

THE HIGH COURT

[2022] IEHC 350

[2021 / 4933 P]

BETWEEN

NICHOLAS O'DWYER

AND PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFFS

AND

TREVOR GILLESPIE AND DANIEL DESMOND HOWE

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 30th day of May, 2022

1. By deed of mortgage dated the 1st of February 2008, between AIB Home Loans Ltd. on the one part and the first defendant (Mr. Gillespie) on the second part, Mr. Gillespie created a charge over a property known as 2, Friars Lough, Leighlinbridge, Co. Carlow.

2. As is often the case, the mortgage contained a negative pledge. In this case, the negative pledge was in the following terms: -

“11.4 Negative pledge

Not without the prior written permission of [IIB]:

11.4.1 Create or permit to subsist on a Security interests apply over the Secured Assets or any of them; or

11.4.2 Part with, sell, transfer, lend, lease or otherwise dispose of, whether by means of one or of a number of transactions related or not and whether one time or over a period of time, the whole or any part of the Secured Assets . . .”

3. On the 14th December 2010 the mortgage was registered to the bank on Folio 28583F, in which the Friars Lough property to which I have just referred is to be found.
4. Ultimately, the interest of IIB Homeloans Ltd. in the mortgage was transferred to the second named plaintiff, Pepper.
5. Pepper claimed this interest on the 7th August 2020, the interest was recorded on the Folio on the 18th August 2020, and on the 2nd December 2020 the first plaintiff (Mr. O'Dwyer) was appointed as receiver over the property.
6. Because of difficulties experienced by Mr. O'Dwyer in the receivership, a motion ("the first motion") was issued in these proceedings seeking, among other things, to restrain the defendants from interfering with the receivership. The first motion was given an initial return date of the 8th November 2021. On the Friday before the first return date (namely on the 5th November 2021) Mr. Gillespie talked with the solicitors for Mr. O'Dwyer. The discussion is summarised in this way in an affidavit sworn by Mr. O'Dwyer grounding the current motion for interlocutory relief: -

"In the discussion, the First Named Defendant indicated that he had been made bankrupt and stated that he was unaware of the current status of the Property. My solicitor, Caroline Shanahan of Beauchamps, informed him that the Second Named Defendant was in occupation of the Property and was claiming that it was his uncle's house. Mr Gillespie confirmed that he did not know the Second Named Defendant and did not know who was occupying the Property.

The First Named Defendant explained that he had previously been involved with a Mr Charles Allen who had operated a purported trust known as the Charles Allen Trust. He recalled that Mr Allen had stayed in the Property for a short period of time and had subsequently let it out to third parties. He said that he later contacted Mr Allen to obtain possession of the Property in order to accommodate a friend but that the

conversation became unpleasant. He said that he had nothing further to do with the Property after that point.

The First Named Defendant also indicated his willingness to co-operate with the receivership and when the matter came before Court next on 17 January 2022, the First Named Defendant appeared remotely and consented to Orders being made against him terms of the reliefs sought in the First Motion. I beg to refer to a copy of the relevant Court Order, when produced. I have also been advised by my solicitor that the First Named Defendant expressly stated that he had not consented to the Second Named Defendant's occupation of the Property."

7. After his appointment, but before issuing these proceedings, Mr. O'Dwyer had appointed two agents in respect of the property. The first of these is Camelot Property Management ("Camelot") which was required to inspect the property. The second of these was Madison Property Management ("Madison") which was to act as managing agent in respect of the property.

8. On the 9th of December 2020, Camelot arranged for one of its agents to attend the property. Their report includes the following section: -

"Our agent spoke to a man in his early twenties, he stated it was his uncles home and he was just staying there a short while. His uncle was not home on the day on the visit and the nephew would not disclose any of his own details or his uncles. Our agent advised him to contact Madison as soon as they could, and passed on Madison's contact details."

9. On the 17th December 2020, 22nd January 2021 and 26th January 2021 another Property Company (Ishonon Limited) visited the Property on behalf of Mr O'Dwyer, Here are its findings;

“On first visit door was answered by a young man who said he was a nephew of the occupant, who he said was away. He gave his name as Daniel Murphy but otherwise was very guarded and refused to divulge any further information. Left card for occupant to ring but received no call.

No response to door on second visit and applied tape and posted letter to door.

At last visit, letter removed and tape broken. Door answered again by young man who said he was instructed not to give any information. He did, from a distance, show a letter that was addressed to Receiver”.

