

THE HIGH COURT

[2022] IEHC 109
[2022 No. 596 P]

BETWEEN

PATRICK HENNESSY

PLAINTIFF

AND

KEN TYRELL AND EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on 24th February 2022

1. This is an application for an interlocutory injunction restraining and prohibiting the defendants and each of them their servants and agents from taking possession, marketing, selling or arranging for the sale of the lands and premises comprised in Folios 1427F and 19343F of the Register, County Laois, and further and in the alternative an interlocutory injunction restraining and prohibiting the defendants and each of them their servants and agents from proceeding with an online auction of the lands and premises comprised those folios scheduled for 24th February, 2022 and the advertisement of same, pending the trial of the action.
2. The motion was issued and served by leave of the court on Thursday last 17th February, 2022 and was returnable for yesterday 23rd February. Notwithstanding the very tight timeframe the defendants filed their replying affidavits and the motion was heard yesterday. The urgency is that there is an auction scheduled to take place at noon today.
3. The lands the subject of the application comprise 73 acres at Kilbreedy, County Laois. They were purchased by Mr. Hennessy in 2005. The purchase was funded or partly funded by a loan from Allied Irish Banks plc ("AIB") secured by a charge over the property. It is not clear how much of the purchase price was borrowed but if it was not all of it, it was a substantial part of it. Apart from the lands the subject of these proceedings, Mr. Hennessy and his brother Mr. Thomas Hennessy and their wives have interests in other lands and properties in County Laois, all of it heavily encumbered and said to be cross securitised.
4. Mr. Hennessy failed to meet his obligations to AIB and on 3rd November, 2016 and 10th November, 2016 AIB called in the loans and on 25th November, 2016 issued several summary summonses claiming money judgments. Mr. Hennessy entered his appearances but those actions did not progress. It is said that Mr. Hennessy engaged with AIB over the following years but no resolution was achieved.
5. In about June, 2019 AIB transferred the several Hennessy family loans and the security held for them to Everyday Finance DAC ("*Everyday*"), and on 27th August, 2019 Everyday was registered on the Folios as the owner of the charge. It is said that there was further engagement between Mr. Hennessy and his brother, by their financial advisor Mr. Deeney, and Everyday, by its managing agent Mr. Mark Power of BCM Global ASI Ltd., but no resolution was found. Along the way it was said that one of the options under consideration by Everyday was the appointment of a receiver.

6. In about September, 2021 Everyday appointed Mr. Ken Tyrrell as receiver over 15 Hennessy family properties, including the Kilbreedy lands. Under the standard form AIB charge, Mr. Tyrrell's power was limited to the collection of the rents and profits. Mr. Hennessy and his brother have a company called Hennessy Brothers Farming Ltd. This company is said to have licences to farm most or all of the Hennessy family lands for a total payment of €50,000 per annum, included in which is a licence fee of €10,800 per annum in respect of the Kilbreedy lands. None of this income has been paid to Mr. Tyrrell. It is said by Mr. Hennessy that Mr. Tyrrell never asked for the licence fee from the company but it appears to be accepted that Mr. Hennessy and his brother received that income and did not pay it over.
7. According to Mr. Hennessy, the total value of the Hennessy family holdings is about €7 million and the aggregate liabilities amount to €5.7 million. The amount of the liabilities does not appear to be in dispute but the value of the lands is. What appears to be absolutely clear is that the Hennessy Brothers are unable to pay their debts or to secure the agreement of Everyday to a restructuring of their debts upon terms that they can meet.
8. I have no evidence of what, if any, payments have been made since the loans were called in by AIB or since the assignment to Everyday, but I get the distinct impression that it is little or nothing. As far as I can see, all that Mr. Tyrrell has collected is the rent from two houses which generate between them €625 per month. If the Hennessy brothers cannot come to terms with Everyday and cannot refinance elsewhere, some or all of the holdings will have to be sold.
9. It is not contested that Everyday has a power of sale or that the power has arisen or that it is exercisable. While at first glance this application might be thought to be for an order absolutely restraining a sale, on closer scrutiny it is an application for injunction restraining the sale in the manner now proposed by Everyday and Mr. Tyrrell.
10. The evidence is that Mr. Hennessy was shocked to be told by Mr. Deeney, shortly after 2nd February, 2022 when Mr. Deeney was told by Mr. Power, that Mr. Tyrrell intended to sell the 73 acres. I am not on an interlocutory motion to decide any question of fact, but as far as I can see there had never previously been any threat of a sale and it is common case that Mr. Tyrrell does not have a power of sale, so that if Mr. Hennessy was shocked that appears to me to be understandable.
11. On 5th February, 2022 Mr. Hennessy learned from a friend that the lands at Kilbreedy had been advertised for sale on the website of BRG Gibson Auctioneers and were being offered for sale by public online auction on Thursday 24th February, 2022. Soon after he established by his solicitors that the lands were being offered for sale on foot of a proposed contract between "*Patrick Hennessy acting by the receiver Ken Tyrrell*" and the purchaser. In fact it now appears – but it is acknowledged that Mr. Hennessy was not told at the time – that two deeds of appointment were executed on 28th January, 2022 by Everyday and Mr. Tyrrell by which Mr. Tyrrell was appointed as agent for Everyday to market and contract to sell Mr. Hennessy's assets. It is acknowledged that the first that

