1999] IEHC 214 (Unreported, High Court, Laffoy J., 5th February, 1999) where she stated "*it is axiomatic in trespass cases that damages are not an adequate remedy*." Similarly the dictum of Clarke J., in *Metro International SA v. Independent News and Media* [2006] 1 I.L.R.M. 414 at p. 423:-

> *"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. To take an extreme but illustrative example a person who owns a house and whose house is occupied by others (assuming them to be a mark for the value of the house) would undoubtedly be entitled to an injunction to restrain such wrongful occupation even though there is a sense in which the aggrieved party could be fully compensated by being awarded as compensation as against a defendant of means the value of the house together with any additional sums that might be necessary to compensate for the disruption caused. 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."

Again in *Allied Irish Bank PLC & Ors. v. Diamond & Ors.* [2012] 3 I.R. 549, Clarke J. identified a factor on the issue of the adequacy of damages which is relevant to this case. Having stated that the courts have always been anxious to guard property rights in the context of interlocutory injunctions, he stated at para. 8.2:-

"The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value. Viewed in that way, damages would not be an adequate remedy for AIB. In particular, a failure to grant interlocutory relief at this stage would mean, in practice, that imposing some form of springboard injunction after the trial would be largely redundant. If the defendants are permitted to avail of what transpires to be (after trial) an unlawful head start for the period between now and trial, it will become virtually impossible to undo that head start in any practical way whatever the findings of the court at trial might be. In those circumstances, it seems to me that AIB would suffer irremediable loss to its property rights in the event that it should not obtain an interlocutory injunction now but should succeed at trial."

In *Saville v. Byrne* [2012] IEHC 415 (Unreported, High Court, Laffoy J., 19th October, 2012) granted an injunction to the plaintiff, inter alia, restraining the defendant, his servants or agents, from:-

(i) "re-entry or trespassing or otherwise interfering with said dwelling house and all or any part of the Property;

(ii) from interfering with the access of the plaintiff, his servants or agents, invitees, licensees and assignees to the said dwelling house or all or any part of the Property, including the stables and outhouses thereon; and

(iii) from interfering with the use and enjoyment by the plaintiff, his servants or agents, invitees, licensees and assignees, of the said dwelling house, the stables and outhouses and all or any part of the Property "

In that case, the plaintiff had claimed that the defendant commenced a pattern of behaviour involving assault, trespass causing deliberate damage to property, harassment and obstruction. Having held that there was a fair issue to be tried, the Court went on to consider the adequacy of damages. The Court stated at para. 5.2 and I quote :-

"The second question is whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he could adequately be compensated by an award of damages. Given the nature of the plaintiff's claim, that he is entitled to possession of the Property and he is entitled to use it as he thinks fit, if he were to establish that entitlement as and from 5th January, 2012 at the trial, in my view, he could not be adequately compensated by an award of damages."

For precisely the same reason, if the plaintiff in this case can establish at the trial its entitlement to possession of this property from the 5th August, 2015, then the unlawful deprivation of possession pending trial could not be adequately compensated by an award of damages.

11. Even if property rights were not in issue in this case, the Court would still be constrained to hold that damages are not an adequate remedy on the facts of this case. By any yardstick the defendant is a man in serious debt. Apart from the sums due on foot of his mortgage, there is the matter of the judgment mortgage against his interest in the property in favour of ACC Bank in a sum in excess of €1.3 million. The second defendant's counsel has submitted that the debt is owed by four people and should be divided accordingly. However, the registration of the full sum as a judgment mortgage on this property suggests that it is a joint and several decree for which the defendant is liable. While he withholds possession his indebtedness is rising. There is therefore a considerable risk, if not a certainty, that if this injunction was not granted any damages found to have been sustained by the plaintiff would not be met by the impecunious second defendant. On the other hand, should the plaintiff's assertions of duplicity on the part of the original mortgagee Bank of Scotland plc and the plaintiff be established at trial, (in that connection the Court notes that to date, no evidence has been adduced of such duplicity), then damages will adequately compensate him for any loss, bearing in mind that it is undisputed that he mortgaged his property; that he consented to an order for possession of that property and that he executed a voluntary deed of surrender in respect of the property.

