**THE COURT OF APPEAL**

**Neutral Citation Number: [2019] IECA 211**

**Record Number: 2016/445**

**Peart J.**
**Baker J.**
**Kennedy J.**

**BETWEEN:**

**SHANE MCCARTHY**

**PLAINTIFF/RESPONDENT**

**- AND -**

**SEAMUS MURPHY**

**DEFENDANT/APPELLANT**

**JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 23RD DAY OF JULY 2019**

1. This is an appeal from the order of the High Court (Keane J.) dated 26th July 2016 firstly refusing the appellant's application to cross-examine the respondent and a Mr Ryan of ACC Bank who swore affidavits grounding the respondent's application for injunctive reliefs; and secondly granting to the respondent injunctive reliefs restraining the appellant from interfering with the receiver in carrying out his functions as receiver in relation to the secured property, being part of the property comprised in Folio 22202F County Meath as described in the Schedule to the said order, and restraining him also from trespassing thereon. Other ancillary reliefs were also granted.

2. The trial judge gave his reasons for making the said orders in his written judgment delivered on the 8th July 2016 [2016] IEHC 391.

3. The appellant was not legally represented at the hearing in the High Court, and appeared in person. On this appeal he has been ably represented by both solicitor and counsel.

4. The respondent's application for injunctive reliefs came before the High Court on foot of a notice of motion dated 4th June 2015. It was grounded upon two affidavits, one of John Ryan sworn on the 22nd May 2015, and one of the respondent sworn on the 29th May 2015.

5. While in his notice of appeal which was filed before the engagement of his present legal team, the appellant sought to appeal the refusal of leave to cross-examine as well as the granting of the injunctive reliefs, the principal focus of the appeal at hearing was upon the latter. I will therefore in the main address that ground of appeal. Before doing so I will set out a brief outline of the relevant factual background as well as certain other matters that arose following the conclusion of the hearing in the High Court, though prior to the perfection of the order.

6. In July 2006 the appellant borrowed a sum of €228,000 from ACC Bank plc (now ACC Loan Management Limited) on foot of a facility letter dated 26th of July 2006 the purposes of which were, as noted by the trial judge, firstly to facilitate the repayment of the defendant's existing borrowings with another financial institution; and secondly, to enable the appellant to complete the refurbishment of three residential investment units contained in the property known as "The Cottages, Grangeboyne, Kilmessan, County Meath. The loan was drawn down in two tranches on 15th September 2006, and 2nd March 2007 respectively.

7. In compliance with one of the conditions of the said loan the appellant granted a first legal mortgage and charge to the bank over "the lands hereditaments and premises now registered on folio 22202F of the Register of Ownership of Freehold Land Co Meath". This mortgage was registered as a burden on that folio on 2nd January 2007. According to the bank the appellant defaulted on his obligation to make repayments in accordance with the loan agreement, following which it sent a letter of demand to the appellant on 8th April 2014 which demanded immediate repayment of all monies due under the loan agreement, and in that regard stated that the amount required to be repaid was €212,492.61. The appellant failed to repay the said sum as demanded by the said letter of demand, and the bank's case is that this constituted what is described in clause 8.2.1 of the mortgage as "an enforcement event", and accordingly that the bank was thereafter entitled to appoint a receiver and manager over the secured property.

8. By deed of appointment dated 1st May 2014, executed under seal by the bank, the respondent was appointed as receiver over the security property.

9. The appellant in resisting the application for injunctive relief in the High Court denied ever having received the said letter of demand, and therefore denied that there had been an enforcement event entitling the bank to appoint a receiver. He also disputed the accuracy of the amount claimed to be due by him on foot of the loan. These are issues which I will return to in due course.

10. The affidavit by the receiver in support of his application described in some detail his efforts to conduct the receivership pursuant to his appointment, including acts of obstruction and trespass by the appellant as described in the affidavit. Some factual disputes were raised by the appellant in his replying affidavits. It was on account of those factual disputes that the appellant had sought leave to cross examine the bank's deponents on their affidavits. However, there was no doubt as noted by the trial judge that the

appellant had not surrendered possession of the property to the plaintiff and was not proposing to do so unless ordered by the High Court, because he was not satisfied that the appointment of the receiver was valid.

