

THE HIGH COURT

[2022] IEHC 274

[Record No. 2021/2718 P]

BETWEEN

KEN TYRRELL

PLAINTIFF

AND

SEAN O'CONNOR AND CORMAC O'CONNOR

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on the 12th day of May, 2022.

Introduction

1. This is an application for interlocutory relief in which the plaintiff seeks possession of the property comprised in Folio 67632F, County Cork, together with ancillary orders in the usual terms preventing the defendants from impeding and/or obstructing the plaintiff from taking possession, ordering the defendants to deliver up to the plaintiff forthwith any keys, alarm codes and/or other security and access devices as may be in their possession, restraining them from collecting rents or otherwise holding themselves out as the party entitled to let the property, and so on.
2. The first defendant is the sole registered owner of the property, although it seems that the second defendant was sued as he was claiming an interest in it. However, it appears that the plaintiff has come to an arrangement with the second defendant, who accordingly did not take part in the interlocutory application.
3. The property comprises approximately one acre and is situate approximately one kilometre from Kilbrittain village in County Cork, and comprises two warehouses, an office and a yard, which has been used as a bus depot. The second defendant resides in the adjoining property which is not the subject matter of these proceedings.
4. The property is the subject of a Charge dated 18 April 2007 executed by the first defendant in favour of Ulster Bank Ireland Limited ("the Charge") which disapplies ss. 17 and 20 of the Conveyancing Act, 1881, but does not contain any provision disapplying s. 19 of the 1881 Act and the Charge is therefore to be read as if the statutory power to appoint a receiver is contained in it. Clause 11 of the Charge extends the statutory powers of any receiver so appointed and Clause 12 contains the usual provision to the effect that any receiver so appointed is deemed to be the agent of the first defendant.
5. Mr. Tyrrell states on affidavit that he was appointed as receiver over certain assets of the first defendant, including the property, by deed dated 9 January, 2019. He also states that, by Agreement dated 19 May, 2020, ("the Agency Agreement") he was appointed as agent of Promontoria (Oyster) DAC ("PODAC"), the chargeholder.
6. The proofs are put on affidavit by Ms. Adrienne Fitzgibbon, a senior manager of BCMGlobal ASI Ltd, which has been appointed by PODAC to provide loan administration, relationship and asset management services in respect of the first defendant's loan facilities and related securities.

7. Ms. Fitzgibbon says at para. 2 of her affidavit that she has responsibility for the day to day administration and management of the first defendant's Loan Facilities and at para. 3 that she has had access to the books and records of PODAC having relevance to these proceedings and that she makes her affidavit from a perusal of those books and records or, where otherwise appears, in the belief that the facts she is averring to are true and accurate. She also confirms her authority to make the affidavit for and on behalf of PODAC.

Evidence in relation to loan, securities, and powers of the plaintiff

8. Ms. Fitzgibbon refers to and exhibits a Facility Letter dated 17 February, 2014, whereby Ulster Bank Ireland Ltd agreed to advance to "the partnership of Sean O'Connor and Elizabeth Long" (collectively, the "Borrower"), a loan facility in the sum of "up to €321,850.00" subject to the terms and conditions contained therein. The facility letter provides that the loan will be drawn down by a single advance and, in Clause 7, it provided that the Borrower would repay the loan and interest by the repayment date, which was 31 January, 2019.
9. Some issue was taken at hearing with the fact that the receiver was appointed prior to that date. However, I am satisfied that nothing arises on this point, because Clause 7.2 provides that prior to the Repayment Date, the Borrower was to make 59 monthly instalments of €2,555.24 and then a final instalment sufficient to pay the outstanding balance of the Loan and Interest in full by the Repayment Date. Furthermore, Clause 8.1. provided that the first instalment was due on 28 February, 2014, with subsequent instalments due monthly thereafter.
10. Clause 17.1 provided that if any Event of Default as specified in the Facility Letter occurred, then the bank could demand immediate repayment of the Loan, all interest accrued and all other sums payable by the Borrower under the terms of the Facility Letter, and could also stop the drawing of any undrawn part of the loan. One of the Events of Default as so defined was the failure to pay any amount payable under the Facility Letter on its due date.
11. Therefore, if any of the instalments were missed, the entire sum would become immediately repayable and consequently the power to appoint the receiver would then arise under s. 19 of the 1881 Act. Provided therefore, the fact that the loan amount had become due and owing before that date has been proved on affidavit, the mere fact that the receiver was appointed prior to the ultimate repayment date originally provided for does not create any legal impediment to his appointment.
12. However, the first defendant says that the fact that the debt is due has not been proven. His first submission is that Ms. Fitzgibbon does not actually say explicitly in her affidavit at any point that the first defendant is in default in his payments, and this is correct. However, she does state at para. 29 that, by letter dated December 2018, PODAC wrote to the first defendant in connection with the Facility and the related Mortgage, and that this letter noted that, as of 3 December, 2018, the amount due and owing by him under