10. In response to correspondence from Madison sent to the occupant of the property and noting that the occupation was illegal and the property was being trespassed upon, Mr. O’Dwyer (on the 7th April 2021) received a very peculiar letter. The letter runs to four type written pages. It is stated to be sent from 2 Friars Lough, Leighlinbridge, Carlow. It asserts “private arrangements” in respect of the “private occupation or possession of our above private dwelling”. It states the author of the letters was “an express equitable interest in our above private dwelling and home”. It calls upon Mr. O’Dwyer to refrain from “knowingly willful unlawful deliberate trespass on our private dwelling and home, to intrude over our private affairs, over our peaceful and quiet enjoyment thereof, and /or over our proprietary and equitable rights and interests, all in relation to our above private dwelling and home”.

11. There are two further notable things about the letter. As Mr. O’Dwyer observes in his grounding affidavit, there is no meaningful information provided as to the precise tenancy or any other arrangement or interest which the authors claim in respect of the property. The source or nature of the equitable interest to which reference is made in the letter is nowhere described. Apart from the substance of the letter, the other striking aspect of the letter is that it is not signed by an individual but is rather signed in the following fashion: -

“private occupiers

All rights reserved”.

12. Naturally, Mr. O’Dwyer instructed his solicitors to write in response to this letter. This correspondence was sent to the occupant at Friars Lodge. There was no reply to the letter from Beauchamp, the receiver’s solicitors. Mr. O’Dwyer therefore arranged for a further occupancy check report. The agent of Camelot attended at the property on the 11th June 2021, and spoke with an individual named Des Murphy. Mr. Murphy said that he is “the tenant’s father” and explained that “the tenant was away at work”. I took the reference to “the tenant” to be a reference to the second defendant, Mr. Howe.

13. As I have already noted, the return date for the first motion was the 8th November 2021. On the second return date, the 17th January 2022, a letter was handed into court on behalf of Mr. Howe. This letter is dated the 15th January 2022. It is unsigned, and is stated to be sent by “Mr. Daniel Howe’s host”. I have considered the entirety of the letter, portions of which refer to tragic personal events. The most relevant portion, in my opinion, is the second paragraph of the letter which reads: -

“As 2 Friars Lough, Leighlinbridge, is quite close to Carlow and to its college, Mr. Daniel Howe Jr. decided to attend Carlow College. He asked me if I would give him a Tenancy Lease for 2 Friars Lough. This is the first time Mr. Howe has seemed to assert himself heretofore relying on others to do such things for him. I was delighted to assist him with ‘Independent Living’, and happy that he asked, something which he had never done before. I saw this as a very formative element of his rehabilitation. I only charged him a nominal lease payment, so he does not feel any stigma of charity”.

14. This letter refers to an affidavit of Mr. Howe, stated to be sworn in France in January 2022. In this, Mr. Howe swears as follows: -

“13. I say/know to be true, that I have never met Mr. Gillespie, or have any agreement with him, in private or otherwise. My natural, good faith, private right to reside as a

tenant in possession, at 2 Friars Lough, Leighlinbridge, Carlow, is not dependent upon Mr. Gillespie's consent or goodwill, in any way".

"14. I say/know to be true that 2 Friars Lough, Leighlinbridge, Carlow, was Mr. Gillespie's former property, before Mr. Gillespie privately transferred his Lawful, Natural, Equitable Interests irrevocably to my host in August 2013. I say and know to be true that Mr. Gillespie's private equitable interest in 2 Friars Lough, Leighlinbridge, Carlow is transferred, irrevocably, to my host in August 2013. I first visited this address in November 2013, with my uncle, before I was offered to be, in good faith, natural, lawful right to privately contract, with my host, to make 2 Friars Lough, Leighlinbridge, Carlow, my home".

15. The affidavit goes on to state (as had the letter of the 4th January 2021) that the proceedings are statute barred, that Mr. Howe is "not legally known as Daniel Murphy . . .", that he was the "legal status of tenant in possession . . ." and that both Mr. O'Dwyer and Pepper are "engaged in willful and malicious practices, by misrepresenting the fact that they were aware, intended to act in an unconscionable manner against my host and I".

16. Nowhere in the papers before me is the "host" identified by Mr. Howe.

17. In the light of the affidavit of Mr. Howe, the fact that Mr. Howe was said to have tested positive for Covid – 19 while on a trip to France (and was therefore unable to attend in court) and the contents of the letter to which I have referred, the first motion was adjourned to the 21st February 2022. This was designed to allow Mr. O'Dwyer's lawyers to prepare and serve a replying affidavit. Such an affidavit was sworn (on the 18th February 2022) by Mr. O'Dwyer. The affidavit is a brief one, and makes the point that Mr. Gillespie is the registered owner of the property, that there is no documentation exhibited by Mr. Howe evidencing the transfer of the property by Mr. Gillespie to the "host" in August 2013, that the negative pledge clause (which I have already recited) would have been violated by any such transfer in

the absence of written consent (of which there is no record), and that Mr. Howe had not set out “the basis on which the property has been occupied by Mr. Howe or any other person” – including his “host”.