11. The trial judge concluded that there was no doubt that the defendant had obstructed the plaintiff from taking possession, and also that he had interfered with the functions of the receiver and had trespassed on the receivership property, and had in other ways generally reserved to himself the right to let the investment units on the property and to collect any rent due. As I have already stated, the appellant considered that there had been no enforcement event and therefore that the appointment of the receiver was invalid, and therefore that he was entitled to continue to do the matters complained of notwithstanding that he had defaulted on his repayments. The trial judge dealt with these matters at paras. 17-19 of his judgment.

12. In the High Court the appellant had advanced a number of grounds of defence to the application for an interlocutory injunction. He submitted that the deed of appointment was void for uncertainty and further that the deed of appointment was invalid as it had not been properly sealed by the bank, since only one signature authenticated the seal of the bank on the deed. He urged also that the deed of appointment was invalid because it had not been preceded by a letter of demand. He also sought to resist the application for injunctive relief on the basis that the bank had by then assigned the underlying debt to another financial institution and therefore was not entitled to enforce its security.

13. He also submitted that only two of the three residential units over which the receiver sought to exercise his powers were comprised in folio 22202F, County Meath. In response to that assertion, the trial judge noted that despite the fact that in the form of acceptance which the appellant signed on 3rd August 2006 he had agreed to provide the bank with security over "three duplex units", and not two as now contended by the appellant, the receiver was content that if the High Court saw fit to grant injunctive relief, the receiver would deal only with the two residential units which are wholly within the folio and would take no further steps in relation to the remaining unit pending the trial of the action.

14. In reaching his conclusion that the application for interlocutory reliefs should be granted to the receiver as sought, the trial judge firstly rejected the application by the appellant to cross-examine the bank's deponents on their affidavits filed in support of the application. Having referred to certain authorities on the question of the right to cross-examine the deponents, the trial judge at para. 54 of his judgment stated:

> "Since it is unnecessary, indeed inappropriate, to seek to resolve any conflict of fact there might be between the parties in relation to the particular issues the defendant has sought to raise in the context of the present interlocutory injunction application, in the exercise of my discretion I must refuse the defendant's application for leave to cross examine the plaintiff and Mr Ryan."

15. As I have already noted, counsel for the appellant did not really press the appeal against the refusal of leave to cross-examine, and in my view that was a correct decision. The trial judge clearly had a discretion in relation to that question, and unless there is some clear and manifest error in the manner in which that discretion was exercised this Court ought not to interfere. In that regard it is clear that the trial judge considered the relevant authorities, and in circumstances where he was dealing with an interlocutory application for injunctive relief, and therefore not required to reach definitive conclusions in relation to disputed facts, it was within his discretion not to permit such cross-examination to occur.

16. As for the reliefs themselves, the trial judge first addressed the question of the appropriate test to be satisfied by the respondent on an application for injunctive relief of the kind sought by the receiver. As I have stated, the appellant was not legally represented. However, the trial judge refers to the fact that while the receiver submitted that he was seeking reliefs that were essentially prohibitory in nature, and therefore that the appropriate test was that set out in *Campus Oil Ltd v. Minister for Industry and Energy (No.2)* [1983] I.R. 88, namely whether a serious or *bona fide* fair issue was raised, (and in that regard referred also to the judgment of Laffoy J. in *Kavanagh & anor v. Lynch & anor* [2011] IEHC 348) counsel for the receiver nevertheless felt it appropriate to draw the court's attention to the judgment of this Court in *Bank of Ireland & anor v. O'Donnell & anor* [2015] IECA 73 in which, as the trial judge stated "the Court of Appeal found that what was being sought by the receiver was, in essence, a mandatory injunction to vacate the property the subject of the receivership".

