

THE HIGH COURT

[2023] IEHC 166

2022 No. 1946P

BETWEEN

COLIN GAYNOR

PLAINTIFF

AND

JOHN MCDONALD

DEFENDANT

JUDGMENT of Ms. Justice Eileen Roberts delivered on 31 March 2023

Introduction

1. This is the plaintiff's application for an interlocutory injunction directing the defendant to vacate and deliver up possession of lands comprised in Folio LS9703 Co Laois (the "**Property**"). The injunctive relief sought also extends to an order directing that the defendant remove all bloodstock present on the Property as well as restraining him from trespassing on the Property or impeding the plaintiff in gaining access to it. Injunctive relief is also sought to restrain the defendant from dealing with, disposing of or damaging the Property or impeding the orderly sale or disposal of the Property and permitting the plaintiff to secure the Property.

The parties and the background to this dispute

2. The present application arises in unusual circumstances, set out in some detail below, where both the plaintiff and the defendant assert title to the Property and the right to possession of it.
3. The plaintiff is a receiver over the Property. He was appointed by deed of appointment dated 24 May 2021 on behalf of Pepper Finance Corporation (Ireland) DAC (**“Pepper”**). Pepper had acquired the interest and security previously held by ACC Bank plc in respect of a loan facility advanced by ACC Bank plc to a Mr David Julian which was secured on the Property by deed of mortgage dated 23 March 2005 (the **“Mortgage”**).
4. On 23 March 2005, David Julian, pursuant to a deed of transfer of that date, bought the Property from his father, Patrick Julian, for €100,000. A loan facility of €101,000 was advanced to David Julian by ACC Bank plc to enable him to purchase the Property and this loan was secured by the Mortgage. David Julian was registered as the full owner of the Property on 14 May 2008. The Mortgage was registered as a burden on the Property on that same date, 14 May 2008, by ACC Bank plc.
5. ACC Bank plc ceased to provide banking services on 27 June 2014 and on that date it re-registered as a private limited company changing its name to ACC Loan Management Limited. On 13 July 2016, pursuant to sections 56(1) and 63 of the Companies Act 2014, ACC loan Management Limited converted to a Designated Activity Company. By deed dated 31 October 2018, Cooperatieve Rabobank U.A. (**“Rabobank”**) agreed to purchase all the interest then held by ACC Loan Management DAC in loan assets including the facility of David Julian and the Mortgage. By Global

Deed of Transfer dated 23 August 2019, Pepper acquired all the interest of Rabobank in loan assets which included the loan facility of David Julian and the Mortgage.

6. Pepper's security was registered as a burden on the Property on 12 September 2019.
7. Pepper wrote to David Julian by letter dated 11 February 2021 demanding the sum of €94,465.69 then alleged to be due and owing by David Julian to Pepper in respect of the loan facilities. The plaintiff was thereafter appointed by Pepper as receiver over the Property in May 2021, as outlined above.
8. Following the plaintiff's appointment as receiver, he was advised by David Julian that there was a dispute as to the ownership of the Property and that the Property was in possession of the defendant, John McDonald.
9. In correspondence from the defendant's solicitors dated 25 November 2021 they asserted that the defendant is the owner of the Property and that he had bought the Property in January 1981 (appears this should be 1985) from Mr Patrick Julian (long before Patrick Julian purported to sell it to his son David Julian). In support of this position, the defendant provided an unregistered deed of transfer dated 4 January 1985 which was executed both by Patrick Julian and the defendant and witnessed by their respective solicitors, pursuant to which the Property was purportedly transferred from Patrick Julian to the defendant in consideration of £25,000.
10. There is no interest registered over the Property in favour of the defendant.
11. The defendant is a brother-in-law of Patrick Julian. Patrick Julian is married to the defendant's sister, Sheila. That makes him David Julian's uncle. All of these parties live in close proximity to each other and to the Property.
12. The evidence provided by the defendant in his replying affidavit sworn on 30 August 2022 is that he received compensation for a personal injury he had been involved in at

work and that, when the case settled in 1984, he was asked by Patrick Julian for a loan as Patrick Julian was then in financial difficulty.

- 13.** Both Patrick Julian and the defendant engaged solicitors. The defendant agreed to loan money to Patrick Julian in two tranches. The first was a sum of £10,000 which was secured by a promissory note which Patrick Julian agreed to repay within fifteen months from 4 January 1985. It appears that these monies were repaid at some point. The second tranche was £25,000. The defendant states at para 2 of his affidavit that it was agreed between him and Patrick Julian that Patrick Julian

“would transfer the lands In Folio LS9703 to me and a Deed of Transfer was executed on 4th of January 1985 by Patrick Julian and myself in the presence of John Aylmer Solicitor and William X. White Solicitor. It was agreed between Patrick Julian and myself that if he repaid the sum of £30,000 to me within a fifteen month period then he could effectively buy back the lands in Folio LS9703 from me”.