the Facility Letter was €301,463.01, with a daily rate of interest accruing at €38.42 per day. Formal demand for repayment was made, and she exhibits the demand letter.

13. As the Facility Letter provides for repayment by way of 59 monthly instalments of €2,555.24 with a requirement for a final instalment in a sum sufficient to pay the outstanding balance of the Loan and interest in full by 31 January, 2019, it appears that this letter is necessarily asserting that the first defendant has defaulted on his obligation to repay in accordance with the terms of the Facility Letter. Furthermore, Ms. Fitzgibbon says that the first defendant has failed, refused and/or neglected to discharge the sum of "€301,463.01 or any sum" to PODAC. This seems to me to be a clear statement that none of that sum has been paid and read together with the exhibits, it seems to be inescapable that that sum is due and owing under the loan, albeit that it would arguably be preferable if this was simply stated directly.
14. This brings me to the related objection of the first defendant which was that Ms. Fitzgibbon's affidavit contained inadmissible hearsay. Given that I am going to refuse the injunctive relief on other grounds, but more particularly because I do not believe I have the benefit of full written or oral submissions on this issue, I do not think it is advisable to offer any comments on it or on the applicability of s.14 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020, which may well defeat any hearsay objection.
15. The plaintiff also relied on a Protective Certificate issued by Cork Circuit Court as evidence of admission by the first defendant of sums due and owing to PODAC and relied on *Ennis Property Finance DAC v. McLaughlin* [2021] IECA 292 for the proposition that the first defendant was now estopped from disputing that he was indebted to PODAC. However, as no prior notice of reliance on this certificate was given to the first defendant, in the particular circumstances of this application, the plaintiff cannot rely on the Order of the Circuit Court. If this matter had been relied upon in affidavits or if it is indicated in good time before a hearing that a document which does not require to be proved will be relied upon in the course of the application, then of course the authority shows that a debtor may be estopped from disputing a debt in subsequent proceedings. However, in this particular case I think reference to the protective certificate in written submission is insufficient notice of the intention to rely on the admissions apparently made by the first defendant in the personal insolvency proceedings.
16. On the assumption that, on a full consideration of the issues, the plaintiff would be in a position to prove that the monies were due and owing despite demand having been made, the provisions of the Charge would then become material. By virtue of Clause 2 of that deed, the first defendant charged the property in favour of Ulster Bank Ireland Ltd, who registered the Charge as a burden on 14 May, 2007. On 9 March, 2017, PODAC became registered as owner of this charge. While Ms. Fitzgibbon also exhibits the Global Deed of Transfer dated 19 December, 2016, by which PODAC acquired the first defendant's loan and related charge, certainly insofar as the Charge is concerned, I am not concerned with that deed because PODAC are registered as owner of the Charge and enjoy all the rights of the original chargeholder.

