

THE HIGH COURT

[2020] IEHC 534
[No. 2018 9790 P.]

BETWEEN

KEN FENELL

PLAINTIFF

AND

ALEK BOLES, COLIN BOLES, HEATHER BOLES AND MALCOLM BOLES

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 21st day of October 2020

1. There is now only remaining one question to be determined in these proceedings before submissions are made for final orders. The agreed issue is "whether the documents constituting the deeds of appointment dated the 24 October 2017 were effective to appoint the plaintiff as receiver over the properties identified . . . in specific deeds of mortgages".
2. As the hearing on the 30 September 2020 progressed, both counsel with conspicuous ability, narrowed that issue down to whether the description and appearance of the instruments of appointment necessitated more than what was presented to each of the defendants in November of 2017 and throughout the prosecution of these proceedings. Particular attention was paid to the exchange of affidavits with exhibits for the interlocutory injunction application seeking orders for the defendants to vacate the said property. Counsel for both parties have informed the Court that the determination sought will allow the parties to make final submissions for all remaining orders to be made by this Court in the partially determined interlocutory injunction applications and for the plenary trial of these proceedings.

Facts relevant to the remaining issue

3. Donal O'Sullivan was examined and cross-examined about his position as director of Promontoria (Aran) Ltd. and his signature of the relevant five instruments of appointment of receiver on the 24 October 2017.
4. The instruments as originally exhibited were dated the 24 October 2017 and were described as a "deed of appointment of receiver". On the last page of every copy and counterpart before the schedule containing a description of the property, the following wording appears: -

"IN WITNESS whereof PAL has hereunto set their respective hands as authorised signatories with authority to execute this Instrument of Appointment on the day and year above in WRITTEN and the Receiver has hereunto set his hand by way of receipt and acknowledgment of his appointment.

SIGNED by

Director

for and behalf of

PROMONTORIA (ARAN) LIMITED Duly authorised

Director".

5. Following that layout is: -

"CONFIRMATION OF ACCEPTANCE OF APPOINTMENT AS RECEIVER

I, Ken Fennell HEREBY ACKNOWLEDGE receipt of this instrument of appointment upon the date aforesaid and accept the appointment thereby notified upon and subject to the terms and conditions above referred to and more particularly contained in the Security Document.

Dated this day of 2017 at o'clock a.m. / p.m.

SIGNED by the said Ken Fennell

in the presence of

Signature of Witness

Occupation of Witness

Address of Witness

_____ "

6. The plaintiff was also examined and cross-examined during which he explained that having obtained each instrument, duly signed by Mr. O'Sullivan, and advice from his solicitor, he signed the confirmation of acceptance which was witnessed in counterpart.
7. Although it was put to the plaintiff that the defendants were only given counterparts initially which either did not contain the signature of Mr. O'Sullivan or the signature of the plaintiff, no point is now taken about service of only counterparts which were not fully complete. Furthermore, there is no question now that Promontoria (Aran) Ltd. under each of the relevant mortgages or by operation of law, could have appointed the plaintiff under hand by a director on its behalf.

8. Counsel for the defendants submits at paras 9 and 10 of his final written "Outline Submissions" that Promontoria (Aran) Ltd., having chosen to appoint the plaintiff as receiver by deed, must comply with the formalities for appointment by deed.
 - "9. Having been served with incomplete deeds, the Defendants had no way to know if the formalities were complied with. The incomplete deeds were served in November 2017, the first time the defendants were informed that the deeds had been executed in counterpart was when the Plaintiff served his replying affidavit on the 11th February 2019. Once the counterparts were exhibited, the Defendants then considered whether the deeds had been executed or merely signed, this issue was tested at the interlocutory stage when the Plaintiff then sought to rely on the statutory power to appoint at least in three of the mortgages to appoint by writing and that they did not need a deed
 10. It is submitted that the plaintiff is bound to comply with the formalities, having chosen to appoint by Deed, the Deed should be complete. If the court does not agree and does not distinguish Cregan J.'s decision [in *McCleary v. McPhillips* [2015] IEHC 59] on the facts of this matter and finds that the Deed suffices as an instrument in writing, the instruments in writing are deficient, four are not signed by the plaintiff and the mortgagee did not sign a fifth, the mortgagee's signature is a legal requirement".
9. I should clarify that it is now accepted on behalf of the defendants that Promontoria (Aran) Ltd. can appoint by an instrument in writing under each mortgage whether by virtue of the terms of the relevant mortgage or the by the operation of s. 24 of the Conveyancing Act 1881. In fact, counsel for the defendants submits that the Court may wish to take into account the fact that if it deems the appointments invalid, Promontoria (Aran) Ltd. could have appointed and could still appoint by simple instrument in writing. Ultimately the gravamen is whether what purports to be a deed can be an instrument in writing.
10. Counsel for the plaintiff submits that the relevant law is as is set out by Cregan J. in *McCleary v. McPhillips* [2015] IEHC 592 and particularly at paras. 133 – 134: -
 - "133. This phrase - "by writing under its hand" - has, in my view, three constituent elements. These are (i) that the appointment of the receiver is "by writing"; (ii) that it is "under its hand" and (iii) the use of the pronoun "its" means that it must be the signature of a person duly authorised by the Bank to sign such documents, under hand, on behalf of the Bank.
 134. It is also clear from the authorities that "under hand" or "under the hand of" or "under its hand" means "with the signature of". See *Trustee Solutions v Dubery* [2006] EWHC 1426 (ch); *Watersons Trustees v St. Giles Boys Club* 1943 SC 369; *Electronic Rentals v Anderson* [1971] 124 CLR 27".