He notes that there was a charge registered on the Property in favour of ACC Bank plc at that time. The defendant avers that Patrick Julian agreed in writing by way of undertaking that he would discharge that loan and furnish the defendant with a sealed discharge in respect of same. He did not do so.

- 14.** The folio for the Property confirms that there was indeed a charge registered by ACC Limited on the folio when the defendant entered into the transaction with Patrick Julian. That charge had been registered on 26 May 1978 but does not appear to have been cancelled until 14 May 2008. The folio also indicates that a further charge was registered on the Property in favour of ACC Limited on 13 February 1987 which was cancelled on 24 February 2004. A judgment mortgage against the interest of Patrick

Julian in the Property in favour of Allied Irish Banks plc was registered on 9 June 1994 which charge was cancelled on 23 January 2008. It is apparent that Patrick Julian remained the registered owner of the Property and in those circumstances third party security interests were registered against Patrick Julian's interest in the Property after the defendant had allegedly purchased it.

15. The defendant avers that at the time he made the loan to Patrick Julian, he believed that the monies would be repaid as agreed. He avers at paragraph 3 of his affidavit that "*by reason of the fact that [Patrick Julian] is married to my sister Sheila, I agreed to permit him to continue farming the lands in Folio LS9703*".
16. In correspondence between the defendant's solicitors, W.X. White, and the plaintiff, W. X. White confirmed by letter dated 25 November 2021 that "*[a]t the time the sale completed the registered owner, Patrick Julian requested that our client would hold off registering the title for a period of time as Mr Julian hoped to raise money to buy back the lands from Mr McDonald*".
17. As it happened, Patrick Julian did not repay £30,000 as agreed or indeed at any time. The defendant avers that a meeting took place at the offices of his solicitor on 6 January 1996, which was attended by Patrick Julian, his wife Sheila and eldest son Paul as well as a friend of the defendant and the defendant's solicitor Mr White. The defendant alleges at para 6 of his affidavit that at that meeting it was agreed that the defendant would enter into possession of the Property and would farm the lands exclusively without any interference from Patrick Julian or any members of his family. The defendant says that he then entered into "*sole and exclusive occupation*" of the Property and that he has farmed the Property from that date to the present time. He never however registered any interest in the Property.

18. The defendant avers that in about 2010 he was approached by Patrick Julian's son David, who advised him that he was now the owner of the Property and he requested that the defendant vacate the Property immediately. The defendant refused to vacate and says at para 8 of his affidavit that

"...I pointed out to David Julian, which in my view he clearly already knew, that I had purchased the property from his father in 1985 and that I have been farming the lands for many years at that stage to the full knowledge of him and all members of the Julian family".

19. The defendant says that the transaction entered into by David Julian and his father was "illegal and/or fraudulent". He says at para 8 of his affidavit that

"the said Patrick Julian knew full well that he was not in a position to sell the said lands to his son David Julian and also, the said David Julian was fully aware of my ownership and occupation of the lands in Folio LS9703 and that he was not in a position to secure a loan/mortgage on the property with ACC plc at that time".

20. The defendant instructed his solicitors to write to ACC Bank plc in 2011 after he was approached by David Julian. This correspondence is exhibited. ACC Bank plc confirmed that they were relying on their registration as owners of a burden over the Folio and said that this, coupled with the registration of David Julian as the registered owner of the Property, was conclusive evidence of the title.

21. The papers before the court also included Circuit Court ejectment proceedings which David Julian issued against the defendant on 15 March 2013. Those proceedings indicate that David Julian, appearing on his own behalf, sought recovery of possession of the Property which it was alleged had been occupied by the defendant "since 14 May 2008" and which David Julian claimed to have demanded possession of "on 25 April

2012". A defence was delivered by the defendant on 6 September 2013, instructing his current solicitors. The defence took a preliminary point in respect of jurisdiction.

Otherwise the defendant denied the plaintiff's claim for recovery of possession and counterclaimed for a declaration that he had had "*undisputed and continuing possession and use of the lands in Folio 9703 since January 1996*". I will return to the alleged significance of those proceedings when dealing with the arguments advanced by the parties.

22. Pursuant to section 19 of the Criminal Justice Act 2011, the plaintiff on 15 September 2021 reported to Gardai his concern that the funds advanced by ACC Bank plc may have been procured from ACC Bank plc as a consequence of knowingly false or potential fraudulent declarations and assurances made by David Julian to ACC Bank plc regarding the status of the Property and the security that he could provide in return for the advance of funds to him.
23. The plaintiff wishes to market the Property for sale and requires vacant possession to do so. There have been various interactions between the plaintiff and the defendant regarding the locks and gates on the Property with each party claiming to be entitled to secure and use the Property. It is in those circumstances that the present proceedings and interlocutory application arise.

