APPROVED **[2023] IEHC 492**

THE HIGH COURT

2023 No. 3628 P

BETWEEN

RICHARD FARRINGTON

PLAINTIFF

AND

PROMONTORIA (OYSTER) DAC
STEPHEN TENNANT
JONATHAN FENN

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 August 2023

INTRODUCTION

1. This judgment is delivered in respect of an application for an interlocutory injunction. The principal order sought is one restraining the sale of a property by auction on 17 August 2023. The application for the injunction is moved by the registered owner of the property, Mr. Farrington. Mr. Farrington appears as a litigant in person.

2. The defendants are, respectively, the holder of a registered charge in respect of the property; the (first) receiver appointed by the charge holder; and the auctioneer engaged for the purpose of the sale. As explained at paragraphs 36 to 39 below, it appears that the current receiver of the property is Mr. Damian Harper. The defendants confirm that, at the plaintiff's election, they will consent to the joinder of Mr. Harper to the proceedings whether in addition to, or in substitution for, Mr. Tennant.

3. The property is located in Derrybeg, Rossbrien, County Limerick. The title to the land is registered under Folio 46591F, County Limerick.

PRINCIPLES GOVERNING INTERLOCUTORY INJUNCTIONS

4. The principles governing the grant of interlocutory injunctions have recently been clarified by the Supreme Court in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65, [2020] 2 I.R. 1. In brief, a court hearing an application for an interlocutory injunction should first consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief pending the trial could be granted. The court must consider whether the plaintiff has established that there is a "*serious issue*" to be tried (sometimes referred to as an "*arguable case*" or as a "*fair issue*" to be tried). If so, the court should then proceed to consider how matters should best be regulated pending the trial. This involves consideration of the balance of justice (sometimes referred to as the "*balance of convenience*").

5. The preferable approach is to consider the adequacy of damages as part of the balance of justice, rather than as a separate step in a three-stage test. It is not

simply a question of asking whether damages are an adequate remedy. An interlocutory injunction should not be *granted* merely because the plaintiff can tick the relevant boxes of arguable case, inadequacy of damages, and ability to provide an undertaking as to damages. By the same token, an interlocutory injunction should not be *refused* merely because damages may be awarded at trial.

6. If the balance of justice is finely balanced, then it might be appropriate for the court to consider, even on a preliminary basis, the relative strengths and merits of each party's case as it may appear at the interlocutory stage. This will be necessarily dependent upon the proceedings presenting a legal issue upon which the court could confidently express a view, and also dependent upon any facts relevant to the disposition of that issue being supported by credible evidence (*Ryan v. Dengrove DAC* [2021] IECA 38).

7. Finally, the threshold to be met by the plaintiff will be more exacting in circumstances where *mandatory* relief is being sought by way of an interlocutory injunction. Rather than simply demonstrate a serious issue to be tried, it will be necessary for the plaintiff to establish a strong case that they are likely to succeed at the hearing of the action (*Lingam v. Health Service Executive* [2005] IESC 89).

NO SERIOUS ISSUE TO BE TRIED

8. The first matter to be addressed is whether or not the plaintiff has established that there is a serious issue to be tried. More specifically, it is necessary to consider whether the plaintiff has made out a case which, if substantiated at trial, would justify the prohibition of the sale of the property by the defendants.

9. The plaintiff has yet to deliver a statement of claim in the proceedings. It is thus somewhat difficult to identify, from the limited papers to date, the precise grounds upon which the plaintiff seeks to restrain the sale of the property. The plaintiff has, however, filed written legal submissions.

10. Helpfully, the plaintiff explained, at the outset of the hearing on 9 August 2023, that his principal concern is as follows. The plaintiff asserts that it is not permissible for any of the defendants to purport to sell the property in the absence of a court order for sale. The plaintiff makes two related arguments by reference to the Land and Conveyancing Law Reform Act 2009 as follows. First, it is said that a power of sale is not exercisable without a court order pursuant to Section 100 of the Act. This provision is said to apply to the mortgage in the present case notwithstanding that it had been created prior to the commencement date. Secondly, it is said that any statutory power of sale which might previously have existed by virtue of the Conveyancing Act 1881 has now been repealed. It is further said that this is so notwithstanding the saver introduced under the Land and Conveyancing Law Reform Act 2013. These two arguments are considered, in turn, below.

