

THE HIGH COURT

[No. 2019/8023 P.]

BETWEEN

FLOR CROWLEY

PLAINTIFF

AND

**PROMONTORIA (OYSTER) DAC, DONAL O’SULLIVAN, JOHN BURKE
AND DAVID O’CONNOR, RECEIVER**

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 22nd day of June 2020.

1. In these proceedings, which were initiated on 16th October, 2019, the plaintiff makes a number of complaints against the defendants in respect of the enforcement of a security which the first named defendant contends that it owns, in relation to a property at 7 Sallins Grove, Sallins Park, Sallins, Co. Kildare (“the property”). The security was contained in a “deed of mortgage” of 29th July, 2002 made between the plaintiff and First Active plc.
2. The first defendant is a designated activity company which contends that it now owns the charge in question. The second and third named defendants are directors of the first named defendant, and the fourth named defendant is an insolvency practitioner who was appointed Receiver to the property by an instrument of appointment dated 2nd October, 2019.
3. In the plenary summons, the plaintiff claims various breaches of duty, breach of contract, “false and/or fraudulent accounting” and other causes of action. While the plenary summons does not contain any pleas for relief, a statement of claim has now been served in which damages, including aggravated and/or exemplary damages, is being sought for a wide range of alleged causes of action.
4. The present application before the court is the plaintiff’s motion for the following reliefs:
 - “(1) An Order or Orders, requiring that the fourth named defendant, as a matter of urgency, Mr. David O’Connor, purported Receiver over certain of my assets [sic], provide full documentary proof of which entity appointed him as alleged receiver over certain of my assets [sic], namely Ulster Bank (Ireland) Limited, as in proceedings record No. 2013/EJ 112, or Promontoria (Oyster) DAC as in High Court record No. 2018/173CA
 - (2) An Order or Orders requiring the hearing first named Defendant Promontoria (Oyster) DAC, to provide full, unredacted documentary proof of the powers and/or rights as relied upon on by them to validly and lawfully appoint the fourth named defendant as alleged receiver to the plaintiff’s assets, and/or to permit him and, his servants or agents to enter upon, and take purported possession of the plaintiff’s property at 7 The Grove Sallins Park Sallins Co. Kildare.

- (3) An Order that the purported receiver David O'Connor be removed with immediate effect pending the provision, full analysis and verification of the information sought above, and for rectification and/or restitution by Mr O'Connor of any damages/costs/losses caused to the plaintiff and any of his assets pursuant to Mr O'Connor's actions and/or those of his servants/agents Namely Steven Moran of Donore Multyfarnham, Co Westmeath in claiming alleged vacant possession of the plaintiff's property, with said restitution to be done within 7 days from the granting of such Order and if the said order is granted and the receiver does not comply that the court order grant the plaintiff's requests permission to remove the hoarding and repair any damage to the property and bill David O Connor for his outlay and cost to achieve this remedy.
 - (4) Any other Order or Orders such as this Honourable Court should deem just;
 - (5) An Order for expenses and outlay of this application."
5. It is clear from the affidavits sworn in the course of the application that the Receiver has purported to take possession of the property. The plaintiff made reference to being in occupation of the property, but did not gainsay the assertion of counsel for the defendants that the property was not his family home and was in fact a "buy to let" property. It seems that the Receiver's efforts to secure the property have encountered difficulties, ultimately causing the Receiver to instruct his servants or agents to secure the property and to cause the property to be steel-shuttered. The side gate to the property has been damaged, and an agent of the company acting for the Receiver has secured the gate with a lock and chain, the locks previously installed by the Receiver having been changed by persons unknown.
6. The plaintiff swore an affidavit on 5th December, 2019. This affidavit sets out certain grounds for the application. During the course of the two-day hearing, the plaintiff, who represented himself at the hearing, refined his arguments, which may be summarised as follows:
 - (1) The first named defendant, which purported to appoint the fourth named defendant as Receiver in relation to the assets of the plaintiff, "deliberately misled this honourable Court into the belief that [the first named defendant was]... the true party of interest in regard to certain loans and facilities secured over certain of [sic] the plaintiff's assets" [para. 2 grounding affidavit]. Effectively, the plaintiff alleges that the first named defendant cannot establish the "chain of title" to show that it is the holder of the charge over the plaintiff's property and thus entitled to appoint a Receiver.
 - (2) The plaintiff raises a number of points about what he alleges are technical flaws in the appointment of the Receiver.
 - (3) The plaintiff maintains that the appointment of a Receiver is an abuse of process, as Circuit Court Proceedings in which Ulster Bank, prior to the transfer of the

security to the first named defendant, sought possession against the plaintiff remain extant.

