

APPROVED

[2023] IEHC 425



THE HIGH COURT

Record No.: 2022/1455 P

BETWEEN:

PATRICK FITZSIMONS

Plaintiff

-and-

START MORTGAGES DESIGNATED ACTIVITY COMPANY, MAZARS and  
KEENAN PROPERTY MANAGEMENT LIMITED

Defendants

**JUDGMENT of Mr. Justice Rory Mulcahy delivered on the 20<sup>th</sup> day of July 2023**

**Introduction**

1. In these proceedings, the Plaintiff claims that he has been defamed by the Defendants who, he says, have made false allegations in relation to his failure to pay his mortgage and have threatened to trespass on his property (“**the Property**”). The proceedings were commenced by Plenary Summons dated 11 April 2022. The Plaintiff has not yet delivered a Statement of Claim.
2. This judgment concerns three motions issued by the Plaintiff.

NO REDACTION REQUIRED

3. The first motion, issued on 5 September 2022, seeks an Order for Contempt by the Defendants who, it is alleged, continued to defame the Plaintiff while the proceedings were ongoing.
4. The second motion, issued on 14 September 2022, seeks an interlocutory injunction preventing the Defendants from defaming the Plaintiff while the proceedings are ongoing when the Defendants sent their servants or agents to the Plaintiff's property to defame him and harass the occupants.
5. Both motions were grounded on affidavits which contained limited factual averments, but on foot of an Order dated 12 December 2022 (O'Moore J) the Plaintiff delivered an affidavit sworn on 21 December 2022 in which he set out the factual matters giving rise to his complaints in those motions.
6. The third motion also seeks an Order for contempt, in this case on two grounds. First, that the Defendants have harassed the Plaintiff's home and occupants contrary to the Court Rules that they not interfere with these ongoing proceedings. And second, for failing to comply with a Court Order regarding delivery of replying affidavits.
7. In substance, the Plaintiff only pursued the application for the injunction and the application for contempt alleged to arise from the Defendant's failure to deliver affidavits in accordance with the Court's direction.

### **Background**

8. On 10 January 2006, the Plaintiff and his wife, now deceased, accepted a loan offer from Irish Life & Permanent plc for the sum of €250,000. The loan was for the purchase of a house, and the security for the loan was a mortgage on the house, being the Property the subject of these proceedings. The mortgage was executed on 26 January 2006.
9. The first Defendant acquired all rights in the loan and mortgage by a Global Deed of Transfer dated 1 February 2019.
10. The first Defendant alleges that the Plaintiff defaulted on his repayment obligations and it made a demand for repayment of the loan on 2 March 2022. In circumstances where the loan was not repaid on foot of that demand, the first Defendant appointed Hilary

Larkin of the second Defendant as Receiver over the Property on 29 March 2022 (“**the Receiver**”). The Plaintiff was advised of the appointment of the Receiver on 1 April 2022. The Receiver also wrote to the occupiers of the Property on the same day, advising them of her appointment and telling them that any further payments in respect of the Property should be made to her appointed agents, the third Defendant, a property management company.

11. As noted above, the Plaintiff issued these proceedings on 11 April 2022, in apparent response to the appointment of the Receiver.

12. The application for an injunction arises from the activities of the Receiver and the third Defendant. In brief, it is alleged that the Receiver and her agents have attended at the Property on a number of occasions. The Plaintiff’s affidavit of 21 December 2022 sets out the following details:

- On 18 August 2022, their representatives attended at the Property and looked for occupancy details of the Property;
- On 13 September 2022, their representatives attended at the Property, offered to pay the occupants cash to vacate the Property and advised them to stop paying rent to the Plaintiff;
- On 20 September 2022, their representatives attended at the Property, offered to carry out repairs and again looked for occupancy details;
- On 13 October 2022, representatives attended at the Property, advised the occupants that the Plaintiff “*hasn’t paid the, the mortgage on the Property*”, sought access to the Property and again advised the occupants to stop paying rent to the Plaintiff.

13. The Plaintiff has recordings of each of these encounters and provided the Court with transcripts (from which the quoted words above were taken). In circumstances where the contents of those transcripts were not disputed, it was considered unnecessary for the Court to listen to the recordings.