No requirement for a court order

11. Chapter 3 of the Land and Conveyancing Law Reform Act 2009 provides for the obligations, powers and rights of a mortgagee. The powers conferred include a right to sell a mortgaged property. It is provided that the power of sale shall not become exercisable without a court order unless the mortgagor consents in writing to such exercise not more than 7 days prior to such exercise. It is not permissible to contract out of these provisions in the case of a "*housing loan*" as defined. There is a factual dispute between the parties as to whether the

mortgage in the present case would constitute a *"housing loan"* as defined. For the purpose of the application for an interlocutory injunction, I will assume—without deciding—that the definition is met.

12. The difficulty with the plaintiff's argument is that the deed of mortgage in the present case had been created prior to Chapter 3 of the Land and Conveyancing Law Reform Act 2009 coming into effect. The commencement date is 1 December 2009. The deed of mortgage is dated 24 September 2003 and was registered on the newly created folio on 16 October 2003.

13. Section 96 of the LCLR Act 2009 provides that the powers and rights of a mortgagee under Sections 97 to 111 apply to any mortgage created by deed *after* the commencement of Chapter 3 of the Act. It follows, therefore, that the provisions do not apply to a pre-2009 mortgage.

14. The plaintiff seeks to overcome this difficulty by arguing that the temporal limitation only affects the "*powers and rights*" conferred on a mortgagee, and that the requirement to obtain a court order for sale is properly characterised as a "*restriction*". In support of this argument, the plaintiff read aloud a note which had, seemingly, been prepared by his former solicitor.

15. With respect, this argument is untenable. Chapter 3 of the Land and Conveyancing Law Reform Act 2009 does not distinguish between "*powers and rights*", on the one hand, and "*restrictions*", on the other. Rather the only potentially relevant distinction made under Chapter 3 is between "*powers and rights*" and "*obligations*". The principal "*obligations*" of a mortgagee are those identified at Section 107, i.e. the obligations on selling. Section 100 creates a "*power*" of sale and as such is subject to the temporal limitation.

Conveyancing Act 1881

16. In the case of a mortgage created prior to 1 December 2009, the mortgagee will, generally, enjoy a statutory power of sale pursuant to the provisions of the Conveyancing Act 1881. Those provisions continue to apply, notwithstanding their repeal, by virtue of the saver provided for under the Land and Conveyancing Law Reform Act 2013.

17. The plaintiff contends that the saver does not apply and seeks to call in aid a judgment delivered in other proceedings in which he was involved: *Bank of Ireland Mortgage Bank v. Farrington* [2018] IEHC 331. With respect, the plaintiff's attempted reliance on this judgment is misplaced. As appears from the procedural history recited in the judgment, an earlier set of proceedings involving the same parties had come before the High Court by way of an appeal from the Circuit Court. The High Court (Charleton J.) had referred a consultative case stated to the Supreme Court pursuant to Section 38 of the Courts of Justice Act 1936. The case stated was, however, overtaken by events in that the Land and Conveyancing Law Reform Act 2013 had come into force the day before the order was made. Those earlier proceedings were subsequently discontinued.

18. The bank then issued fresh proceedings before the Circuit Court. Those proceedings then came before the High Court on appeal. The difficulty identified by the High Court (Coffey J.) in his judgment in *Bank of Ireland Mortgage Bank v. Farrington* is that a formal order was required setting aside the order for possession previously granted by the Circuit Court in the first set of proceedings. See paragraph 12 of the judgment as follows:

> "On 29 July 2014, and prior to any determination by the Supreme Court of the case stated to it by the High Court on the 25 July 2013, the plaintiff purported to discontinue the

> proceedings by issuing a notice of discontinuance in the High Court, dated 29 July 2014. On 30 July 2014, the plaintiffs' lawyers, in the presence of the defendants' solicitor, informed Charleton J. that the proceedings were being discontinued and that the case stated was being withdrawn. It was not in dispute that, at the hearing of this appeal, Senior Counsel for the plaintiff informed the court that the plaintiff intended to bring further proceedings pursuant to the Act of 2013. By consent, the court made an order striking out the proceedings with an order for costs in favour of the plaintiff. Whether through inadvertence or otherwise, no order was made to vacate the order for possession made by the Circuit Court on 13 December 2011 which remains extant. […]"

19. The High Court further held that the issuance of the second set of proceedings by the bank had not been for an improper purpose but solely for the purpose of availing of the Land and Conveyancing Law Reform Act 2013 which the Oireachtas enacted to ensure that secured creditors are entitled to enforce their debts. The High Court made an order staying the fresh proceedings but only until such time as the order of the Circuit Court had been vacated.

