

THE HIGH COURT

[2016 No. 3688 P.]

BETWEEN

TOM KAVANAGH

PLAINTIFF

AND

SEAMUS MURPHY

DEFENDANT

JUDGMENT of Mr. Justice Fullam delivered on the 6th day of December, 2016.**Introduction**

1. This is an application for interlocutory injunctions, in prohibitory and mandatory terms, restraining any interference with the conduct of a receivership.

Background

2. The plaintiff is an insolvency practitioner and a partner in Deloitte the accountancy firm.

3. The defendant is the owner of property at Fairgreen Industrial Estate, Summerhill Road, Trim, Co. Meath contained in folios 1 – 738 F and 2302 L Co. Meath. The defendant represented himself at the hearing before me.

4. On 9th December 2003 the defendant executed a Deed of Mortgage and Charge over this property in favour of Bank of Scotland (Ireland) Limited (BOSI) as security for loan facilities per Letter of Offer of 22nd September, 2003. With effect from 31st December 2010 the business of BOSI became vested in Bank of Scotland plc (BOS) by Order of the Scottish Court of Session.

5. By Deed of Appointment dated 22nd April 2014, Bank of Scotland Limited (BOS) appointed the plaintiff receiver over property

6. By deed of assignment of 20th April 2015, BOS assigned its interest in the loan and related security to Ennis Property Finance Limited (Ennis).

7. By facility letter dated 22nd September 2003 BOSI confirmed its offer to the defendant to make available a loan facility of up to €725,000 for the purpose of the defendant's requirements in respect of a separation settlement (€600,000), working capital (€40,000) and the re-financing of other loans (€85,000). The loan was subject to the defendant providing a first specific charge over the property at Fairgreen Industrial Estate and to the General Conditions Applicable to Loan Facilities Provided By BOSI (General Conditions). The defendant signed his acceptance of the offer on the 29th September 2003 and the Deed of Mortgage and Charge on 9th December 2003.

8. The defendant drew down the said loan facilities. The defendant failed to meet his obligations under the terms of the loan agreement. By letter of demand dated 7th April 2014 the BOS demanded the immediate repayment from the defendant of the total sum of €705,071.45. No payment was made on foot of the demand.

9. The Deed of Appointment of 22nd April 2014 was signed by Alexander Wilson, Senior Credit Risk Manager and authorised signatory of BOS.

10. The plaintiff wrote to the defendant on 11th June 2014 notifying him of his appointment and informing him that no further action should be taken by him in relation to the letting, sale and/or collection of rental income in relation to the properties. He directed that all further rental income be directed to the Receivers' Office. On the same date the plaintiff wrote to Securitech Limited of which the defendant was the sole shareholder, on the understanding that it was in occupation of the property. In his letter the plaintiff informed Securitech that he had now taken the place of the landlord and all rent should be payable to him in his capacity as receiver. He requested details of Securitech's tenancy and/or the legal basis of its entitlement to occupy the property. He further advised Securitech that any payments to a previous landlord since 29th May would not discharge the company's liability for rent to the Receivership.

11. The plaintiff says in his grounding affidavit that he made a number of calls to Securitech but received no explanation as to the basis on which it claimed to be entitled to occupy the property. By letters dated 20th June 2014, the plaintiff's solicitors, Byrne Wallace, called on the defendant, the Directors of Securitech and the Occupier of Securitech to provide details of any lease being claimed. No written response was received by the plaintiff.

12. The plaintiff avers that he had an unproductive meeting at his offices with the defendant who was accompanied by a colleague and a legal advisor.

13. Subsequently, on 2nd September, the defendant wrote to the Receiver's Office seeking to view the original Deed of Appointment of the plaintiff and raising issues concerning identity of the owner of the charge at that date. The plaintiff responded by letter dated 11th September affording the defendant an opportunity to view the Deed of Appointment at the offices of his solicitors, Byrne Wallace.

14. By letters dated 9th February 2015 Byrne Wallace wrote to the defendant, the Directors, Securitech Limited, and the Occupier Securitech pointing out the failure to establish the basis of any entitlement to occupy the property and called on them to vacate the property by 5pm on 20th February, failing which the Receiver "would take all appropriate measures".

15. The defendant responded to Byrne Wallace by letter dated 16th February alleging harassment of his tenant and claiming that the plaintiff had ignored his request of 2nd September to view the Deed of Appointment. The defendant said he was consenting to allow the plaintiff "another 10 days to validate his position". Byrne Wallace also received an unsigned letter headed "Securitech" dated 18th February 2015 stating that the property had been "continually leased from December 15th 1998". The plaintiff points out that Securitech Limited was incorporated on 22nd December 2003 some five years subsequent to the commencement of the purported lease. No lease was attached to either letter.