Balance of convenience

12. On the facts of this case, it appears to the Court that the balance of convenience weighs heavily in favour of granting the injunction. Asked by the Court why it should not grant an injunction in circumstances where her client had executed a deed of voluntary surrender, counsel for the second defendant submitted that there were serious issues to be tried around various transactions by both the plaintiff and its predecessor, Bank of Scotland plc. She also at the very least implied deficiencies in the legal advices afforded her client. She was not in a position to offer any evidence in relation to those issues but relied entirely on her client's instructions in advancing that submission. It appears that the second defendant is contending that the deed of voluntary surrender was only executed to facilitate a sale to the purchasers who had contracted to buy the property in January, 2015 for a sum of €750,000. The plaintiff disputes this and maintains that it was at all material times made clear that the manner and nature of the sale of the property would be in accordance with its internal rules and processes. Assuming for the sake of argument that the second defendant is correct in this assertion, then it appears to the Court that his remedy for such a breach of agreement lies in damages and does not justify what the Court is satisfied on a prima facie basis, is a trespass. The second matter which the second defendant sought to place in the scales on his side was the assertion that this is a family home. The Court has no hesitation in holding that this property ceased to be a family home when the second defendant and his wife executed a voluntary deed of surrender on 9th July 2015. The third matter placed in the scales on the second defendant's side of the balance was his medical condition. This was sought to be relied on, on two grounds; the first as a basis for suggesting that he did not have the requisite capacity to execute the deed of voluntary surrender; the second as a basis for suggesting that the granting of injunctive relief would cause particular hardship for this defendant. As already stated in dealing with the issue of the adequacy of damages, a hotchpotch of medical notes and records has been exhibited in the second defendant's affidavit. The Court has found nothing in the notes or reports to suggest that at the time of executing the deed of voluntary assignment, his mental capacity was in any way impaired. The Court has no doubt that this entire experience must have been stressful for both the second and third defendants but that is not a sufficient basis on which to annul

their voluntary deed. Again the Court repeats that they had the benefit of legal advice at the time of the execution of the deed of voluntary surrender.

13. The submission that the plaintiff's various medical conditions should be put in the balance, if carried to its logical conclusion would mean that proceedings could never be maintained against persons who are undergoing medical treatment. That is not the law. The second defendant has a number of medical conditions which are not exceptional for a man of his age and which in any event, are not on the evidence of medical documentation read by the Court disabling in nature.

14. Finally the second defendant seeks to put in the balance that an injunction would render him homeless. "*Homeless*" is an emotive term which evokes images of people bereft and abandoned. The Court has not one shred of evidence that in the event that it grants this injunction such a fate awaits Mr. May. He has chosen not to share with the Court his current resources, either financial or social. On the evidence he will simply be another person looking for a place to live. The outcome of the granting of an injunction will simply be that he will be compelled to honour the acceptance and acknowledgement given by him in the deed of voluntary surrender that he is debarred from returning or entering upon the property.

15. In the scales of the balance of convenience on the plaintiff's side is the fact that there is an acknowledged, executed deed of voluntary surrender which establishes a *prima facie* property right in the plaintiff, the breach of which will not be met by an award of damages. Somewhat unusually in this case there is a further factor to be added to the plaintiff's side of the scales and that is the rights of the third defendant. She has honoured the deed of voluntary surrender and having done so, is anxious that the property be sold as soon as possible. As matters stand, she has a potential equity in this property which cannot be realised until the property is sold. Every day that passes, the debt increases and her equity diminishes. It is manifestly in her interest that this property be sold. The continuing trespass of her estranged husband is directly damaging her interests. For the forgoing reasons the Court has no doubt that the balance of convenience lies in granting the relief sought so that the second and third defendants' liability to the plaintiff can be discharged and such equity as remains be paid to the third defendant.