17. The appellant has submitted that the higher test required in cases where a mandatory injunction is sought should apply in the present case, and accordingly that the test is that stated by Fennelly J. in *Maha Lingam v. Health service Executive* [2006] 17 ELR 137. As to this question, the trial judge concluded as follows at paras. 59 and 60 of his judgment:

> "59. In the event, I find it unnecessary to decide which of the two alternative threshold tests ought more appropriately to apply on the particular facts of the present case. The defendant does not deny that he entered into the relevant loan agreement; that he drew down the relevant funds; and that he has had the benefit of those monies. He does not deny that he provided a mortgage or charge over the property as security for that borrowing, conferring upon the bank a right to appoint a receiver over it in the event of any default in repayment. He does not deny that he failed to repay that loan in accordance with the terms of the loan agreement or that he remains in default in that regard.
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> 60. The defendant has raised a number of technical arguments concerning the validity of the plaintiff's appointment as receiver notwithstanding his own default but I have come to the conclusion that those arguments are insufficient – whether taken individually or considered together – to persuade me that the plaintiff has failed to raise a clear and strong prima facie case that is appointment as a receiver is valid and that he is consequently entitled to take possession of the mortgaged property unimpeded and unobstructed by the defendant."

18. The appellant has submitted that it is unclear from the way in which the trial judge expressed himself that he considered the receiver's application by reference to the higher *Maha Lingam* test where the reliefs being sought are in reality mandatory in nature even though expressed in the notice of motion in terms of restraining orders, and that it is the appropriate test by which the receiver's application should have been assessed.

19. In my view, while undoubtedly the trial judge perhaps ought to have grasped the nettle so to speak and stated definitively that he was applying the higher test, it is clear from the way in which he expressed himself particularly in para. 60 that he was satisfied that the receiver had "a clear and strong *prima facie* case that his appointment was valid". But even if that is being over-indulgent to the trial judge, I would in any event myself be satisfied that a strong arguable case was made out on the application by the receiver on which it is probable that he will succeed at trial. The facts in his favour are clearly strong for the reasons identified by the trial judge at para. 59, and such arguments as are advanced on the appellant's affidavits are not such as to reduce the cogency of the receiver's case below the level of a strong arguable case.

20. I appreciate that certain factual matters are disputed by the appellant, particularly perhaps that he received the letter of demand, as contended by the receiver, which is the foundation stone of the bank's claim that an enforcement event occurred. But the resolution of disputed facts must await a full hearing. The respondent had certainly put forward cogent *prima facie* evidence that a letter of demand had been sent to the appellant by the bank. A copy of that letter was exhibited. It is dated 8th April 2014, and on its face indicates that it was sent both by registered post and by ordinary post to the appellant to an address which the appellant has not contended is not his correct address. Indeed, it is the address at which in his own sworn affidavits he states as his address. Indeed, Mr Ryan of ACC bank in his sworn affidavit has exhibited a copy of a "bar coded item delivery record" indicating that the letter of demand was delivered on the 9th April 2014. While the appellant is entitled to persist in his denial of his receipt of the letter when it comes to a substantive hearing of these proceedings, I am satisfied that the receiver on the present interlocutory application has established to the level of a strong *prima facie* case that a letter of demand was sent to the appellant, and that therefore by his default of payment on foot thereof the bank was entitled to appoint a receiver under the terms of the mortgage deed.

21. On a *prima facie* basis the receiver has in my view made out a strong case for injunctive relief, and I would not interfere with the trial judge's conclusion in that respect.

22. Neither would I interfere with the trial judge's conclusion that damages were an adequate remedy for the appellant should he in due course prevail at the substantive trial of this case. In fairness that conclusion was not the subject of argument by the appellant on this appeal.

23. However, there is another matter that arose in somewhat unusual circumstances after the hearing in the High Court concluded, and which is relied upon to a considerable extent by the appellant at the appeal before this Court. It arose from the fact that the trial judge refused to permit the appellant to rely on two affidavits which he had sworn. The first is dated the 19th April 2016 which is the date on which the hearing of the motions concluded, and the second is an affidavit sworn on the 26th July 2016 which was after the trial judge had delivered his written judgment, and in fact the date to which the trial judge had adjourned the matter so that he could hear submissions as to the form his order should make in the light of his judgment. This Court by order dated 23rd February 2017 made an order on consent *inter alia* permitting these affidavits to be admitted as new evidence on this appeal. But it is contended as part of the appeal that the refusal by the trial judge to allow the appellant deploy the two affidavits in the High Court led to an unfairness in the hearing. However, I am not satisfied in that regard.