Mr. Hennessy could have known of this was when he received the replying affidavit of Mr. Tyrrell on this motion which was sworn on 22nd February, 2022.

12. The replying affidavit of Mr. Tyrrell identifies, correctly it is acknowledged by Mr. Hennessy, three strands to the application:-
 - (1) The powers of Mr. Tyrrell;
 - (2) The marketing and sale of the property;
 - (3) The adequacy of damages and of the undertaking as to damages offered by Mr. Hennessy.
13. As to the powers of Mr. Tyrrell, it is common case that he has no power of sale *qua* receiver. It is more or less conceded that there is ambiguity and contradiction in the draft contract for sale as to the capacity in which Mr. Tyrrell would enter in contract: not least in the first line which suggests that he would do so as receiver, which it is accepted he cannot. Mr. Brady, for Mr. Tyrrell and Everyday, argues that notwithstanding the apparent contradictions it is clear that the assurance of the property will be by Everyday. He acknowledges that what is proposed is a workaround to overcome the problem for the defendants that the receiver *qua* receiver has no power of sale. Mr. Brady was not able to say why the deeds of appointment of 28th January, 2022 have been signed by Mr. Tyrrell "*without personal liability*". While it is not expressly said by the defendants that the existing draft contract can or will be modified to remove the contradictions – as well as the glitch identified by Mr. Bredin in one of the deeds of 18th January, 2022 which appears to limit the appointment to "*part of*" the lands in one of the folios – I think that it probably could. I am not persuaded that there is a serious question to be tried as to Everyday's entitlement to appoint an agent to do anything that it is entitled to do itself.
14. The core issue of this application, it seems to me, is whether Mr. Hennessy has established a fair question to be tried as to Everyday's entitlement to sell the land in the way it proposes.
15. Mr. Bredin, for the plaintiff, relies on the decision of the Supreme Court in *Holohan v. Friends Provident and Century Life Office* [1966] I.R. 1, in which, as appears from the headnote, it was: -

"Held by the Supreme Court (Ó Dálaigh C.J., Lavery and Walsh JJ.),

 - 1, that a mortgagee with a power of sale has not power to dispose of the mortgagor's property with the same freedom as if it were his own;*
 - 2, That the question to be investigated in such an action is whether or not the mortgagee acted as a reasonable man would have acted in selling the mortgagor's property;*
 - 3, That the conduct of the defendant company in refusing to consider an alternative mode of sale to that upon which they had decided and in refusing to examine the*

possibilities of obtaining a better purchase price by adopting such a method of sale was unreasonable conduct on their part;

4, That the defendants should be restrained from completing the sale”.