18. At the court hearing of the 21st February 2022, there was no attendance by or on behalf of Mr. Howe. On the application for Mr. O’Dwyer, an order was made amending the title of the proceedings so that the second defendant is described as “Daniel Desmond Howe” as opposed to “Daniel Murphy”. While Mr. O’Dwyer’s replying affidavit had been sworn on the 18th February, it had been neither filed nor served and a further adjournment was permitted in order to allow this to be done. Mr. O’Dwyer avers that: -

“due to an administrative oversight [the affidavit] was not sent for registered posting to [Mr. Howe] on the 15th March 2022. In light of the bank holiday period of 17 and 18 March 2022, the papers were not ultimately delivered to [Mr. Howe] until the morning of the 21st March 2022 when the first motion was due to be heard. On becoming aware of this, the court struck out the first motion as against [Mr. Howe]”.

19. While this situation is clearly unsatisfactory, the uncontradicted evidence of Mr. O’Dwyer is that the first motion was struck out against Mr. Howe without any consideration of the merits of the motion. I accept the submission that the striking out of the first motion does not prevent the second motion being issued, even if that involved the seeking of broadly similar reliefs against Mr. Howe.

20. The second motion, which came before me for hearing on the 23rd May 2022, is grounded upon an affidavit of Mr. O’Dwyer. I have relied heavily upon this affidavit in setting out the background to the current application. Mr. O’Dwyer’s affidavit also indicates three concerns, which have been summarised as follows: -

- (i) The continued occupation of the property by Mr. Howe and other persons unknown to Mr. O’Dwyer “will continue to have a serious detrimental effect

upon the conduct of the receivership” and will “irretrievably” impair the ability of Mr. O’Dwyer to market the capital;

- (ii) Mr. Howe “may well not be able to account to me in respect to any damages which the receivership may suffer on account of the matters complained of herein”;
- (iii) There is no guarantee that the property market in Ireland will continue to perform as robustly as is currently the case, and that there arises “a real possibility that if [Mr. Howe] is permitted to continue frustrating the receivership . . .” Mr. O’Dwyer may not be able to take advantage of the current buoyant property market and may therefore not achieve the same financial return for the receivership as he would otherwise obtain.

21. For the purpose of the current motion, I have considered carefully the affidavit of Mr. Howe and the correspondence which I set out earlier in this judgment. On the legal principles applicable, I have been referred to a range of authorities culminating in the judgment of Costello J. in *Tyrrell v. Wright* [2017] IEHC 92. At paras. 55 – 58 of her judgment, Costello J. considers the applicable principles. I am satisfied that these principles also apply here, not least because the injunction sought by Mr. O’Dwyer both in form and substance amounts to mandatory interlocutory relief.

“55. It was accepted by the plaintiff that the primary relief sought against the first named defendant in respect of the three secured properties was arguably mandatory and that the threshold test which the Court ought to apply was that set out in the case of *Maha Lingham v. Health Service Executive* [2006] E.L.R. 127 and *Bank of Ireland v. O’Donnell* [2015] IECA 73. He must establish “a strong case that [he is] likely to succeed at the hearing of the action.”

56. The decision of Keane J. in *Keating & Co. Limited v. Jervis Shopping Centre* [1997] I.R. 512 is relevant to my decision. At p.518 of the report Keane J. states:

It is clear that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that is also the case where the claim is for an interlocutory injunction only. However, that principle is subject to the following qualification explained by Balcombe L.J. in the English Court of Appeal in *Patel v W.H. Smith (Eziot) Ltd* [1987] 1

W.L.R 853AT P. 859: -

“However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application set out in *American Cyanamid Co. v Ethicon Ltd.*[1957] A.C. 396 in relation to the grant or refusal of an interlocutory injunction. ”

See also Kavanagh v. Lynch [2011] IEHC 348 where this dictum was followed by Laffoy J.

22. In this case, Mr. Gillespie is the registered owner of the land. The debts currently owed to Pepper are secured by a mortgage executed by Mr. Gillespie, the validity of which he does not contest. The terms of that mortgage prevent Mr. Gillespie from lawfully disposing of the land without the written consent of Pepper (or its predecessors in title) and there is no evidence any such consent has been given. Mr. Gillespie does not dispute the legality of the appointment of Mr. O’Dwyer as receiver over the property. No coherent case is made out on behalf of Mr. Howe that the appointment of Mr. O’Dwyer is in any way unlawful. Equally, the claim to an interest in the land (if I could even describe it as such) put forward by Mr. Howe is completely vague and unconvincing. In particular, the provision by or on behalf of Mr. Howe of affidavit evidence and correspondence which goes out of its way to cloak the

identity of Mr. Howe's "host" and which studiously avoids giving any detail (let alone documentary evidence) of any interest Mr. Howe has in the property is absolutely striking. To use the language employed by Costello J. in *Tyrrell v. Wright*, there is simply no material available to the court which would satisfy me that Mr. Howe has put in "evidence to establish that he has a right to do what would otherwise be a trespass".

