Neutral Citation: [2017] IEHC 178

THE HIGH COURT

COMMERCIAL

[2017 No. 220 P.]

BETWEEN

DONORE GARAGES LIMITED AND PAUL O'REILLY

PLAINTIFFS

AND

STEPHEN TENNANT

DEFENDANT

THE HIGH COURT

COMMERCIAL

[2016 No. 9493 P.]

BETWEEN

DONORE GARAGES LIMITED AND PAUL O'REILLY

PLAINTIFFS

AND

ENNIS PROPERTY FINANCE LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 9th day of March, 2017

1. There are two related proceedings concerning the plaintiffs. In the first proceeding record number [2017 No. 220 P.] the plaintiffs seek orders restraining the defendant from entering upon the premises at 50 Patrick Street (which includes 31 and 31A Kevin's Street) ("the premises") in his capacity as receiver and from collecting rent from tenants in the premises and otherwise interfering with the plaintiffs' quiet enjoyment of them.

2. The related proceedings bearing record number [2016 No. 9493 P.] brought by the same plaintiffs against Ennis Property Finance DAC seek specific performance of an alleged contract relating to the premises and/or damages. Both proceedings have been consolidated.

3. Two interlocutory applications before the court and both relate to proceedings bearing record number [2017 No. 220 P.]. The plaintiffs' motion before the court is for the following relief:-

(a) an injunction restraining the defendant from selling or marketing for sale the premises;

(b) an injunction restraining the defendant from endeavouring to collect rent from the premises;

(c) an injunction directing the defendant, his servants or agents and any person acting in concert with him to forthwith deliver up vacant possession of the premises to the plaintiff;

(d) an injunction restraining the defendant, his servants or agents and any person acting in concert with him from interfering with and/or preventing the plaintiffs or their servants or agents from entering onto the premises;

(e) an injunction restraining the defendant, his servants or agents and any person acting in concert with him from entering onto the premises or interfering with the plaintiffs' quiet enjoyment of same;

(f) an injunction restraining the defendant, his servants or agents and any person acting in concert with him from entering onto the plaintiffs' premises and interfering in any way with the tenants therein and their quiet enjoyment of the premises;

(g) an injunction restraining the defendant, his servants or agents and any person acting in concert with him from removing all locks all replaced by him on the plaintiffs' premises; and

(h) an declaration that the defendant has been improperly appointed as receiver over the premises.

4. The second application in these proceedings is brought by the defendant, as receiver, seeking the following orders:-

(a) an interlocutory injunction requiring the plaintiffs, their servants and/or agents forthwith to surrender vacant possession of the property to the defendant;

(b) an interlocutory injunction restraining the plaintiffs, their servants and/or agents from preventing, impeding and/or obstructing the defendant, his servants or agents from securing, taking possession of, getting in and collecting vacant possession of the property;

(c) an interlocutory injunction restraining the plaintiffs, their servants and/or agents from collecting, or attempting to collect the rents for the property;

(d) an interlocutory injunction restraining the plaintiffs, their servants and/or agents from trespassing upon, entering upon

or otherwise attending at the property;

(e) an interlocutory injunction restraining the plaintiffs, their servants and/or agents from interfering with the functions and office of the defendant as receiver of the property;

(f) an interlocutory injunction directing the plaintiffs, their servants and/or agents to deliver up to the defendant, his servants or agents forthwith, possession of the keys, alarm codes, locks and other security and access devices and equipment in respect of the property;

(g) an interlocutory injunction directing the plaintiffs, their servants and/or agents to account for all purported rents and other payments paid/received or to be paid/received in respect of the property since the appointment of the defendant as receiver on 8th December, 2016, in respect of the property and an order requiring the plaintiffs, either or all of them to pay over the same to the defendant forthwith;

(h) an interlocutory injunction directing the plaintiffs, their servants and/or agents to deliver up forthwith all books and records held by them relating to the property, including all documents relating to title to the property;

(i) an interlocutory injunction directing the plaintiffs, their servants and/or agents not to impede and/or obstruct the defendant in his efforts to market the property for sale; and

(j) an interlocutory injunction directing the plaintiffs, their servants and/or agents not to hold themselves out as having any entitlements to sell, rent, deal with or otherwise grant any entitlement to possession of the properties.