17. It was submitted at hearing that s.31 of the Registration of Title Act, 1964, did not truly provide for conclusiveness of title because the register is liable to rectification for fraud or mistake. However, just because that is a possibility as a matter of law, provided the factual circumstances for it exist, does not mean that the provision for rectification has any application here. The effect of s.31 would be set at nought if, in every case, a general argument was made, without reference to any facts which might give rise to grounds for rectification on the basis of fraud or mistake, that the contents of the register thereby became questionable or less than conclusive. The Court of Appeal has rejected those arguments in *Tanager DAC v. Kane* [2019] 1 I.R. 385, and I therefore have no hesitation in finding that PODAC have acquired all of the rights of the original chargeholder under the deed of charge.
18. The Global Deed of Transfer is also material, however, because it transfers the first defendant's loan. The first defendant in his written submissions takes exception to the redaction of that deed on the basis that it does not comply with the requirements for redaction as set out by Haughton J. in *Courtney v. OCM Debtco DAC* [2019] 2 ILRM 166, which were approved by Barniville J. in *Victoria Hall Management Ltd v. Cox* [2019] IEHC 639. I think there would be some merit to those arguments in that the contents of the deed after the identification of the parties and before its operative part has been entirely redacted and there is no explanation on affidavit as to what this is, though I strongly suspect that it is the definition section. It should be noted that McDonald J. in *Everyday Finance DAC v. Woods* [2019] IEHC 605, indicated that the definition section of a deed of this type should be unredacted. This would, therefore, be the general position, subject to any specific objection to a particular definition, for example an objection on grounds of commercial sensitivity to the disclosure of the consideration paid for the loan book. There is also a full redaction of Clause 4, and I am not sure to what this relates.
19. It seems to follow from the judgment of Haughton J. in *Courtney* that the first defendant is correct in stating that redaction should be properly justified on affidavit with at least a general identification of what is contained in the portion redacted (for example whether it is a recital containing definitions of terms used in the deed) together with a justification for redaction. Furthermore, it should be the case that redaction is reviewed by a solicitor as officer of the court as a safeguard against excessive redaction. However, there is no evidence that any of that has been done. Ordinarily, therefore, I would afford the plaintiff time to deal with these technical issues, as this appears to have been the approach taken in other cases, but this is not now necessary in view of the conclusions I have reached below.
20. It is not necessary for me to come to a definitive conclusion on those issues relating to proofs, however, as an issue arises in this case as to the purpose for which the plaintiff seeks possession and whether he is entitled to seek an injunction on that basis. I should point out that the plaintiff is quite explicit in his affidavit as to his purpose for seeking the injunction, as he states at para. 50:

"I say and believe that it is my intention to sell the Property in order to reduce the first named defendant's overall liability to the Chargeholder. I say and believe that the Defendants are directly preventing me from exercising my duties as (sic) Receiver in this regard. In those circumstances, I say and believe that the balance of justice lies in granting the within application."

21. Quite apart from the fact that the plaintiff, as receiver, does not enjoy any power of sale it seems to me that this application cannot succeed because it is an effort to secure summary judgment and is therefore contrary to the Supreme Court authority of *Charleton v. Scriven* [2019] IESC 28.
22. However, in view of the fact that a large variety of arguments were canvassed by the borrower as to why the application should not succeed and given that these arguments have been raised now in a number of cases, it seems to me that it is appropriate to comment on the merits or otherwise of those arguments, albeit that my observations on these issues are necessarily *obiter*.

Objections by the first defendant

i. Objection on the basis of maintenance and champerty

23. The first defendant suggested that the assignment of his loan to PODAC was void as (in the antique language applicable to this area of the law) it "savoured of" maintenance and champerty and was therefore void.
24. This argument is based on the Supreme Court decision of *SPV Osus Ltd. v. HSBC Institutional Trust Services (Ire) Ltd.* [2019] 1 I.R. 1 where the assignment of a claim in bankruptcy in New York, together with associated causes of action, was held to be void as contrary to public policy. It should be noted, however, that in the course of that judgment, the Supreme Court explicitly confirmed the legitimacy of the assignment of debt, notably at para. 102 where O'Donnell J. stated:

"[D]ebts, though enforceable by action, have always been regarded as assignable even if in some cases when contested they can give rise to contentious litigation."
25. Indeed, the judgment as a whole reviews the common law approach to assignments in this area and also notes (at para. 29) that the effect of s. 28 (6) of the Supreme Court of Judicature Act (Ireland), 1877 was to render assignable in law those matters which had previously been assignable in equity and that this included the assignment of debts which had been regarded as a permissible and legitimate form of assignment.
26. In view of that very recent statement of a unanimous Supreme Court as to the lack of any objection on the basis of maintenance or champerty to the assignment of a debt, I do not think the first defendant has raised a serious question to be tried as to the unlawfulness of the sale of his debt to PODAC on these grounds.