14. On 14 October 2022, the third Defendant served Notice of Termination addressed to all occupiers of the Property advising that the tenancy of the dwelling would terminate on 3 June 2023 and that vacant possession must be given up on or before that date. The

reason for termination given was that the landlord intended to sell the Property. The Notice was accompanied by a statutory declaration from the Receiver stating her intention to sell the Property. It appears that the notice was also served on the Residential Tenancies Board.

15. The proceedings were adjourned from time to time and as stated above, the Plaintiff was directed to file a further affidavit by 23 January 2023, with the Defendants to reply by 7 February 2023. The Plaintiff complied with this direction by filing his affidavit on 21 December 2023. Notwithstanding that the Plaintiff delivered his affidavit almost a month before the date required, the first Defendant filed its affidavit one day late, on 8 February 2023. The second Defendant filed a replying affidavit on 21 February 2023. Solicitors for the Defendants filed a further affidavit on behalf of all three Defendants on 24 February 2023 in response to the contempt motion.
16. Insofar as the Plaintiff purports to maintain a claim in defamation, it is not clear to me that he has pleaded his case in accordance with the requirements of the Defamation Act 2009. However, no objection is taken on this account and it is not, in any event, necessary for me to determine that issue for the purpose of deciding these applications.

### **The Injunction Application**

17. The Plaintiff's injunction application and, for that matter, his first contempt motion seem to have been based on the mistaken premise that issuing the within proceedings would act as an automatic stay on the appointment of the Receiver such that it was impermissible for the Receiver to have taken any of the steps detailed at paragraphs 12 and 14 above. As he puts it in an affidavit filed in response to the Defendants' last affidavit, the Defendants having entered appearances, they have recognised the Court as the arbitrator between the parties. Accordingly, he says:

*“[T]he Receiver should have paused her work pending the outcome of the case as the receivership process cannot run in parallel with the Court process, the Court has to take precedence.”*

18. Issuing proceedings does not, in general, have the effect of pausing or staying a process such as the appointment of a receiver which is the subject of those proceedings. Rather an application for a stay or injunction must be sought and obtained if a party wishes to achieve that result. Moreover, it could not, in any event, have had such an effect in this case, where the Plaintiff has not sought to challenge the appointment of the Receiver, nor yet identified any basis upon which he might so do.
19. There was, therefore, nothing improper about the Receiver taking steps on foot of her appointment to take control of the Property and the income from the Property. The Plaintiff has not made out a fair issue to be tried regarding the steps taken by the Receiver which might give rise to the grant of an injunction. None of the steps taken by her appear to be steps which the Receiver was not entitled to take on foot of her appointment. There is nothing in the actions of the Receiver or her representatives which could be described as harassment. Unless and until the Plaintiff seeks to make an arguable case that the Receiver was not validly appointed, there is no basis to restrain her from continuing to act as she has, or from instructing her agents so to do.
20. The Plaintiff also seems to have understood that the second Defendant continuing to hold herself out as Receiver following the issuing of the proceedings was, of itself, defamatory. This was a proposition rejected in **Farrelly and Anor v Kavanagh [2015] IEHC 114:**

*“33. The plaintiffs have not impugned the mortgage in proceedings against the mortgagee and the deed has not been set aside. According it remains a valid enforceable deed on its face. The plaintiffs did not sue the bank and did not seek an order that the bank remove the defendant as receiver over the property. The plaintiffs adduced no evidence that the bank, never mind the defendant, was aware of the alleged undue influence of the plaintiffs’ own solicitor. In these circumstances there can have been no obligation on the defendant to act upon the mere allegations of the plaintiffs. From his perspective there were three valid mortgages and he had been validly appointed under a deed of appointment pursuant to those mortgages. He owed a duty to the bank which had appointed him to realise the assets. Unless or until that deed of appointment had been set aside either by the bank or by an order of the court he acted perfectly correctly in describing himself as a receiver and in continuing to act as a receiver over the properties. Indeed, he had a duty so to do. It follows therefore that there can be no question of a case in defamation arising based on the fact that he described himself as the receiver of the plaintiffs’ properties or that he continued to act as a receiver of those properties. This claim in defamation also must be rejected.”*