7. The second and fourth named defendants swore affidavits in response to the plaintiff's grounding affidavit. In addition, a Mr. Stephen McKeever, who is the Head of Asset Management (Ireland), which is employed by Link ASI Limited, a company providing loan administration and asset management services to the first named defendant, also swore an affidavit in support of the first named defendant's position.
8. The plaintiff swore an affidavit on 15th December, 2019 in which, *inter alia*, he made complaint about actions taken by the Receiver involving the boarding up of the property. The plaintiff also swore an affidavit on 6th February, 2020 which was more in the nature of a legal submission than relating to the facts of the matter.
9. Both sides made detailed legal submissions in support of their respective positions. I have considered these submissions, both written and oral, in coming to my decision.

The first named defendant's title.

10. The background to the loan to the plaintiff and the security created is set out in the affidavit of Donal O'Sullivan, the second-named defendant of 14th January, 2020. First Active plc ('First Active') issued a facility letter on 27th March, 2002 by which it agreed to advance the plaintiff a loan facility in the amount of €165,700 in order to purchase a residential investment property. In 2004, First Active agreed to advance to the plaintiff a top-up loan facility in the amount of €59,500 in connection with the original facility. One of the terms and conditions applicable to the facility letter was that the facility would be secured by a first legal charge on the property. It is not disputed by the parties that this charge was executed on 29th July, 2002.
11. By the Central Bank Act 1971 (Approval of Scheme of First Active plc and Ulster Bank Ireland Limited) Order 2009 (SI 481/2009), First Active transferred its business to Ulster Bank Ireland Limited ("Ulster Bank"). The first named defendant contends that this transfer included the facilities and charge the subject of the present proceedings. Ulster Bank subsequently converted into a designated activity company in May 2016.
12. The first named defendant contends that, by way of a global transfer of 19th December, 2016 between Ulster Bank Ireland DAC, Ulster Bank Limited and the first named defendant, the right title and interest of Ulster Bank in the facilities the charge and all other rights connected therewith were transferred to the first named defendant. The global deed of transfer was exhibited to the second named defendant's affidavit, but it was heavily redacted. The entries of the facilities and the charge in the schedules to the deed were exhibited.
13. Significantly, the first named defendant was registered on 9th March, 2017 on the folio of the property as the owner of the charge executed by the plaintiff in respect of the property.

14. The plaintiff takes issue with this chain of title. He argues that the statutory instrument of 2009 referred to "business" being transferred from First Active to Ulster Bank, and "excluded business" which was not to be transferred, and which was set out in one of three schedules to the statutory instrument. The plaintiff stated that it had not been shown whether the facilities relating to his property were transferred or excluded.
15. The plaintiff also drew attention to a form C1 (registration of a charge) of 19th December, 2016 which was registered in the Companies Registration Office. The plaintiff alleged that this form C1 showed that the first named defendant had in fact charged its property in favour of an entity known as Mount Street Mortgage Servicing Limited ("MSMSL").
16. It was argued that the charge referred to "mortgaged property" and that this involved an assignment in favour of MSMSL of the full benefit of rights, title and interest in "related property rights". While the purpose of this document was unclear, the plaintiff submitted that it suggested that the first named defendant had divested itself of the rights in the charge, and therefore could not appoint a Receiver pursuant to that charge.
17. In relation to the circumstances in which the fourth named defendant was appointed, the plaintiff drew attention to references by the fourth named defendant in different items of correspondence variously to a "deed" of appointment and an "instrument" of appointment. The document proffered by the fourth named defendant himself was entitled an "instrument of appointment". The plaintiff noted that the second named defendant's execution of this instrument was not dated, whereas the confirmation of the fourth named defendant's acceptance of his appointment was dated by him as 2nd December, 2019 at 4 o'clock in the afternoon.
18. The plaintiff submitted that the first named defendant had not established that the execution of the document preceded the fourth named defendant's acceptance of his appointment, that this was an ambiguity, and that this ambiguity should be construed *contra proferentem*, rendering the instrument of appointment void.
19. The plaintiff also submitted that the appointment by the first named defendant of the fourth named defendant as Receiver was an abuse of process, and should not be permitted. The background to this allegation is summarised at paras. 25-31 of the affidavit of Mr. McKeever. It seems that Ulster Bank issued Circuit Court proceedings against the plaintiff seeking possession of the property on 27th August, 2013. In February 2015, the County Registrar in Naas made an order for possession in favour of the bank. In May 2018, Judge O'Donoghue affirmed the Possession Order made by the County Registrar and substituted the first named defendant as plaintiff in the Circuit Court proceedings. Ultimately, the plaintiff appealed the Possession Order to the High Court, and on 18th July, 2019, Ms. Justice Murphy vacated the orders made in the Circuit Court on 23rd February, 2015 and 4th May, 2018 and remitted the matter to the County Registrar. The plaintiff was awarded certain costs arising from the appeal.
20. Mr. McKeever avers in his affidavit that he is advised that the reason the High Court vacated the order for possession and the order substituting the first named defendant as

a plaintiff in the Circuit Court proceedings was that the County Registrar did not have jurisdiction to make the order for possession, and that this application should have been determined by a judge of the Circuit Court. Mr. McKeever avers that “the appeal essentially turned on a point of procedure”. Mr. McKeever goes on to swear that it was not the intention of the first named defendant to progress the Circuit Court proceedings simultaneously with the receivership, and that the solicitors dealing with the Circuit Court matter have been instructed to discontinue the Circuit Court proceedings and deal with any outstanding costs orders in those proceedings.