16. Byrne Wallace responded to the two letters on 2nd March enclosing a copy of their letter of 11th September 2014. The Securitech response dated 16th March and signed on behalf of the "Securitech Group", called for the plaintiff to establish the authority of Alexander Wilson to execute the Deed of Appointment on behalf of BOS. A search of the Companies Registration Office indicated that a company named Securitech – U.K. Limited, incorporated in England applied for registration of an Irish Branch Office at Finnigans Way, Trim, Co. Meath. A search of the U.K. Companies Office showed that the sole shareholder of Securitech U.K. was James Murphy of Grange Boyne, Kilmessan, Meath having a date of birth of 8th September 1960. James Murphy resigned as Director and Secretary of the U.K. Company on 31st March 2015. James Murphy has the same address and date of birth as the defendant.

17. In a supplemental affidavit sworn on 21st July 2016 on behalf of the plaintiff, Ms. Karen McCrave, Director of Ennis Property Finance Limited states that no repayments had been received in respect of the defendant's loan accounts since the 18th September 2010 and that no rent has been paid to the receivership since the date of the plaintiff's appointment. Ms. McCrave exhibited three documents evidencing the authority of Mr. Wilson to appoint the plaintiff as receiver, a Power of Attorney of 30th April 2013 given by BOS to Derek Woodhead, Managing Director, Global Non-Core Ireland; a Letter of Nomination dated 1st May 2013 confirming the authority of "each of the Director of Credit Risk Heads of Credit Sanctioning, and Senior Manager(s) of Global Non-Core Ireland as authorised signatory of the Company to sign deeds and documents including: '(m) (Appointment of Receivers and Insolvency Practitioners)'; and a letter from Mr. Wilson dated 18th July 2016 signed as the Director – Ireland Client Asset Management. The letter states that as of the 22nd April 2014 he was a Senior Credit Risk Manager of the Bank and the Deed of Appointment was signed by him in his capacity as a Senior Credit Risk Manager.

Summary of the plaintiff's case

18. In essence the plaintiff submits that his appointment as receiver of the secured property is valid in accordance with the agreements and documents executed by the defendant and that he and his staff are being obstructed in carrying the functions of the receivership.

It is submitted that the plaintiff is entitled to the interlocutory junctions sought on whichever test is applied, be it a standard test of a serious or *bona fide* question to be tried as set out in *American Cyanamid v. Ethicon* [1975] AC396 endorsed in this jurisdiction in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 or the more onerous test of whether the plaintiff has made out a strong prima facie case in line with *Maha Lingam v. The Health Service Executive* [2006] 17 ELR 137. The plaintiff submits that there is no denial by the defendant that the money was lent or that the significant amount stated to be outstanding is not due.

The defendant has refused to yield up possession to the plaintiff.

The plaintiff submits that if he does not obtain possession of the property it may be inevitably impaired and in the circumstances it is urgent that it be sold.

17. It is submitted that damages would not be an adequate remedy for the plaintiff. The defendant has not shown that he will be in a financial position to discharge any significant damages and costs. In that regard the defendant has averred that the property is his source of income and pension fund.

As regards the balance of convenience, it is in the immediate financial interest of all parties that the secured property be sold and in the defendant's particular interest to discharge his indebtedness on which interest continues to accrue.

The Defences

1 The plaintiff was not validly appointed receiver of his property;

The defendant says that Mr Wilson was not an employee of the original appointing Bank. The plaintiff exhibits the chain of authority by which Mr Wilson was authorised to execute the Deed of Appointment.

Paragraph 8.1 of the Deed of Mortgage and Charge signed by the defendant provides:-

"At any time after the power of sale has been exercisable whether or not the bank has entered into or taken possession of the Secured Assets or at any time after the Mortgagor so requests the bank may from time to time appoint under seal or under hand of a duly authorised officer or employee of the bank any person or persons to be receiver and manager or receivers and managers of the Secured Assets or any part or parts thereof and from time to time under seal or under hand of a duly authorised officer or employee of the bank removing any receiver so appointed and may so appoint another in his stead."

The defendant further asserts that as BOS was domiciled in Scotland and governed by the laws of Scotland, any purported power of attorney would have to be granted under Scottish law.

2 The defendant says he did not consent to the sale of his mortgage and charge to Ennis Property Finance Limited

Clause 14.2 of the General Conditions provides:

"The bank may at any time, without the prior consent of the Borrower, assign novate or transfer any of its rights and benefits and transfer any of its obligations under any of the Finance Documents to any person, firm or company or subparticipate or subcontract any of its rights or obligations under the Finance Documents."

3 The property is fully insured and the subject of a valid lease to Securitech U.K.; the lease and tenant are in situ since 1992 and BOSI were aware of that.

