

THE HIGH COURT

[2022] IEHC 717

2020 No. 6478P

BETWEEN

PROMONTORIA (FINN) LIMITED and by Order DAMIEN HARPER

PLAINTIFFS

AND

NEIL ARMSTRONG and LINDA ARMSTRONG

DEFENDANTS

JUDGMENT of Ms. Justice Eileen Roberts delivered on 20 December 2022

Introduction

1. This judgment relates to an interlocutory application by the plaintiffs who seek vacant possession of a property in folio 35808F of the register Co. Kildare, being 29 Tannery Road, Rathangan, Co. Kildare (the ‘**Property**’). The plaintiffs also seek various orders prohibiting the defendants from obstructing the plaintiffs’ efforts to take possession of the Property, to secure the Property and to collect any rents arising in relation to the Property.
2. The interlocutory application was heard by this court on 29 November 2022. There was no appearance by or on behalf of the defendants and no affidavits have been filed by them. This court is satisfied that the defendants were notified of the hearing date by letter dated 18 July 2022 as set out in the affidavit of service of Rachael Reid sworn 24

November 2022, albeit that this letter was subsequently returned to the plaintiffs' solicitors.

The parties and the background to this dispute

3. The defendants are a married couple who appear to have resided for at least a period of time at an address in Portlaoise, Co Laois. The defendants now say they are estranged and that the first named defendant is residing in the Property. There was however some conflicting evidence on that latter point for certain periods.
4. On 17 September 2008 the defendants were provided by First Active plc with a loan facility of €248,400 to purchase the Property. The loan facility provided that the defendants would pay interest only for the first 24 months of the loan facility and thereafter repayment would revert to capital and interest for the remaining term. The loan term is stated to be 35 years. Interest was a fixed interest rate. From 17 November 2011 the monthly repayments were confirmed to be €1506.92. The defendants accepted the terms and conditions of this loan facility on 25 September 2008. That acceptance confirmed that First Active plc "*may decide to securitise some of its mortgages and that "mortgages may be transferred to investors, which include major financial institutions worldwide"*". The loan conditions confirmed that "*the mortgage and all associated rights and interest (including the loan and any other debt secured thereby and the interest in related insurances and assurances) will be freely transferable by First Active plc on such terms as First Active plc may think fit as part of a loan transfer and mortgage securitisation scheme"*".
5. The defendants and First Active plc entered into a mortgage in respect of the Property on 11 December 2008, which was registered with the Land Registry on 15 January 2009. The deed of mortgage confirmed the entitlement of First Active plc, should the

defendants default in making the agreed repayments, to enforce the mortgage by appointing a receiver. Clause 13 of the deed of mortgage confirms that any receiver appointed by the lender would have specific powers in addition to those granted by statute, including at clause 13(e)(i) the power to enter upon and take possession of the Property and at clause 13(e)(ii) the power to manage, sell or let the Property.

6. Clause 10 of the deed of mortgage provided further confirmation of the lender's power to transfer the mortgage and any security created by it to any person, with or without notice to the borrowers.
7. Clause 6(e) confirmed a covenant on the part of the borrowers not to create any lease or tenancy or part with or share the occupation or possession of the Property.
8. First Active plc had been acquired by the Royal Bank of Scotland Group in 2004. The banking business of First Active plc was transferred to Ulster Bank Ireland Ltd (**'Ulster Bank'**) on 15 February 2010 pursuant to Statutory Instrument No. 481/2009.
9. The Property was originally a family home. The defendants fell into arrears and, by letters dated 10 December 2013 and 30 December 2013 they were issued with a demand for arrears then outstanding in the amount of €12,328.37. The letter advised that Ulster Bank would take legal action if the arrears were not discharged and this "*may also include seeking a court order to repossess your property*".
10. Ulster Bank appointed Sean Webb and David Brady of Cabot Financial (Ireland) Ltd as joint receivers over the Property by deed dated 28 September 2014.
11. By deed of transfer dated 29 September 2015, the first named plaintiff acquired the interest of Ulster Bank in the defendants' mortgage security executed by the defendants on 11 December 2008. The first named plaintiff became registered as the owner of the charge held by First Active plc over the Property on 15 October 2015.