5. It was agreed between the parties that I should deal with the injunction motions as one composite hearing and that the plaintiff would proceed first. The starting point of the plaintiffs' application is that they challenge the authority of the defendant as receiver and rely on the decision of Murphy J. in *English v. Promontoria (Aran) Limited* [2016] IEHC 662, where the learned judge granted a stay on the appointment of a receiver where Promontoria (Aran) Limited asserted that it had purchased loans but not establish its legal right to appoint a receiver.

6. Although there was evidence strongly suggestive of the fact that the defendant had been duly appointed as receiver, the exhibited copies of the deed of conveyance and assignment of the loan between Bank of Scotland plc and Ennis Property Finance Limited did not have a signature of the parties to the agreement. At para. 20 of his affidavit sworn on 30th January, 2017, Mr. Jonathan Hanly stated:-

> *"Ennis acquired the interest of the bank under the loan facilities advanced to the plaintiffs and to Loshian Limited and the related security in respect of the secured properties pursuant to a loan sale deed dated 29th July, 2015, as amended and restated on 12th November, 2015, made between the bank of the first part and Ennis of the second part and pursuant to deed of conveyance and assignment dated 20th November, 2015, made between the bank of the first part and Ennis of the second part. I beg to refer to a true copy loan sale deed and true copy deed of conveyance and assignment which had been redacted on grounds of commercial sensitivity upon which marked with the letters and numbers 'JH9' and 'JH10' I have signed my name prior to the swearing hereof."*

7. While the copy exhibit JH9 was not executed and this became a significant issue at the hearing of the motion, the defendant's solicitor made inquiries during the hearing to see if the original could be found and whether or not it had been executed. Over the lunch break, an affidavit was sworn by Mr. Alan O'Sullivan, a solicitor and partner of Hayes Solicitors who are the solicitors for the defendant. In that affidavit, he said that having made inquiries that a true copy of the amended and restated purchase deed which was exhibit JH9 in Mr. Hanly's affidavit was furnished to him by Arthur Cox Solicitors for Ennis Property Finance DAC, the assignee of the loan in relation to the acquisition of the relevant loan portfolio from Bank of Scotland. He said that a true copy of the amended and restated purchase deed of 12th November, 2015, was furnished to him by Arthur Cox on Friday, 3rd March, 2015, and it was confirmed to him by Arthur Cox that this was a true copy of the original. He then exhibited a copy of the amendment and restatement deed of 12th November, 2015, which shows that the document was duly executed by Mr. Hanly on behalf of Ennis Property Finance DAC. For the purpose of the interlocutory hearing, this disposed of any doubt about the execution of the loan transfer and I am satisfied from the evidence adduced by the defendant at the hearing of the motion that the defendant has been duly appointed as receiver.

8. The other main plank of the plaintiffs' argument on the hearing of the motions was that the plaintiffs had entered into a binding agreement with Bank of Scotland in 2014, to buy out their loans at agreed prices and that ten of eleven properties at issue in the loan sales have now been purchased. While there was no dispute that the plaintiff had purchased back ten of the eleven properties, the defendant vigorously disputes the agreement contended for by the plaintiff.

9. There is no dispute that the plaintiffs have failed to pay a final amount of £285,000 due in respect of the premises and which was necessary to release security on the upper floors of the premises. In order to explain what is meant by "the upper floors" of the premises for the purpose of this application, it is necessary to briefly set out some factual material concerning the relationship between the plaintiff and Bank of Scotland who were the original holders of the loan.

10. The premises at 50 Patrick Street and 31 and 31A Kevin Street ("the premises") comprise Nash's pub and the upper floor properties. These premises were originally acquired by Loshian Limited. The property is subject to a 999 year lease between Dublin City Council and Loshian. In or around November 2004, the first named plaintiff acquired the upper floor properties from Loshian and, as part of that arrangement, the consent of Dublin City Council was required to assign that part of the lease which pertained to the upper floor properties.

11. In June 2005, the first named plaintiff mortgaged its interest in the upper floor properties to the bank and around the same time Loshian provided the bank with a mortgage in respect of its legal ownership of Nash's pub in order to secure borrowings. In April 2010, the bank appointed Mr. Michael McAteer of Grant Thornton to be receiver and manager over certain assets of Loshian including Nash's pub. Between December 2013 and March 2015, the plaintiffs and the bank entered into discussions where it was envisaged that, subject to certain conditions, if the plaintiffs remitted funds in the sum of €2,100,000, the bank would release the security it held over eleven properties belonging to the first named plaintiff. One of these properties included the upper floor properties. The sum of €2.1m represented a substantial discount on the monies actually due and owing by the first named plaintiff to the bank.