The above was cited approvingly by Baker J. in *Woods v. Ulster Bank* [2017] IEHC 155 at paras. 53 – 54.

11. The book of authorities submitted to this Court includes the judgment of McGovern J. in *Jennings v. Bank of Scotland, Wallace and Donohue* [2012] IEHC 515. Paras. 11 to 13 of that judgment are quite pertinent to the determination of this sole remaining issue: -
 - “11. In this case, the signature of the Receivers was merely to confirm their acceptance of their appointment. There were no formal requirements necessary. What they did on 25th May, 2012, was sufficient to signify their acceptance of their appointment. This was expressed in a more formal way when they signed the original deed which was sent over from Scotland. But I cannot see how these steps would in any way call into question the validity of their appointment. Support for this view is to be found in the judgment of Lord Evershed M.R. in *Windsor Refrigerator Co. Limited and Another v. Branch Nominees Limited and Others* [1961] 1 ALL E.R. 277, where at p. 281, he said:

“The question is not whether these two gentlemen, when they put their names on this document, were purporting to execute a document under their hands as agents for the company, or had any authority to do so. The question, as I conceive it to be, is: Can this document, albeit purporting to operate as a deed, but failing to do so - can it none the less be the instrument of the company in writing? I have come to the conclusion that that question ought to be answered in the affirmative.”
 12. In this case, the Bank contends that the document executed by Mr. Bruce was a deed. But even if it was not a deed, it is clear that it had all the requisite qualities to be an instrument in writing under Mr. Bruce's hand and, for the reasons I have outlined above, I accept that Mr. Bruce had authority to create such an instrument.
 13. I therefore hold that the Receivers are validly appointed and I refuse the application to discharge them”.

Conclusion

12. The Court understands how the defendants gradually learned over a significant period of time about the compliance measures of Promontoria (Aran) Ltd. in regard to the appointment of the plaintiff. The defendants were entitled to probe the validity of the appointment of the plaintiff and to put the plaintiff on proof of his appointment. In this regard the statement of Baker J in *Kavanagh v Walsh* 2018 IEHC 91, 2019 1 IR 619 at para [34] is quite apt:

“I accept that the authorities bear out the proposition that a court must be vigilant regarding the validity of the appointment of a receiver who seeks an injunction against a mortgagor and a court is entitled to scrutinise the deed of appointment. The making of an injunction in favour of a receiver is a remedy not to be lightly made, and the proofs must be sufficient and clear.”

13. The law is clear in relation to the sole remaining issue that what may appear to be a deed of appointment requiring certain conditions can actually be a simple instrument to appoint. In other words, the deed of appointment has effectively turned out to be a simple instrument to appoint which requires no further formalities than appear in the instruments which were eventually made available to the defendants whether by way of copy of the original or copy counterpart over a protracted period of time.
14. As may have been gleaned, the Court is not impressed by the unnecessary references in the instruments of appointment to wording for deeds which appear anachronistic and lacking plain english. Nevertheless, the appointments were valid.
15. I will hear counsel as to all parts of the order to be made following this determination that the documents entitled "Deed of Appointment" and dated the 24 October 2017 were effective to appoint the plaintiff as receiver over the properties identified. The prayer in the plenary summons issued and the reliefs sought in the notice of motion seek various orders directing one or more of the defendants to vacate properties contained in specific Folio numbers including part of one Folio.

Solicitors for the plaintiff: O'Brien Lynam.

Solicitors for the defendant: Lawlor Partners.

Counsel for the plaintiff: Paul Fogarty.

Counsel for the defendants: Andrew Robinson.