- 12.** The defendants were advised by letter dated 5 November 2015 that with effect from 23 October 2015 the new owners of the defendants' loan, being the first named plaintiff, had appointed Capita Asset Services (Ireland) Limited to take over the day-to-day management of the loan including managing the collection of repayments.
- 13.** Mr Sean Webb and Mr David Brady were discharged as joint receivers over the Property and, by deed of appointment dated 19 July 2016, James Murphy, chartered accountant, was appointed receiver over the Property. Mr Murphy has since died and was replaced as receiver by the second named plaintiff under a deed of appointment dated 18 November 2020 and was substituted as the second named defendant in these proceedings by order of the High Court dated 21 September 2021.
- 14.** On a date unknown to the plaintiffs, the defendants appear to have vacated the Property and moved to another property in Portlaoise. The Property was rented out by the defendants to third parties, and it appears clear that during that period neither of the defendants resided in the Property. When the plaintiffs learned that tenants were intending to vacate the Property, the plaintiffs arranged for personnel to attend the Property on 28 April 2020 following the departure of the occupants and at a time when the Property was vacant. The locks on the property were changed on that date by representatives of the plaintiffs and the Property was secured. It appears that the first named defendant then himself changed the locks again thus preventing the plaintiffs from gaining access to the Property. In more recent times, as outlined above, the first named defendant claims he has moved back into the Property.
- 15.** The evidence shows that as at 5 June 2020 the defendants were indebted on their loan for the Property in the amount of €324,789.34. No further payments have been made by the defendants.

Correspondence between the parties

- 16.** On 10 November 2017 the first named defendant stated that he was living out of one room in the Property due to marriage separation. He expressed a hope that he could raise a mortgage on the Property which would result in a redemption of the mortgage claimed by the first named plaintiff. On 13 November 2017 correspondence on behalf of the then receiver noted the intention to sell the Property as soon as practicable and proposed a period of four weeks to allow the first named defendant to make alternative accommodation arrangements. The first named defendant responded on 13 November 2017. He said in that letter that he would “*not have his proprietary rights arbitrarily seized from him*”. The plaintiffs’ then solicitors sent a letter dated 15 November 2017 addressed to the first named defendant at the Property setting out in summary form the relevant history of the defendants’ dealings, the appointment of the receiver and proposed next steps.
- 17.** A detailed response dated 22 November 2017 was issued by the first named defendant. He admits that the loan monies were advanced to the defendants by First Active plc but states that Ulster Bank and the first named plaintiff are strangers to him. Complaint is made that the loan transfer negated the defendants’ equitable right to redeem the loan had they wished to do so. He says that Ulster Bank ought to have allowed the borrowers to redeem their loans for whatever price the first named plaintiff paid for the loan. The first named defendant said that he did not accept the validity of the transfer of his loan to either Ulster Bank or to the first named plaintiff. The first named defendant also alleges in this correspondence that his estranged wife Linda was subject to undue influence by him to sign for the mortgage. This is not an allegation that has ever been made by the second named defendant, however. The first named defendant argued that the terms of his mortgage amounted to unfair terms not binding on the defendants as consumers. The

first named defendant also indicated that he intended to have the mortgage account assessed for interest overcharging, although this does not appear to have been an issue which he ever later raised. The correspondence ends with a proposal, advanced on an open basis on behalf of both defendants, where he indicates that the defendants would be

“open subject to prior agreement in writing that the property be put on the open market and whatever sale price is achieved, Promontoria retains this amount in full and final settlement less €20,000 remitted to ourselves for relocation costs. If this can be agreed, we will not hesitate in signing a non-disclosure agreement”.

18. This proposal was not acceptable to the plaintiffs.
19. By letter dated 9 February 2020 the first named defendant wrote to Link ASI Limited on behalf of the first named plaintiff seeking evidence that the first named plaintiff was entitled to demand repayment of the loan. The first named defendant said he would accept €10,000 in exchange for his consent to sell the Property provided the evidence he requested was provided to him.
20. On 9 December 2020 the first named plaintiff received a notice dated 4 December 2020 from the Property Registration Authority. This notice outlined an application which had been lodged by the first named defendant giving his address as the Property and seeking to cancel the charge on the Property registered in favour of the first named plaintiff. The claimed justification for seeking the removal of the charge was that any claim in respect of it was alleged to be statute-barred. An affidavit was filed by Raphoe Collins, solicitor, on the 22 February 2021 to confirm the first named plaintiff's objection and opposition to that application. The affidavit outlined the acknowledgement of indebtedness made by the first named defendant, the appointment of a receiver by the first named plaintiff, the commencement of proceedings against the defendants, and the temporary recovery of vacant possession of the Property by the plaintiffs.