24. The circumstances in which the appellant had sought to rely upon these two affidavits is set forth with clarity in his written legal submissions, and it is convenient to set them out *verbatim* as they appear therein, since there is no controversy arising in that regard

> "… The hearing of the motions in the High Court commenced on 12 April 2016. In circumstances where the matter did not conclude on the said date, Keane J. listed the balance of the matter for hearing on 19 April 2016.
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> On 19 April 2016, the appellant filed and sought to rely upon a further affidavit in relation to the matter. The learned High Court judge ruled that the appellant was not entitled to rely on the said affidavit of 19 April 2016 on the basis that the affidavits were closed and the matter was part-heard.
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> The hearing proceeded on 19 April 2016, with the High Court reserving judgment and delivering its written judgment on 8 July 2016. The High Court adjourned the matter to 26 July 2016 for the purposes of determining the form of the order to be made and dealing with the issue of costs.
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> The appellant then filed and sought to rely upon a further affidavit on 26 July 2016. The learned High Court judge refused to have regard to the contents of the affidavit on the basis that the High Court had already given judgment in relation to the substance of both applications on 8 July 2016 and the Court was accordingly *functus officio*.
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> Accordingly, while it is common case on this appeal that the appellant's affidavit of 26 July 2016 does identify a mistake in the affidavit of John Ryan of 22 May 2015, the mistake was identified by the appellant in an affidavit sworn only after the High Court had heard the motions in full and delivered a written judgment in relation to same on 8 July 2016."

25. As can be seen from the above, it is accepted by the receiver that there was an error in the affidavit of John Ryan in that he incorrectly referred to account number 1003 8071. An affidavit of Paul Shaw of ACCLM acknowledged this to be an error, and explained also that in the meantime Mr Ryan had left ACCLM, but stated that he himself was familiar with the loan accounts of the appellant and the associated security. He went on to explain that the two drawdowns of the relevant loan facility were made on account number 1003 8073, and not account number 1003 8071. He acknowledged also that due to the same error, the incorrect account statements were exhibited, and he went on to exhibit the correct copy statements. However, Mr Shaw went on to state in his affidavit that when the appellant failed to meet his repayment obligations in relation to the loan facility, loan account 1003 8073 went into arrears, but that he also had defaulted in relation to his repayment obligations on account number 1003 8071 where that account had gone into arrears on 3 July 2012, and that situation still pertains.

26. In the circumstances described, the receiver submits that the acknowledged error in Mr Ryan's affidavit has been corrected and explained, and an appropriate apology given to the court and to the appellant, but that in the end nothing turns on the error, and certainly that it provides no basis on which this court could conclude that any injustice to the appellant arose such that the order is made in the High Court should be vacated.

27. I should add that some issue was taken by the appellant that he had not been served with a copy of the correcting affidavit of Mr Shaw. However, as a precaution, and in anticipation of that issue arising, an affidavit was sworn on the date of the hearing of this appeal before this Court by a legal secretary employed by the solicitors acting for the receiver in these proceedings in which she states from facts within her own knowledge that on the 22 February 2017 under cover of a letter of the same date she served a copy of that affidavit on the appellant by pre-paid registered post, and she exhibits a certificate of posting in that regard goes on to say that the documents were not and were returned to her office undelivered on 30 March 2017. She goes on to state that following the return of the document undelivered, she sent a copy to the appellant as his email address, and she exhibits a copy of that email.

28. I am satisfied as to service of the copy affidavit of Mr Shaw upon the appellant, and I am also satisfied, despite the able submissions of counsel for the appellant, that the undoubted error contained in the affidavit of Mr Ryan which was identified by the appellant, and which he sought unsuccessfully to draw to the attention of the trial judge on 26 July 2016 is not, in the light of the correction, explanation and apology, sufficient to form a basis for interfering with the order made by the High Court. While it would have been open to the trial judge to have accepted the affidavits which the appellant had sought to have admitted, and if necessary to have permitted the respondent an opportunity to respond, it was nevertheless within his discretion to have decided as he did.

29. I am satisfied that no injustice occurred in all the circumstances, particularly having regard to the correcting affidavit of Mr Shaw before this court, which makes it clear that in reality the receiver's strong arguable case is not undermined by the now corrected error made by Mr Ryan in his affidavit.

30. In my view there is no basis for interfering with the orders made by the High Court in its order under appeal, and I would dismiss the appeal.