ii. Validity of the Receiver's appointment

27. Objection is made on the basis that the Charge provides for the appointment of a “receiver and manager”, whereas the deed of appointment provides for the appointment of the plaintiff solely as a “receiver”.
28. In fact, the Charge in this case does not describe the person appointed to manage the charged property as a “receiver and manager”, as is often the case in deeds of this nature. Clause 11 provides:
- “At any time after the power of sale has become exercisable the Bank or any Receiver appointed hereunder may enter and manage the Mortgaged Property or any part thereof and provide such services and carry out such repairs and works of improvement reconstruction addition or completion (including the provision of plant equipment and furnishings) as deemed expedient.”
29. Insofar as doubts were expressed at interlocutory stage in previous case law such as *McCarthy v. Moroney* [2018] IEHC 379 and *Charleton v. Scriven* as to the validity of an appointment of a person as “receiver” when the relevant mortgage or charge provided for the appointment of a “receiver and manager”, those doubts were put to rest by the Court of Appeal in *Fennell v. Corrigan* [2021] IECA 248, which approved a judgment of this Court (Allen J.) in *McCarthy v. Langan* [2019] IEHC 651, delivered at substantive stage some time after both *McCarthy v. Moroney* and *Charleton v. Scriven*.
30. In any event, the argument was always weaker in relation to this Charge, as is apparent from the text of Clause 11 set out above. There is no reference in Clause 11 to the appointment of a “receiver and manager”, but rather a receiver who is appointed to enter and manage the Mortgaged Property. In any event, as established definitively by the Court of Appeal judgment in *Fennell v. Corrigan*, the question of whether a receiver has been properly appointed when the deed of appointment refers to him or her as a receiver but the mortgage or charge refers to the appointment of a receiver and manager, is one of construction and not of law. Having found that a deed of appointment must, insofar as it was reasonably possible, be interpreted harmoniously with the debenture authorising the appointment, it appears that a number of relevant factors were identified by the Court of Appeal (*per* Murray J.) in interpreting the deed of appointment in that case. First, the deeds stated that it was executed on foot of the power in that behalf contained in the mortgage, which was a power to appoint a receiver and manager. Secondly, it was stated in the deed that the receiver so appointed was intended to have all of the powers provided for in the mortgage and by law. Thirdly, “Receiver” was defined in the mortgage as a person appointed as receiver and manager. Fourthly, the receiver was appointed over the “undertaking” of the borrower, which indicated that he was to have the powers of a manager to buy, sell and carry on trade.
31. In this case, Clause 1 of the deed of appointment of the receiver expressly recites that he is appointed “TO THE INTENT that the Receiver may exercise all the powers conferred on the Receiver in relation to the Mortgaged Property whether under the Mortgage or by law or otherwise”.