- 21.** Various difficulties regarding service of the proceedings and motion papers were encountered by the plaintiffs who obtained an order for substituted service from the High Court on 8 March 2021.
- 22.** Following service of papers in compliance with that order for substituted service, further correspondence was received from the first and second named defendants. The first named defendant wrote to the plaintiffs' solicitors by letter dated 11 March 2021 in which he stated that he was a separated father living in the Property. He sought time to allow proposals and a possible resolution to be considered. The second named defendant corresponded with the plaintiffs by letter dated 12 March 2021. She complained that the documentation was left at her address in Portlaoise and also stated that the first named defendant was not living with her but lived in Rathangan, which is where the Property is located.
- 23.** By letter dated 17 March 2021 the first named defendant complained that a copy of these proceedings had been sent to the Property Registration Authority before being served on him and that they contained sensitive details regarding family law matters.
- 24.** A supplemental affidavit of the second named plaintiff was sworn on 5 May 2022 in order to provide an update for the court. That affidavit referred to a report dated 15 March 2022 from Blackwater Asset Management who conducted an occupancy check on the Property on 15 March 2022. That report outlined that following a conversation with the occupants of a neighbouring property it was confirmed that the second named defendant does not reside in the Property but that the first named defendant does. The plaintiffs therefore believe that the first named defendant now resides in the Property but the plaintiffs cannot say whether other individuals are also residing there.
- 25.** The plaintiffs' motion which issued on 1 March 2021 was re-entered before the High Court on 9 May 2022. Just prior to that hearing date an email was received from a Ms

Clare Kelly, personal insolvency practitioner on behalf of the first named defendant. In those circumstances the court adjourned this application to 20 June 2022. The defendants were advised of the position by letter from the plaintiffs' solicitors dated 10 May 2022 and it was confirmed that if the defendants wished to oppose the plaintiffs' application they would need to set out their position on affidavit. The matter came before the High Court on 20 June and was adjourned to 11 July 2022 to allow the correspondence from Ms Kelly to be exhibited on affidavit. The defendants were advised of same. A hearing date of 29 November 2022 was set for the hearing of this interlocutory application and the defendants were advised of same by letter dated 18 July 2022 from the plaintiffs' solicitors. There was no appearance by the defendants on that date nor any further correspondence or update from Ms Kelly in the interim period or since.

Submissions regarding the need for and the reasons to grant interlocutory relief

- 26.** The plaintiffs say that the defendants are clearly indebted to them for the balance due under the mortgage. In light of that and the plaintiffs' right to obtain vacant possession of the Property under the mortgage, they say damages are not an adequate remedy for them. They say that the balance of convenience clearly favours the court granting the interlocutory injunctive relief sought.
- 27.** The plaintiffs say that the proposals already advanced by the first named defendant on behalf of both defendants effectively acknowledge that the plaintiffs are entitled to proceed with the sale of the Property subject to a payment to the defendants for what they term "relocation costs". They say that the defendants have refused to engage at all with these proceedings. The plaintiffs say that the least risk of injustice is to permit the plaintiffs to proceed with the sale of the Property pending a full hearing of the proceedings.

This court's decision

- 28.** In weighing up the various considerations in this case this court needs to consider not only the submissions made by the plaintiffs on affidavit and through their counsel, but also the correspondence issued by the defendants. When a party does not engage with proceedings it is difficult for a court to anticipate all the arguments that might have been made by that party had they engaged. In this case the defendants have made various complaints and have looked for original documentation and evidence. However, they have not raised any detailed defence or objection and indeed they appear to have acknowledged their debt. They do not deny that the loan was advanced to them or that they ceased to repay the mortgage. While it is understandable at a human level that borrowers may be unable or unwilling to engage with legal proceedings against them, this will eventually result in a court having to determine an application such as this one without the benefit of hearing directly from those borrowers.
- 29.** The Court of Appeal in *Everyday Finance DAC v. Gleeson* [2022] IECA 130 held that an application for interlocutory relief which sought vacant possession of property should be characterised as mandatory in nature. The plaintiffs' application in this case seeks possession of the Property and therefore is essentially a mandatory injunction, requiring the plaintiffs to satisfy the court that they have a strong case likely to succeed at trial. In circumstances where the plaintiffs have established the matters set out in this judgment regarding the loan, the default, the registration of the relevant charge over the Property in favour of the first named plaintiff, the appointment of receivers and the powers arising under the mortgage documentation executed by the defendants, I believe that the plaintiffs have established a strong case likely to succeed at trial, as required by *Maha Lingham v. HSE* [2005] IESC 89. In particular, I am satisfied that the defendants have not demonstrated that there is, in the words of Clarke CJ at para 6.13 of his judgment in

Charleton v. Scriven [2019] IESC 28, “an issue of any substance concerning the validity of the appointment and powers of receivers”.