21. Notwithstanding this, the plaintiff stated that, when the present application came before the High Court in December 2019, Ms. Justice Reynolds queried why the Circuit Court proceedings were still extant in circumstances where a Receiver had been appointed and was taking active steps to recover the property. I asked counsel for the defendants to clarify this point during the hearing. Having taken instructions, he informed the court that the notice of discontinuance of the Circuit Court proceedings had been filed, but that the plaintiff had objected to the removal of the matter from the Circuit Court list, as he wanted to agitate questions in relation to the costs of the appeal to the High Court, which had been awarded in his favour. The plaintiff complained that the first named defendant had not been responding to requests he had made to have his costs discharged. The position of the first named defendant therefore is that it has no intention of pursuing the Circuit Court proceedings, and wishes to rely on its appointment of the fourth named defendant to assert its rights.
22. The plaintiff, who represented himself throughout the hearing, made reference to a number of authorities in support of his application and emphasised the following points:
 - The appointment of the Receiver was an abuse of process, given the existence of Circuit Court proceedings maintained by the first named defendant. The plaintiff referred to a number of authorities on abuse of process in this regard, and also invoked the concepts of *res judicata* and the court’s jurisdiction to strike out proceedings on the basis that they are frivolous and vexatious.
 - The plaintiff referred to para. 12(f) of the charge, by which the “borrower appoints the Receiver the attorney of the borrower” for certain purposes set out in that paragraph, and submitted that the Receiver was acting in breach of this delegation of powers.
 - Reference was made to a number of authorities dealing with the extent to which the court will permit redaction of documents. The plaintiff contended that the redaction in the documents purporting to establish the first named defendant’s right to the charge was impermissible.
 - In particular, the plaintiff relied on the decision of Murphy J. in *English v. Promontoria (Aran) Limited* [2016] IEHC 662 (“English”), in which the court placed a stay on the appointment of a Receiver pending establishment by the defendant as matter of law and fact of its entitlement to appoint the Receiver.

- The plaintiff referred to the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley*, Supreme Court, 29th November, 2019, in relation to the matters which must be proved in an application for summary judgment. It was suggested that the first named defendant had not proved the amounts currently due and owing.
- The plaintiff relied particularly on the decision of the High Court in *The Merrow Limited v. Bank of Scotland plc* [2013] IEHC 130 as an example of a case where the appointment of a Receiver was set aside.
- The plaintiff also made reference to the decision of the Supreme Court in *SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited* [2018] IESC 44 in submitting that rights to litigate could not be transferred to a third party. The plaintiff's submission in this regard is misconceived; that decision relates to issues of maintenance and champerty, and has no relevance to the normal contractual assignment of rights and interests such as is specifically provided for at para. 9 of the charge.

23. Mr. Stephen Walsh BL, acting for all of the defendants, made concise and focussed submissions in reply. They may be summarised as follows:

- To the extent that the plaintiff submitted that the Receiver should be required to remove the shuttering he had erected at the property for security purposes, the plaintiff, in accordance with the test for mandatory injunctions established by the Supreme Court in *Maha Lingam v. Health Services Executive* [2005] IESE 89, would have to establish that he had a strong case that was likely to succeed at the hearing of the action;
- the plaintiff, who has the burden of proof, was not in a position to establish this, or even the lower standard of "a fair case to be tried";
- the plaintiff's undertaking as to damages must be called into question, given that he does not dispute that substantial monies are due and owing by him in respect of the facilities extended;
- the "only available inference" was that the loans and charge had been transferred from First Active to Ulster Bank pursuant to SI 481 of 2009, and that there was "no commercial reality" to any other inference;
- the exhibits demonstrate that the loans and security were transferred from Ulster Bank to the first named defendant;
- there was no indication on the face of the transfer to MSMSL that ownership of the property was transferred to that entity by the deed of 19th December, 2016, but that in any event the first named defendant was the registered owner of the charge on the folio of the property;

- pursuant to s.31 of the Registration of Title Act 1964, the register is “conclusive evidence” of ownership of the charge;
- the appointment of a Receiver is the exercise of a contractual right and cannot be regarded as an abuse of process;
- there was nothing in the decision of Murphy J., either in her decision or order regarding the appeal of the Circuit Court proceedings, which suggested that the appointment of the Receiver was inappropriate.