12. The dispute between the parties centres around whether or not there was a binding agreement between the bank and the plaintiffs which is still in existence. The plaintiffs claim that the delay in paying off the outstanding sum of €285,000 is due to

deficiencies in the title to the premises which are outside the control of the plaintiff but have now been rectified by the Loshian receiver and the defendant in these proceedings. Although these matters were rectified around August 2016, the plaintiff only became aware of this recently and there has been no satisfactory explanation given for that delay.

13. As these applications involve the parties seeking injunctive relief, the court cannot, at this stage, make any final findings. The parties are agreed that the principles laid down by the Supreme Court in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88, apply and that the court has to consider the following matters:-

> (a) whether a fair, bona fide, question to be tried has been raised by the plaintiffs;
>
> (b) whether, if the plaintiffs were to succeed at the trial, they would be adequately compensated by an award in damages;
>
> (c) whether, if the defendant was successful at the trial, he could be adequately compensated by the plaintiffs' undertaking as to damages for any loss which he would have sustained by reason of the grant of the interlocutory relief; and
>
> (d) if there is a question as to whether damages would be an adequate remedy for either party, whether the balance of convenience lies in favour of the award or the refusal of an interlocutory injunction.

Is there a fair issue to be tried?

14. The plaintiffs contend for an open ended agreement to buy out the loans of the first named plaintiff. It is accepted that insofar as the bank entered into any arrangement with the plaintiffs, it did so on the basis of a substantial discount on the debt. The defendant has relied on a number of documents which have established quite clearly that there was no open ended agreement and that the arrangement for the payment down for the debt on a very much reduced basis was on the understanding that it would happen quickly.

15. A letter of 31st December, 2013, from the bank to the second named plaintiff refers to proposals made by the second named plaintiff to the bank. It declined an offer made by the plaintiffs but stated that the bank would be willing to accept an amount of €2,100,000 in full and final settlement of the loan accounts "*strictly conditional upon acceptance of and compliance with the following conditions*":-

> (1) Funds of €2.1m are to be remitted to the bank no later than 28th February, 2014.
>
> (2) Upon receipt of these funds the bank will release its charges over the properties.
>
> (3) The plaintiffs will continue to remit rental income of €15,000 to the bank in the interim.
>
> (4) The plaintiffs to liaise with their selling agent and manage the sales of certain properties which are not the subject matter of this dispute.

16. In an email of 17th June, 2014, from the representative of the bank to the plaintiffs' advisor, Mr. Brian Tuite, and the second named plaintiff, it was made clear that the bank approved the proposed settlement on the basis of a "*quick exit which has been extended several times*". The second named plaintiff and his advisor were informed that the bank was pressing to conclude the deal within a month and the email concluded:-

> *"In summary, Certus will not recommend to the bank that the expired deal be renewed unless concluded by the end of this month."*

17. That clearly conveyed to the plaintiffs the fact that any arrangement or agreement that was in place, had expired, and it would not be renewed unless it was concluded within one month. There is a certain ambiguity in that statement because if the agreement could be concluded within a month it seems to suggest that it had not expired, but may have had a month to run.

18. Be that as it may, on 14th January, 2015, the bank wrote to the second named plaintiff stating that it was still awaiting receipt of the residual settlement sum of €285,000 from the total settlement of €2,100,000. The bank pointed out that the delays on the part of the plaintiffs in discharging the indebtedness were excessive in the light of the large discount that the bank had agreed on the overall settlement. The letter contained the following paragraph:-

> *"Given the above position, the bank are requesting the remaining balance (€285,000) to be received no later than 13th March, 2015. Following the state, the bank would seek to have the property re-valued and will be seeking an increase on the pricing or an alternative strategy."*

19. On 25th May, 2015, Mr. Michael Harnett of Certus sent another email to the second named plaintiff and the plaintiffs' advisor which stated, *inter alia*:-

> *"It was noted that the extension to the Donore Garage Limited settlement (part of the overall €2.1m settlement) had expired for the second time as 13th March, 2015 and as such, there is currently no agreement in place. I am recently aware of other settlements not being extended again or re-priced. Also relevant is the fact that:-*
>
> *(i) the bank is in a different place in terms of exit strategies than they were in December 2013 (time of original settlement agreement);*
>
> *(ii) asset values have increased; and*
>
> *(iii) large discounted settlements to (sic) not appear to be available."*