The plaintiff says that the defendant's evidence is contradictory as to the identity of the occupier and the basis of any entitlement to occupation, in that he has also claimed that a lease of 15th December 1998 is effective. That lease was for a term of 6 years to AED Limited a company of which the defendant was sole shareholder. The lease expired in 2004. AED has been struck off. Furthermore, the plaintiff avers that the defendant is in breach of the Deed of Mortgage and Charge. Clause 4 thereof provides:

"4 Negative Pledge

The mortgagor shall not during the continuance of this Deed except with the prior written consent of the Bank:

1. create, extend or permit any encumbrance over the Secured Assets or any of them ranking in priority to or pari

passu with or after the security hereby created; or

2. part with, sell, transfer, lend, lease or otherwise dispose of, whether by means of one or of a number of transactions related or not and whether at one time or over a period of time, the whole or any part of the Secured Assets."

4 The property is the defendant's income and pension fund and he would be extremely prejudiced and disadvantaged if the plaintiff should unlawfully gain possession of it.

5 The defendant asserts that the plaintiff's undertaking as to damages is insufficient as he does have any assets or liquidity at his disposal to support any claim for damages in the future.

6 The defendant asserts that the value of the property is not diminishing, the market is rising and therefore no urgency arises.

The Law

18. The test for the grant of an interlocutory injunction is set out by the Supreme Court in *Campus Oil Limited v. Minister for Industry and Energy* (No. 2) [1983] I.R. 88 at 107 per O'Higgins CJ:-

"In my view the test to be applied is whether a fair bona fide question has been raised by the person seeking the relief. If such question has been raised, it is not for the court to determine that question on an interlocutory application, that remains to be decided at the trial. Once a fair question has been raised ...then the Court should consider the other matters which are appropriate to the exercise of its discretion to grant interlocutory relief. In this regard I note the view expressed by Lord Diplock in American Cyanamid Co. v Ethicon Ltd. I merely say that I entirely agree with what he said."

The other matters that must be considered are whether an award of damages would be inadequate to compensate the applicant for any loss he or she might suffer if an injunction is not granted, and whether the balance of convenience favours the grant, rather than the refusal of the injunction or injunctions sought.

19. As regards whether reliefs framed in mandatory terms should be subject to a stricter test, Laffoy J. said in *Kavanagh & Ano. v. Lynch & Ano.* [2011] IEHC 348 at para. 7.6:

"Although some of the reliefs sought on the notice of motion have been formulated in mandatory terms, I consider that the orders sought by the plaintiffs directing the defendants to deliver up keys, alarm codes and such like and the documentation evidencing the rights of third parties to portions of the properties the subject of the securities, such as copies of leases and licence agreements, are, in reality, ancillary to a primary reliefs sought by the plaintiffs which, in substance, are prohibitory, in that they are seeking to restrain the defendants' trespass. Therefore, I am of the view that the plaintiffs do not have to show that they have "a strong case" that they are likely to succeed at the hearing of the action, in line with the decision of the Supreme Court in Maha Lingham v. Health Service Executive [2006] 17 ELR 137. Having said that, I am of the view that they have demonstrated that they have a strong case."

Discussion

20. The court considers that the mandatory reliefs sought by the plaintiff in this case are, in reality, ancillary to the primary prohibitory reliefs and the plaintiff does not have to show that he has a strong case.

1 Fair bona fide question to be tried

The plaintiff has raised a fair and *bona fide* question to be tried concerning the validity of his appointment as receiver and his entitlement to exercise his functions as receiver. While it is not for the court at the interlocutory stage to decide questions of fact or law, it is clear that the defendant has not surrendered possession of the secured property to the plaintiff and will not do so unless directed by the court. It is not disputed that the defendant provided security for the underlying loan. Nor is it disputed that the amount demanded on foot of the mortgage, in excess of €700,000, has not been paid. No repayments have been made on the loan for six years. Neither is it disputed that the documents executed by the defendant provide for the power to appoint receivers, the formalities for doing so and also for the assignment of the security and underlying loans. The defendant has raised technical objections to the formalities of the plaintiff's appointment and to the failure to obtain his consent to the assignment of the underlying loan. The defendant's evidence as to the identity of the corporate emanation controlled by him which is in occupation of the property has been insufficient and contradictory. The defendant's arguments have not been such as to persuade the court that the plaintiff has not raised a serious/fair *bona fide* question to be tried or indeed satisfied the higher test of a clear and strong *prima facie* case.

2 Adequacy of Damages

21. It is clear that an award of damages would be of no benefit to the plaintiff as the defendant would not be in a position to meet any substantial judgment together with costs. The defendant has made no repayments on the loan for six years. In this regard the Court notes from an earlier judgment of this court (Keane J) in a similar case, *Thomas Mc Carthy v Seamus Murphy*, that the defendant has further significant indebtedness to another financial institution.

3 Balance of Convenience

22. As far as the balance of convenience is concerned, given the defendant's indebtedness it is in the interests of both parties that the property be sold to discharge that indebtedness and the interest which continues to accrue.

The plaintiff has given an undertaking as to damages as a member of a significant accountancy firm, his capacity to meet any judgment against him is not in doubt.

Decision

23. I will grant the orders sought.