21. In circumstances where the Plaintiff has not set out any basis for contending that the appointment of the Receiver was invalid, it follows that he has not made out a fair issue to be tried that the actions of the Receiver give rise to a claim in defamation.
22. It was also suggested in argument that there had been no default in the repayment of the loan, and it appears to be the suggestions to the contrary by the Defendants which the Plaintiff alleges are defamatory. In circumstances where the Plaintiff was acting under a misapprehension regarding the effect of issuing the proceedings, he has not, at least not yet, tendered any evidence to support the assertion that there had been no default.
23. The only evidence adduced was by the first Defendant to the effect that, as of 31 January 2023, there were arrears of €24,452.02 on the loan. It is worth recording that on the Defendants' evidence, after a period of making no loan repayments between 2010 and 2014, the Plaintiff has made payments every month since and has reduced those arrears from a figure of €57,446.69 in 2014. In those circumstances, an allegation that he wasn't *currently* paying his mortgage might not be strictly accurate. However, the Plaintiff's evidence is that the statement made was that the Plaintiff hadn't paid the mortgage. Having been called on to do so, he hasn't repaid in full, so this statement is, on its face, correct. The Plaintiff hasn't, therefore, made out a fair case that any of the actions or statements of the Defendants are defamatory, still less that there is a basis for considering that an injunction is necessary to restrain the Defendants from making further defamatory statements.
24. Although the Plaintiff has not raised a fair issue to be tried, given the efforts he has made since 2014 to significantly reduce his mortgage arrears, I would encourage all parties to see if a resolution of the issues between them can be found.
25. In light of the conclusion that there is no fair issue to be tried, it is not necessary to address the balance of convenience. I will refuse the Plaintiff's application for an injunction.

## **The Contempt Motion**

26. The Plaintiff is quite correct that the Defendants failed to comply with the directions given by the Court regarding the filing of replying affidavits. Although the failure to comply with a Court's directions should not be taken lightly, it did not, in this case create any prejudice to the Plaintiff.
27. The Order in question merely stipulated the time within which the Defendants were to deliver affidavits; it did not require that affidavit be delivered at all. In this regard, the third Defendant did not deliver an affidavit at all in response to the injunction application. It was not thereby in breach of the Court Order.
28. The remedy for a failure to comply with an Order of this sort might be to seek to disallow any such affidavit, or to seek to recover any additional costs occasioned by delay. It seems wholly disproportionate to allege contempt of court in response to such relatively inconsequential breaches. A failure to comply with such an Order does not equate to contempt of court. Contempt of court will typically only arise where there has been a failure to comply with a Court Order which has been personally served on a litigant and which is penally endorsed, *i.e.* contains a statement advising the subject of the Order that if they fail to comply with it they are liable to sanctions including attachment and committal.
29. Moreover, the purpose of an Order that a party is in contempt is primarily coercive, to ensure compliance with the Court Order. That compliance has been achieved in this case.
30. Nothing has occurred which engages the Court's contempt jurisdiction, and in the circumstances, the Plaintiff's application for an Order for contempt is also refused.

## **Decision**

31. The Plaintiff is a lay litigant and represented himself in these applications. The Orders sought by him were based on misunderstandings regarding the legal effect of issuing proceedings, and of the scope of the jurisdiction to find a litigant in contempt of court.

32. The only correspondence exhibited by the Defendants detailing their response to the Plaintiff's motions are letters of 21 February 2023 calling on the Plaintiff to withdraw his most recent contempt motion. There is every reason to believe, having regard to the manner in which the Plaintiff conducted himself on the hearing of these applications, that had the Defendants written to the Plaintiff to clarify matters that these motions would not have been necessary.
33. In all the circumstances, although I will refuse the Plaintiff the reliefs sought, I propose making no Order as to costs on the motions.
34. If either side wishes to contend for a different form of costs order than that proposed, they should file written submissions in the Central Office of the High Court within ten days of today's date. A copy of the written submissions should be sent to the other side and to the registrar. The other side will then have a further ten days within which to file written submissions in reply. I will list the matter for mention on 10 October 2023 at 10.30 for the purpose of making final Orders.