16. I think that it is hyperbole to suggest, as Mr. Hennessy has, that Everyday has set out to achieve the lowest possible price for the land, but the objective fact of the matter is that Everyday appears to have decided at the end of January, 2022 to sell the land with Mr. Hennessy or Hennessy Brothers Farming Limited in possession. The land appears to have been first advertised for sale in early February, 2022 with an auction date for 24th February, 2022 and the advertising campaign appears to have been limited to those who might stumble on the listing on the surveyor’s website.
17. Mr. Tyrrell, in his replying affidavit, suggests that Mr. Hennessy’s apprehension that a lower price would be achieved without vacant possession is mere speculation. I will content myself by saying that Mr. Hennessy appears to me to have the better end of that argument. Mr. Tyrrell indeed goes so far as to suggest that the licence to Hennessy Brothers Farming Limited to occupy the land at €10,800 per annum, which is €150 per acre, might well drive up the price at auction. The advertised minimum opening bid is €730,000 or €10,000 per acre which is 66 times €150 per acre. I will treat the suggestion – in an affidavit prepared in great haste – as what His Honour Judge James Carroll used to describe as an advocate’s argument.
18. Mr. Bredin argues that Everyday has put up no evidence of any advice it may have taken or any explanation as to why it has decided to proceed in this way. Mr. Brady counters that Mr. Hennessy has not put up any expert evidence either. On the authority of *Holohan*, it appears to me that the onus of proof of establishing that Everyday is acting unreasonably is on Mr. Hennessy but it seems to me that he has established a fair issue to be tried.
19. Mr. Brady has submitted that the object of the sale is to pay down the debt and not to make a profit for anyone. That, I think, is something that remains to be explored.
20. In balancing the competing interests with a view to fashioning an order which will give rise to the least risk of injustice I give considerable weight to the observation of Ó Dálaigh C.J. in *Holohan* at p. 26 of the report, where he said that:-

“No question of a remedy in damages between the parties before the Court can arise: the contract of sale is either properly made or it is not. If not, then it cannot be permitted to be completed, and the appropriate remedy is an injunction”.

21. I note that *Holohan* was recently approved and applied by Laffoy J. in *Edenfell Holdings Ltd.* [1999] 1 I.R. 443. This appears to me to give rise to an argument that if the lands were to be sold for less than could and should have been achieved, Everyday might not be responsible for the shortfall. But of course it would be too late for a remedy by way of injunction if the lands had been sold in the meantime.

22. I do not overlook what might be described as the elephant in the room which is that the impediment to a sale of the lands with vacant possession is the presence on the land of Mr. Hennessy himself, whether in his personal or corporate incarnation. If Everyday were to apply in the prescribed statutory summary manner for an order for possession of the land to allow a sale with vacant possession I cannot think what answer there might be.
23. Similarly, I want to make clear that I would not go so far as to say that Mr. Hennessy has made out a strong case likely to succeed that Everyday is not entitled to offer the land for sale without vacant possession. If on the one hand it is fairly clear that the buyer of a farm with the farmer in possession is in all probability if not inevitably buying a lawsuit which will depress the price, on the other hand it is not necessarily unreasonable for a mortgagee to take into account in deciding what it will do the time, effort and expense of what might turn out to be a protracted campaign of litigation to achieve vacant possession.
24. What tips the balance in this case is the apparent suddenness of the decision to sell; the absence, as far as the evidence goes, of any previous demand for possession; and the absence of any meaningful marketing of the land.
25. Mr. Brady in argument quite correctly points to the first point made in the summary of the applicable principles set out in the judgment of O'Donnell J. in *Merck Sharp & Dohme v. Clonmel Healthcare* [2020] 2 I.R. 1 which is that: -
- "First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted".*
26. Mr. Brady is perfectly correct that Mr. Hennessy cannot hope to secure a permanent injunction restraining the sale of the lands but for the reasons given I think that it can reasonably be contemplated that he might secure a permanent injunction restraining a sale to anyone who might have seen a listing on the surveyor's website in the three weeks or so between the first listing and the date of the auction and who would not have had any opportunity to walk the land.
27. There was some debate in argument as to whether these lands can more properly be considered to be a family farm or a commercial enterprise. My own view is that they are probably more of a commercial enterprise than a family farm, but since the critical issue on my analysis is that any shortfall in the sale price might not be recoverable, I do not believe that anything turns on the nature of the property.
28. For completeness I add that I do not believe the damages will be an adequate remedy for Everyday either. Any apparent surplus of Hennessy family assets over liabilities is dependent on valuations which most surely have been made on the basis of vacant possession and a willing vendor and Mr. Hennessy's ability to meet an award of damages would further depend on the order in which the primary security would be realised for the

various borrowings. However, for the reasons given I believe that the risk of injustice will be minimised by granting the orders sought and by managing the case to an early trial.

29. Provisionally my view is that the costs of this application should be costs of the cause.