The arguments advanced by the plaintiff

24. Counsel for the plaintiff noted that there is no challenge to the plaintiff's appointment as receiver or to the transfer of interests in the loan facility and Mortgage from ACC to Pepper.
25. He relied on the registration of the charge in favour of Pepper. Particular reliance was placed on the conclusiveness of the Register as provided by section 31 of the

Registration of Title Act 1964. He relied on the decision of *Tanager v Kane* [2018] IECA 352, [2019] 1 IR 385. In that case, one of the questions considered by Baker J was whether, in proceedings seeking possession brought by a mortgagee, a court should entertain an argument by way of defence and counterclaim that the Register was incorrect and so whether the court may or should then “look behind” the Register. The court noted that an order for rectification of the Register could not be made within the scope of proceedings seeking possession in a summary manner. These however are plenary proceedings. At para 75 of her judgment Baker J noted that “...*the Register remains conclusive, notwithstanding the power of both the PRA or the court, as the case may be, to rectify the Register to correctly reflect the title of the registered owner*”.

26. Counsel for the plaintiff also referred to the Circuit Court proceedings outlined above. He noted that the defence provided by the defendant in those proceedings did not seek a declaration that the defendant was the owner of the Property. He said this was an entirely contrary position to that taken by the defendant in these proceedings, even though the same solicitors were instructed. He argued that this cast doubt on the credibility of the affidavits filed by the defendant in these proceedings. He noted that there had been no allegation of fraud pleaded in the Circuit Court proceedings and that this court should enquire why it was not pleaded.
27. He also noted that the deed of transfer was unstamped and said the defendant could not rely on it.
28. Counsel for the plaintiff accepted that he was seeking a mandatory interlocutory order and in those circumstances he needed to meet the threshold of a strong case likely to succeed at trial. He said he met that threshold. He argued that if the matter was permitted to go to trial there was little more that could be adduced by way of oral

evidence vis-à-vis the receiver. He argued that even if the defendant succeeded in his claim his remedy must be one against David/Patrick Julian but not against the receiver.

29. He also argued that damages would not be an adequate remedy for the receiver because this claim involved one of trespass.

The arguments advanced by the defendant

30. Counsel for the defendant objected to drawing any inference from the Circuit Court proceedings (which were not put on affidavit). He said that he would have filed an affidavit had he known these proceedings would be referred to.
31. In relation to the interlocutory relief sought he said that the court should resist a summary judgment attempt where there is a clear dispute. In that regard he quoted the comments of Irvine J (as she then was) in *Taite v Beades* [2019] IESC 92 where she stated at para 31 that “[a]s an interlocutory injunction is merely a stepping stone towards a trial, a court must ensure that such relief is not, in practice, treated as a means of obtaining summary judgment against the defendant”.
32. He acknowledged that the defendant has no standing to object to the plaintiff’s appointment but the defendant says that the appointment is based on a fraud. He said that it was a curious position to say that a contract under seal has no standing whatsoever particularly where both parties had involved solicitors to advise them. There was a deed and a promissory note (the latter which was discharged). The defendant is however a stranger to the purchase and loan by David Julian.
33. The defendant’s position is that he has been in possession of the Property since 1996 and he says that he has owned the Property since 1985. He said that ACC had been on notice since 2011 of the defendant’s claims. He suggested that Pepper might have a

cause of action against ACC in that regard as it long pre-dated the sale of the loan to Pepper.

34. Counsel for the defendant strongly resisted any idea of collusion between the parties. I have no reason to believe there has been any collusion.
35. In relation to section 31, counsel submitted that this provision is subject to being set aside by the court on the grounds of fraud. He says that the conclusive nature of the Register doesn't invalidate the previous transfer. He says that s. 120 of the Registration of Title Act 1964, may provide an avenue of remedy for Pepper.
36. He said that in circumstances where Pepper are seeking an order to sell the Property, the balance of convenience clearly favours the defendant and the maintenance of the status quo (which is that the defendant is in possession of and farming the Property). He said damages would adequately compensate the plaintiff.