20. In the face of such correspondence, it is difficult to see how the plaintiffs can maintain that there is an ongoing agreement which would prevent the receiver acting on foot of his authority. While I accept the plaintiffs' complaint that the resolution of the title issue in respect of the premises should have been notified to them by at least last September, this does not affect the views I have just

expressed. While the court cannot make any final determination at this stage, I am satisfied on a prima facie level that the correspondence relied on by the defendant is very clear in its terms and makes any settlement of the loan accounts strictly conditional upon certain events taking place. A letter of 31st December, 2013, states that the arrangements with a view to settling the loans does not and will not constitute a consent or waiver of any right or remedy that the bank may have under the finance documents or otherwise.

21. In *Tyrell v. Wright* (Unreported, Costello J., 17th February, 2017), the learned judge cited with approval the following passage from Keane J. in *Equity and the Law of Trusts in the Republic of Ireland* where the former Chief Justice stated:-

> *"It was always open to the representor to give notice to the representee that he was withdrawing the concession and, provided the notice was reasonable, the concession was then legally withdrawn. Generally speaking, therefore, the estoppel is not permanent in its effects. Thus, an agreement by a creditor to accept a smaller sum in discharge of a debt remains unenforceable; under the decision in Foakes v. Beer, the creditor is not estopped from claiming the full amount by his promise to accept a smaller one. It is, however, generally accepted that there is a category of cases in which a temporary estoppel may become permanent where events make it impossible to restore the parties to their previous positions."*

22. In this case, the bank clearly gave notice of a deadline for the payment of the outstanding sum and that deadline has not been met.

23. It seems to me that there is no fair issue to be tried on this point.

Are damages an adequate remedy for the plaintiffs?

24. Having heard the evidence and submissions in this case, I am satisfied that damages are an adequate remedy for the plaintiffs. In the first place, the proceedings concern a commercial investment property. Secondly, both in correspondence and on affidavit, the plaintiffs have stated that they are willing to see the property sold. In an open letter of 10th February, 2017, the plaintiffs confirmed that a sale price in excess of €1.4m acceptable to them. This is in circumstances where the receiver has now indicated that he had received expressions of interest in relation to the property of in or around €1.6m. In those circumstances, it is untenable for the plaintiffs to submit that damages would not be an adequate remedy.

Balance of Convenience

25. The plaintiffs put the receiver on proof that he was properly appointed. For the purpose of this interlocutory hearing, I do not have to reach any final view on that. But I am satisfied that there is *prima facie* evidence of the valid appointment of the receiver. On that basis, the balance of convenience would lie in favour of the receiver being entitled to carry out his duties and take possession of the property and, if necessary, sell it. It is true that the second named plaintiff has indicated that he would like the first named plaintiff to retain the property ultimately for the benefit of his family but neither of the plaintiffs have shown any prejudice to them if the receiver were to carry out his functions with regard to the property. The balance of convenience clearly favours a refusal of an injunction being granted to the plaintiffs in this case. So far as the defendants cross application is concerned, the balance of convenience favours him being granted the orders which he seeks to secure his possession of the premises and restrain the defendant from interfering with his rights as receiver.

Application to vacate the lis pendens

26. The plaintiff have registered *lites pendentes* in respect of each set of proceedings and the defendant in his application in these proceedings seeks an order vacating the lites pendentes.

27. The parties are in agreement that the law relating to vacating a lis pendens has been codified in Part 12 of the Land and Law Reform Conveyancing Act 2009. Section 123 states:-

> "Subject to section 124 , a court may make an order to vacate a lis pendens on application by—
>
> …
>
> (b) any person affected by it, on notice to the person on whose application it was registered—
>
> (i) where the action to which it relates has been discontinued or determined, or
>
> (ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted *bona fide*."

28. The defendant claims that the action has not been prosecuted *bona fide*. He also argues that a *lis pendens* can only be registered in proceedings in which the party registering has a bona fide claim to an estate or interest in land. In *Gannon v. Young* [2009] IEHC 511, Laffoy J. held that:-

> *"The test on this application is whether, in the changed circumstances, the defendants are now bona fide prosecuting their claim against the plaintiff in the plenary proceedings. Clearly, if their claim is doomed to failure, they are not."*

29. In *Kelly v. IBRC* [2012] IEHC 401, Ryan J. (as he then was) held that the plaintiff's failure to suggest a basis upon which to advance a claim as to interest in the property at issue constitutes an abuse of process.