30. In those circumstances I now consider the balance of convenience, to include the adequacy of damages, in deciding what interlocutory relief it may be appropriate to grant in this matter. As Clarke CJ commented in *Scriven* at para 6.14 “*this may involve the court looking at the practical situation on the ground and attempting to determine the course of action which minimises the risk of injustice*”.
31. The plaintiffs have expressed concern regarding the ability of the second named plaintiff to carry out his role as receiver. It is clear that he will continue to be unable to do so in the absence of a court order given the actions of the first named defendant to date.
32. There is no evidence or any reason to believe that either of the defendants would be in a position to meet any financial shortfall or award of damages if the plaintiffs succeeded at trial. The Court has evidence that the first named defendant has engaged with a personal insolvency practitioner. On the other hand, the plaintiffs are a mark for damages and could make good on their undertaking as to damages if the defendants were to succeed at trial.
33. One of the most difficult aspects of this case is that it appears that the first named defendant may now be living in the Property. While there is no evidence before the court to suggest that it would be impossible for the first named defendant to find an alternative place to live, I believe that in the current climate it may well be difficult for him to secure alternative accommodation. That is a matter I believe could be dealt with by affording additional time to the first named defendant to make alternative accommodation arrangements.
34. One of the other aspects of evidence before this court is that the Property was at one time a family home. I do not know when it ceased to be such. This is an issue that could be of

some significance were it to be raised by the defendants at the trial of the action. The plaintiffs through their counsel have confirmed their intention to bring on these proceedings to trial and to have them case managed to obtain a hearing date as soon as possible. Given that the plaintiffs' primary request is for possession, I direct that there should be no sale of the Property pending conclusion of the proceedings or agreement of the parties. This I believe would maintain the *status quo* pending trial in a manner that would best serve the interests of justice in this case.

- 35.** The facts in this case in that regard are similar to the factual scenario which arose in the case of *Everyday Finance DAC and others v. White and others* [2020] IEHC 71. I agree with the comments of Sanfey J in that judgment when he stated at para 73 that

“[a] stay on sale would allow the defendants to proceed to a hearing and defend the matter fully, knowing that the disposal of the property would not have occurred prior to the hearing in the event that they were successful. Alternatively, it would provide some time and space to the parties to attempt to come to a mutually satisfactory compromise.”

- 36.** In all the circumstances therefore I propose to make an order in favour of the plaintiffs in the terms of paragraph 1 of their notice of motion dated 22 October 2020 but I will impose a stay on that order for possession as against the first named defendant only for a period of six months from the date of this judgment or until alternative accommodation is secured by the first named defendant, whichever is the earlier, in order to facilitate the first named defendant, who is alleged to be residing in the Property, to secure alternative accommodation. The plaintiffs should deal with any other persons in occupation of the property in compliance with any applicable law including residential tenancy laws.

- 37.** I also make orders in favour of the plaintiffs in the terms of paragraphs 2, 3, 4 and 5 of the notice of motion subject to the stay set out above (save that the provisions of paragraph 4 are effective immediately).
- 38.** In relation to the relief sought in paragraph 6 of the notice of motion I make an order in favour of the plaintiffs prohibiting the defendants and all persons having notice of this order from collecting or attempting to collect any payments, including rent, in respect of the Property. I also make an order in terms of paragraph 7 of the notice of motion. At the hearing counsel for the plaintiffs indicated that the plaintiffs were not seeking to pursue the reliefs claimed at paragraphs 8 and 9 of the notice of motion. While I note that there is no clear indication that any rents are being received in relation to the Property, if in fact such rents are being paid by any person in occupation, I direct that these payments should (for so long as they are payable) be made to the second named plaintiff with effect from the date of this judgment pending the hearing of these proceedings.
- 39.** I will hear the parties in relation to costs and any directions or timetable to take this matter to hearing. The matter will be listed for mention for that purpose on Tuesday 24 January at 10.45am. I direct in the meantime that the defendants should be notified of this date and that a copy of this judgment should be served on the defendants in compliance with the order for substituted service dated 8 March 2021 and to the first named defendant addressed to the Property.