Conclusions

24. In relation to the question of the first named defendant’s title to the charge, the plaintiff is in my view justified in submitting that the manner in which the first named defendant’s title is substantiated by the documents submitted is flawed and unhelpful. It is not clear from the documents that the facilities and charge were transferred from First Active to Ulster Bank, and Mr. Walsh was reduced to inviting the court to infer from subsequent events that they had been so transferred. The schedules to the transfer from Ulster Bank to the first named defendant as exhibited were also somewhat unsatisfactory, in that it was not entirely clear, from the pages indicating the entry of the facilities and charge, to which schedules the entries belonged. No satisfactory explanation was forthcoming as to the purpose or meaning of the apparent assignment of certain rights in favour of MSMSL.
25. These matters might have influenced me to take the course adopted by Murphy J. in *English* and stay the appointment of the Receiver. However, in the present case, the first named defendant is the registered owner of the charge. As Murphy J. herself states at para. 24 of her judgment in *English*:
- “24. Where the land in issue is registered land, proof of ownership is straightforward in that the register is conclusive as to title. If the stranger is registered as owner of the first legal charge then he has all the rights and entitlements that flow from the charge”.
26. The conclusiveness of the register has been the subject of many judgments, with a comprehensive analysis by the Court of Appeal of the effect of s.31 of the Registration of Title Act 1964 to be found in *Tanager DAC v. Kane* [2019] 1 IR 385. More recently, I addressed the issue in *Everyday Finance DAC v. White* [2020] IEHC 71, applying the law as set out in *Tanager*.
27. The registration on the folio of the property of the first named defendant as the owner of the charge has established its title, and it is thus entitled to exercise the powers under the charge, including the appointment of a Receiver.
28. In relation to the appointment of the Receiver, the charge clearly gives power to the charge holder to appoint a Receiver. I do not see any significance in the differing references to “instrument” or “deed”. It is not apparent to me that the Receiver may have accepted his appointment before execution of the instrument appointing him, nor is it apparent that any adverse consequences would flow for the first named defendant or

the Receiver even if that were the case. The contra proferentem rule only applies to an ambiguity in an instrument in favour of a party to that instrument. The rule does not apply to an instrument of appointment of a Receiver to which the plaintiff is not a party.

29. I do not consider that the appointment of a Receiver or his actions constitute an abuse of process. The plaintiff has not discharged the onus on him to show that the Receiver has been invalidly appointed, or that the first named defendant is not entitled to appoint a Receiver. The Circuit Court proceedings are not being pursued. The first named defendant is entitled to rely on the contractual rights of which it is now the owner, and the question of abuse of process does not arise.
30. In relation to the other matters raised by the plaintiff:
- The doctrine of *res judicata* and the court's jurisdiction regarding abuse of process have no application in the present case;
 - the Power of Attorney granted by the borrower to the Receiver at para. 12(f) of the charge is confined to the ability to execute certain legal documents, and is not in conflict with the exercise by the Receiver of his role in accordance with the charge;
 - as regards redaction of documents, I am satisfied that the first named defendant was entitled in principle to redact documents, and that such documents are admissible. Indeed, the decision of Murphy J. in *English* is authority for this proposition. See also the decision of Barniville J. in *Promontoria (Arrow) Limited v. Burke* [2018] IEHC 773 at para. 66. While, as I have commented, aspects of the redaction in the present case are unsatisfactory, the first named defendant has established its title to the charge through registration on the folio;
 - the present application is not an application for summary judgment – indeed, it is not an application by the first named defendant at all. There is therefore no need for the first named defendant to prove the plaintiff's debt in this application. The plaintiff does not in fact dispute that monies are due and owing on foot of the facilities.
31. I do not consider that the plaintiff has complied with the criteria for an interlocutory injunction. The plaintiff has not established a fair case to be tried, much less a strong case likely to succeed at trial. Moreover, there is no suggestion other than that damages would be an adequate remedy at trial if the Receiver were shown not to have been properly appointed or to have otherwise wrongfully caused loss to the plaintiff.
32. At paras. 30-33 of his affidavit, the fourth named defendant sets out his powers under the charge to take possession of and secure the property, and to employ contractors for that purpose. No submissions have been made to me which would suggest that it would be appropriate for this Court to make orders preventing the fourth named defendant from exercising these powers.

33. Accordingly, I am not disposed to grant the reliefs sought in the notice of motion. As this judgment is being delivered electronically, I will invite brief written submissions within fourteen days from delivery of the judgment as to the terms of the orders to be made, and in particular in relation to the question of costs.