23. On that basis, Mr. O'Dwyer is entitled to the interlocutory order sought by him. However, even if I had to consider the factors identified by O'Donnell J. (as was at the time) in *Merck Sharpe and Dohme Corporation v. Clonmel Healthcare Ltd.* (31st July 2019) I would also have decided this motion in favour of Mr. O'Dwyer. At para. 64 of his judgment, O'Donnell J. sets out eight steps which might be followed in applications such as this.

Applying that approach to the facts of this case, I find that: -

- (i) If the plaintiffs succeed at trial, it is likely that a permanent injunction will be granted;
- (ii) There is not only a fair question to be tried, but in fact a very strong case made out by the plaintiffs which is likely to succeed at trial, as required by *Maha Lingham v HSE* [2005] IESC 89
- (iii) While requiring Mr. Howe to move out of the property which is occupied for some considerable time is likely to be disruptive, Mr. Howe has not put evidence before me to suggest that he would find it impossible (or even difficult) to find an alternative place to live. He makes no case that he or his dependents will be difficult to house. He says nothing about possessions (such as furniture or other goods) which he will have to accommodate elsewhere. In all these circumstances, I believe that placing a stay of eight weeks from the 23rd of May 2022, when this motion was heard on the orders which I make will be quite sufficient to meet any inconvenience visited upon Mr. Howe by

the making of these orders. As against that, the continuing frustration of the validly appointed receiver in carrying out his job is something which should be avoided. That is particularly so given the risk which the receiver identifies about potential movements in the value of property, and the difficulties in disposing of this property which are caused by the continued occupation of it by Mr. Howe (and other persons).

- (iv) While it is possible that the mischief identified by Mr. O'Dwyer in his affidavit would be addressed by an award of damages against Mr. Howe, there is no reason to believe that Mr. Howe is in a position to meet any such award. This is a factor identified by Mr. O'Dwyer in his affidavit of the 8th April 2022 grounding the current application. Notwithstanding the fact that this question was flagged by the receiver, no information is forthcoming from Mr. Howe about his financial situation and his ability to discharge any award of damages against him.
- (v) No further factors have been identified by Mr. Howe supporting any argument that the injunction should not be granted. To put it another way, the receiver has identified a serious adverse impact on the receivership as a result of the continued occupation of the property by Mr. Howe (and others), a potential loss caused by this continued occupation, he has made out a very strong case that he is entitled to immediate possession of the premises.

24. Whichever way the matter is approached, whether by reference to principles such as O'Donnell J. in MSD, or the approach taken by Costello J. in Tyrrell v. Wright, I have come to the view that the following orders should be granted to Mr. O'Dwyer: -

- a. An Order by way of interlocutory injunction directing the Second Named Defendant, his servants and/or agents and all other persons having notice of

the making of the Order to immediately cease occupancy of and vacate the property known as 2 Friar's Lough, Leighlinbridge, Carlow as more particularly described in the schedule to the Plenary Summons herein (the "**Property**").

- b. An Order by way of interlocutory injunction restraining the Second Named Defendant, his servants and/or agents, and any other person having notice of the said Order, from trespassing upon, entering upon or otherwise attending at the Property.
- c. An Order by way of interlocutory injunction restraining the Second Named Defendant, his servants and/or agents, and any other person having notice of the said Order, from trespassing upon, entering upon or otherwise attending at the Property.
- d. An Order compelling the Second Named Defendant, his servants and/or agents to forthwith deliver up to the First Named Plaintiff herein, all keys, fobs, magnetically readable cards, RFID devices, other electronic access devices, access codes and alarm codes in their possession, power and/or procurement to the Property.

25. The reliefs sought at para. (1), (2) and (3) of the notice of motion effectively require Mr. Howe to vacate the property, not to enter upon or to attend at the property, and not to interfere with Mr. O'Dwyer performing his functions as receiver over the property. To make these orders meaningful, an order in terms of para. (4) of the notice of motion is required, not least because it is logical that (for as long as Mr. Howe is restrained from entry onto the property) he should not have the means to allow him to do so.

26. All of these orders are in place only until the trial of the action. I have refused an application that this motion be treated as the trial of the action, as no basis is made out on the

affidavits for me to do so. In any event, there remains a claim by the plaintiffs for damages which they may or may not wish to prosecute. Equally, in the absence of Mr. Howe I have not made any directions to facilitate an early trial of the proceedings (as I have been asked to do by the plaintiffs). Instead, I have adjourned this aspect of the motion generally with liberty to re – enter.

27. With regard to the costs of the motion, given the contents of this judgment, I have made an order in favour of Mr. O’Dwyer granting the costs of the motion (and this motion alone).