32. Clause 2 of the deed provides that the Receiver thereby agreed and undertook that he should act as such receiver “and exercise all of the powers conferred upon him by the Mortgage or by law or otherwise subject to and in conformity with the provisions in that behalf contained in the Mortgage.”
33. It is therefore clear beyond doubt that it was intended that the receiver as so appointed would enjoy all of the powers set out in Clause 11, and no serious question as to the validity of his appointment has been made out on these grounds.
34. It was further suggested in written submissions that the chargeholder should be in possession before the power to appoint a receiver could be exercisable, but that does not appear to accord with the plain meaning of either s. 19 or Clause 11 of the charge, and no serious question has been raised on this issue, in my view.
- iii. Power of the receiver to enter into possession**
35. The first defendant relies in his written submissions on *Charleton v. Hassett* [2021] IEHC 746 for the proposition that the plaintiff, even in his capacity as agent of PODAC, has no entitlement to possession by way of interlocutory injunction, but should proceed to institute proceedings pursuant to s. 62(7) of the Registration of Title Act, 1964, which continues to apply to charges created prior to 1 December, 2009, by virtue of s. 1 of the Land and Conveyancing Law Reform Act, 2013.
36. I have to say I think there is merit in that argument. Although the Charge is referred to throughout the papers filed in support for this application as a deed of mortgage, the property comprises registered land and the deed quite clearly operates as a deed of charge. That is clear from Clause 2, in which the first defendant “as beneficial owner ... as registered owner ... hereby charges in favour of the Bank so much of the lands in the Schedule hereto as are registered or are required to be registered in the Land Registry by virtue of the statutes in that behalf or otherwise and assents to the registration of the Charge hereby created as a burden affecting such lands”
37. A charge differs from a mortgage over unregistered land in that it does not create an estate in the land itself but operates as a burden within the meaning of s. 69 of the 1964 Act. Nor does it appear that the Charge confers any contractual right of possession on the chargeholder.
38. It should be noted that, in *Kavanagh v. Lynch* [2011] IEHC 348, Laffoy J. (at para. 5.2) interpreted a power on the part of a receiver to, *inter alia*, give notice to quit, take action for ejectment and to let and re-let the property as one which necessarily implied a right to enter into possession so as to meaningfully exercise those powers. It would therefore seem that, insofar as the receiver is acting as such, his right to enter into possession is a necessary incident to the exercise of his powers, rather than a general right to enter into possession such as is enjoyed by the mortgagee of unregistered land who has that right as an incident of his estate or interest in land. As set out at para. 20 above, the plaintiff in this instance specifically says that he wishes to enter into possession, *qua* receiver, in

order to exercise a power of sale which he does not in fact have. As a result, he can have no right to enter into possession for the purposes of selling.

39. Although the plaintiff seems to be clear in his affidavit that he wishes to enter into possession *qua* receiver, he has exhibited an Agency Agreement and therefore also seems to assert a right to enter into possession as agent of PODAC. This necessitates a consideration of the right of the chargeholder to enter into possession.
40. In the Charge, the references to the chargeholder going into possession are as defined in Clauses 9 and 11 and seem to be for a specific purpose. Clause 9 refers to the Bank taking possession of the Mortgaged Property as agent for the mortgagor "to remove, store, sell or otherwise deal with any furniture or goods which the Mortgagor shall fail or refuse to remove from the Mortgaged Property within seven days of being requested so to do by notice from the Bank and the Bank shall not be liable for any loss or damage occasioned to the mortgagor." That clause appears to me not to confer a right of possession but to confer certain powers on the bank after it has taken possession, as it would be entitled to do in circumstances where this form of security was executed in relation to unregistered land as in those circumstances, the deed would operate, in the case of freehold land, to create a term of ten thousand years or insofar as the land was leasehold for the residue of any term of years for which the same were held, less the last three days thereof.
41. Similarly, Clause 11, already quoted above, provides that at any time after the power of sale has become exercisable, the charge holder "may enter and manage the Mortgaged Property" or any part thereof and to provide services and carry out repairs etc. This appears to provide that the right to enter the Property is for the purpose of exercising the right to manage it.
42. In providing that "neither the Bank nor any Receiver shall be liable to the Mortgagor as Mortgagee in possession or otherwise for any loss howsoever occurring in the exercise of such powers", my provisional view is that this may have been inserted because the Charge was drafted to operate as a mortgage where the lands secured were unregistered. Where the Charge applies, as here, to registered land, it does not necessarily alter the right of the chargee to possession from that as traditionally understood and discussed in Wylie, Irish Land Law, 6th ed., at paras. 14-77-14.78.
43. The chargeholder's power of sale does not derive from the deed of charge either but from statute. Section 62(6) of the 1964 Act provides that on registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge will operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge. Subsection (7) provides:

"When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession."

44. Allen J. confirmed in *Charleton v. Hassett* (at para. 56) that a chargeholder has the right to apply to the court under s.62 (7) of the 1964 Act in a summary manner for possession. Turning then to the power of a receiver who had also, as is the case here, been appointed as agent of the mortgagee, he stated (at para. 57):

"Qua mortgagee's agent, the receiver cannot do anything that the charge holder cannot do."