Analysis

37. In analysing matters, this court is mindful of the unusual nature of the facts in this case. The plaintiff is certainly in a strong position to seek possession as the (unchallenged) receiver appointed by the registered owner of a charge on the Property. Ordinarily, this would ensure that the plaintiff was likely to satisfy the burden of proving he had a strong case likely to succeed in relation to the interlocutory relief he was seeking and his entitlement to obtain that relief on a permanent basis following trial.
38. So far as the strength of the plaintiff's case is concerned, it is necessary to consider what potential defences might be open to the defendant. A consideration of those defences will assist in determining the strength of the plaintiff's case. It is true that because the defendant is not a borrower, the types of defences normally open to challenge the appointment of a receiver are not available to him. However, the

defendant has raised an entirely different type of defence namely that he purchased the Property prior to the loan to David Julian by ACC Bank plc. In those circumstances it is argued that the purchase of the Property by David Julian was a fraudulent transaction as Patrick Julian had no title to convey to him. The transactions and registrations which flow from a fraudulent transaction are, if proven, capable of being set aside or rectified by a court on the grounds of “actual fraud or mistake”.

39. As was noted by Baker J in *Tanager* at para 74 of her judgment

“it is clear that, under s. 31 of the 1964 Act, the conclusiveness of the Register is not absolute and a court of competent jurisdiction may direct the rectification of the Register in such manner and on such terms as it thinks just, based on the ground of “actual fraud or mistake”.

40. In *Charleton v Scriven* [2019] IESC 28, Clarke CJ noted at para 6.12 of his judgment that

“there may very well be an important distinction to be made in receivership cases between situations where the receivers concerned simply intend to maintain the situation pending a trial and ones where the substance of the interlocutory order sought is one designed to, in practice, bring the proceedings to an end”.

He also stated at para 6.13 that

“it is important to emphasise that these observations only arise in circumstances where there is an issue of any substance concerning the validity of the appointment and powers of receivers...The potential for a distinction between relief which is essentially mandatory, on the one hand, and that which is prohibitory, on the other, arises where there is at least some significant defence put forward which the court

assesses might arguably provide a basis for suggesting that the receivers might fail at trial”.

41. In the present case if the plaintiff was to be granted the mandatory orders he seeks requiring the defendant to vacate and deliver up vacant possession of the Property, this would likely result in the Property being sold by the receiver. To that extent, granting that mandatory relief would effectively be the end of the matter. The question then arises as to whether this would be a fair and just outcome in circumstances where the court does not have a full picture of the defence advanced by the defendant and in particular whether it is possible that fraud might actually be established following evidence, which would be a basis for the Register to be rectified.
42. At interlocutory stage, this court is not determining any final issues of fact. This court cannot determine whether the defendant will be able to establish fraud at trial. However, it is the view of this court that the defendant has gone considerably beyond a mere bald assertion of fraud. The fraud has been particularised and some evidence has been provided to support it (although significantly more evidence may be available to a trial judge). The transaction in question appears to be corroborated, at least in correspondence, by solicitors who acted for the defendant. I find in those circumstances that it is by no means certain that the plaintiff will succeed at trial.
43. Even if I were to assume that the plaintiff has established the necessary strong case, this court would also of course have to consider the balance of convenience, including the adequacy of damages.
44. Both sides claim that damages would not be an adequate remedy for them. They also both claim that their property rights are impacted. In considering whether damages would adequately compensate either party I have to assess the impact both of refusing

or granting the reliefs sought. If the orders sought were to be refused and the action were to succeed, the result would be that the exercise by the plaintiff of his property rights would have been postponed. On the other hand, if the relief was granted and the action were to fail, the result would be that the defendant's property right would have been extinguished (assuming the intended sale of the Property took place). I believe therefore that refusing the orders carries the lower risk of injustice overall.

45. I believe it is also the case that the Property has some particular importance and emotional connection to the defendant, the loss of which is not easily compensated by way of damages. The Property has been farmed by the defendant for over 20 years and is said to be currently used by him to keep bloodstock. The Property is understood to be close to other lands owned by the defendant and, for farming purposes, this has a particular significance in terms of location. Such land is likely to be extremely difficult, if not impossible, to replace.
46. I believe that the fairest outcome in the circumstances is to refuse the plaintiff's request for the interlocutory orders sought. However, it is imperative that these proceedings be then progressed to trial as soon as possible to minimise any adverse consequences for either side. I note in that regard that although proceedings issued on 19 May 2022 there does not appear to have been any statement of claim yet delivered.

Conclusion

47. For the reasons advanced in this judgment, I have determined that the plaintiff should not be granted the interlocutory injunctions he seeks requiring the defendant to vacate and deliver up vacant possession of the Property and to permit the plaintiff to secure, deal with and dispose of the Property.

48. Instead, it appears to me that the appropriate order is that the parties be directed to agree a timetable and directions to bring this matter to an early trial so that all contested issues of fact and law can be determined.
49. I will list this matter for mention on Friday 21 April 2023 for the purpose of hearing the parties as to costs and to make directions for the trial of this action. In that regard I would encourage the parties to endeavour to agree directions in advance of the return date, failing which I will set directions if agreement is not reached between them by that date.