30. In the matter before me, the defendant argues that the plaintiff's claim is bound to fail. He also argues that even if the plaintiff establishes an arguable case, it is not the type of case in which a *lis pendens* could or should be registered because the party registering it has to have a claim against the title. In respect of the premises at issue, the ground floor is owned by Loshian Limited. So far is the remainder of the property is concerned, the first named plaintiff is the registered owner so the issue of a *lis pendens* would not arise in respect of its existing ownership. The receiver is not the owner and does not claim ownership as against the first named plaintiff.

31. In *Mooreview Developments Limited v. First Active plc* [2011] 1 I.R. 117, Clarke J. held that a party cannot register *lis pendens* against a receiver. Neither could the plaintiffs register a *lis pendens* against Ennis Property Finance DAC who are the defendants in

the other proceedings which have been consolidated with this action because Ennis is the lender and not the owner.

32. As long as the *lites pendentes* remain on the register, the receiver cannot deal with the property or, at best, will be hampered in doing so as some prospective purchases might be put off. On the facts before the court and even allowing for the issues in dispute on the pleadings, I can find no legal basis on which the *lites pendentes* registered in respect of the property should be allowed to stand.

Mandatory nature of relief sought by the defendant

33. It is clear that the defendant's application for injunctive relief includes both prohibitory injunctions and mandatory injunctions. The judgment of O'Higgins C.J. in the *Campus Oil* case, makes it clear that while a mandatory injunction does not usually issue prior to the trial of an action, there are exceptions and each case must be dealt with on its own facts. I accept that the court should be cautious before giving a mandatory injunction at interlocutory stage.

34. I am satisfied, however, that this is an appropriate case in which to grant the mandatory relief sought by the defendant in his application. I have reached this decision for two reasons. In the first place, it is necessary in order to enable the receiver to carry out his functions with regard to the property pending the final resolution of the dispute, in circumstances where damages are an adequate remedy to the plaintiffs and they have already agreed, in principle, to the property being disposed of by him. Secondly, there is strong *prima facie* evidence of the appointment of the receiver and the plaintiffs accept that the balance of €285,000 remains due and owing. If the court were to refuse the defendant's application for a mandatory injunction and merely grant the defendant those injunctions which he seeks of a restraining nature it would severely compromise his ability to get the best price for the property and would largely frustrate the effect of the order.

Undertaking as to damages

35. It is not necessary for me to consider whether or not the plaintiffs are capable of meeting an undertaking as to damages in view of my decision on these motions. So far as the defendant is concerned, there is no credible evidence to suggest that he is not capable of meeting an undertaking as to damages. If the plaintiffs wished to make any serious suggestion in that regard, I would have expected some cogent evidence on affidavit. This was not forthcoming. The defendant is a receiver of some experience and is known to the court and is a member of a large firm of accountants. In the absence of any evidence to the contrary, I am prepared to accept that he will be able to meet an undertaking as to damages.

Conclusions

36. My determinations on issues of fact are made on the basis of motions for interlocutory relief and are not final determinations on the issues between the parties. They are made in the context of the test laid down in *Campus Oil (No. 2)*. On the state of the evidence at this stage, and for the purpose of the plaintiffs' motion, I take the view that the plaintiffs do not have a good arguable case. I am also satisfied damages are an adequate remedy for the plaintiff and that the balance of convenience favours the refusal of an injunction to the plaintiffs and the granting of injunctive relief to the defendant. While I accept that the Defendant has not, at this stage, satisfied me that the Plaintiffs' claim is bound to fail, I am unable to find any legitimate basis for the registration of the *lites pendentes* and I direct that they be vacated. I am also satisfied on the state of the evidence at this stage, the proceedings have been brought with a view to frustrating the receiver from carrying out his duties. If the court was to defer its decision on vacating the *lites pendentes* until the trial of the action, it would defeat the other orders made in favour of the receiver to a large extent. I, therefore, hold that it is necessary to rule on that issue now rather than later. In any event, I see no prejudice to the plaintiffs in so doing as they have agreed in principal to the property being sold at a certain figure and damages are an adequate remedy.

37. I refuse the plaintiffs' application for relief and I will grant the defendant the relief sought at paras. (a) – (j) of the notice of motion dated 30th January, 2017.