45. It therefore seems that there is at least some argument in this case that PODAC, should apply in a summary manner for possession pursuant to s.62 (7). That is not the procedure which has been invoked here.
46. It therefore seems to me to be doubtful that the plaintiff has any entitlement to sue for possession in the manner in which he has, and that the chargeholder should, either itself or through its agent lawfully authorised, have sought summary possession pursuant to s.62(7) of the 1964 Act. These matters were not, however, fully argued.

iv. Data protection objection

47. The first defendant made various objections to the alleged data protection breach in transferring the information in relation to his loans and associated security to PODAC. As this submission was made in a highly generalised manner, it is not entirely clear whether this breach is alleged against Ulster Bank only or against PODAC and/or the plaintiff. In any event, I agree with the submission of the plaintiff that such a breach would not appear to entitle the first defendant to resist the relief claimed (if it were otherwise available). It should be noted that Article 6.1(a) of the General Data Protection Regulation provides that the processing of personal data is lawful where the consent of the data subject is given. This appears to me to have been done at Clause 19 of the Facility Letter which entitled the bank to give anyone any information about the borrower, the loan agreement or any associated security in connection with any proposed transfer of, or financial arrangement per reference to, the facility letter. Similar rights are given for the purposes of debt collection by a third party agency.
48. It does not therefore seem to me that any serious question to be tried has been raised by the first defendant on this basis.

v. Section 91 Land and Conveyancing Law Reform Act, 2009

49. Finally, I wish to make some observations on the reliance by the first defendant on s. 91 of the 2009 Act so as to require the plaintiff (or PODAC) to produce to him all the documents of title relating to the secured property. It does not seem to me that any such

right would, in and of itself, be a defence to an application such as this, if it were otherwise an appropriate application to make. The significance of s.91 in *Charleton v. Hassett* was that the borrower in that case had made his cooperation with the receiver conditional upon receiving inspection facilities in compliance with s.91, and these had not been forthcoming. In those circumstances, Allen J. was of the view that it had not been shown that the borrower in that case had impeded the receivership. Absent that kind of consideration, it does not seem to me that s.91 provides a legal defence to an application for possession.

Postscript on costs

50. This final comment does not arise from any argument made to me and is an observation of my own, arising out of the fact that the property is stated on affidavit to be worth in the region of €100,000. Assuming for the moment that the plaintiff has a right to proceed by way of injunction, I have significant concerns about why these proceedings are brought in the High Court. Since the commencement of s. 45 of the Civil Liability and Courts Act, 2004, by S.I. No. 2 of 2017, with effect from 11 January, 2017, the jurisdiction of the Circuit Court in injunctions relating to property including land (para 27 of the Third Schedule to the Courts (Supplemental Provisions) Act, 1961) extends to properties worth up to €3 million, and there is a presumption that the property is worth less than €3 million which may be rebutted.
51. Obviously, in this case, there is no need to rely on the presumption, because there is a valuation report on affidavit. The property is not, even in terms of rural properties, a valuable property. Were it the case that the application was being granted, the issue of whether the proceedings should have been brought in the Circuit Court and the appropriateness of a differential costs order pursuant to s. 17 of the Courts Act, 1981, as substituted by s. 14 of the Courts Act, 1991, might therefore have to be considered. There must be a concern about the imposition of unnecessary legal costs on a debtor who already seems to be hopelessly in arrears. However, as I am refusing the relief, I do not have to resolve this issue in this case.

Conclusion

52. In my view, it is quite clear from the plaintiff's affidavit that the proceedings are brought solely to achieve the sale of the property, a power the receiver does not have under either the Charge or the Conveyancing Act, 1881. Related to that is the fact that the application is not brought to regularise matters pending trial, such as by permitting a chargeholder or a receiver acting on its behalf, to receive the rents and profits or to manage the property during that period. It is, therefore, an attempt to obtain summary judgment by way of an interlocutory injunction, and is therefore contrary to the Supreme Court authority of *Charleton v. Scriven*.
53. I will therefore refuse the relief sought in the notice of motion.