20. The judgment in *Bank of Ireland Mortgage Bank v. Farrington* does not stand as authority for the proposition that the saving provisions of the LCLR Act 2013 are ineffective.

21. It follows that Promontoria (Oyster) DAC, as the registered charge holder, enjoys a statutory power of sale pursuant to the provisions of the Conveyancing Act 1881. As it happens, it is intended to rely instead on a contractual power of sale. Counsel has drawn my attention, in particular, to the provisions of Clause 8 and Clause 12 of the deed of mortgage. As appears, these clauses allow, first, for the appointment of a receiver, and, secondly, for the receiver to sell the property with all the powers of an absolute beneficial owner.

22. I have carefully considered the terms of appointment of Mr. Harper as receiver and am satisfied that the plaintiff has not put forward any basis for suggesting that his appointment is invalid.

23. In all the circumstances, the plaintiff has failed to establish a serious issue to be tried.

Bank of Ireland Mortgage Bank v. Hade

24. For completeness, it should be recorded that the plaintiff has sought to rely on the judgment of the High Court (Barr J.) in *Bank of Ireland Mortgage Bank v. Hade* [2022] IEHC 645. The plaintiff has cited a note published by the Conveyancing Committee of the Law Society on 12 May 2023 in respect of the judgment.

25. The judgment in *Bank of Ireland Mortgage Bank v. Hade* does not advance the plaintiff's argument. On the facts of that case, the relevant mortgages had been created *after* the commencement date of the Land and Conveyancing Law Reform Act 2009 and had made express reference to its provisions. In the circumstances, the High Court held that, having regard to the provisions of the document which created the mortgage and the general conditions, there had been an agreement between the bank and the borrowers that the loans would be treated as "*housing loans*". This was so notwithstanding that the relevant loans did not strictly come within the qualifying criteria set out in the LCLR Act 2009 because the borrowers in that case were not acting as "*consumers*". The facts of the present case are distinguishable: here, the mortgage had been created some six years prior to the commencement date of the LCLR Act 2009. There is nothing in the terms of the deed of mortgage which suggest that a court order is required before the power of sale becomes exercisable.

Subsidiary objections

26. The plaintiff has raised a number of subsidiary objections to the intended sale as follows. First, the plaintiff makes the objection that the original mortgage was entered into between him and First Active and not with Ulster Bank. With respect, there is no substance to this objection. The transfer between First Active and Ulster Bank was achieved by way of an order under the Credit Institutions (Stabilisation) Act 2010. The plaintiff has not put forward any credible basis for challenging the validity of this transfer.

27. Secondly, the plaintiff asserts that a receiver "*must register his appointment on the folio*". With respect, this is not a correct statement of law. There is no statutory obligation to register the appointment of a receiver with the Land Registry. The Legal Office Note cited by the plaintiff addresses a different issue, namely the requirements in terms of documentation to be filed on an application to register a transfer. These requirements apply post-sale. Thus, in the event that the property were to be sold, the receiver would have to satisfy the Land Registry that he had been validly appointed.

28. Thirdly, it is alleged that Promontoria (Oyster) DAC has "*absolutely assigned*" its loan portfolio to a company called Mount Street Mortgaging Service Ltd. It is said, accordingly, that Promontoria (Oyster) DAC would require their consent and authority to issue purported demands and/or appoint receivers. It is further said that there is no evidence of such consent or authority.

29. With respect, this allegation is entirely unsubstantiated. There is no evidence before the court in respect of this alleged assignment. If and insofar as one might speculate, the allegation appears to be the effect that Promontoria (Oyster) DAC has created some sort of charge over its interest and that this has been registered

in the Companies Registration Office. The plaintiff is not entitled to pursue an allegation in this regard in this application in circumstances where he has failed to put any admissible evidence before the court. Moreover, and in any event, the simple fact of the matter is that Promontoria (Oyster) DAC is the registered owner of a charge on the property.

30. Section 31(1) of the Registration of Title Act 1964 provides as follows:

> "The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

31. The legal consequence of these provisions has been summarised as follows by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381 (at paragraph 51):

> "The Register reflects the ownership of land and burdens affecting the interest of the registered owner. The Register may contain errors and provision is made for rectification on the grounds of actual fraud or mistake: s. 31(1); or where an administrative error is made in registration of an instrument: s. 32. Some interests affect without registration: e.g. under s. 72. A challenge to the correctness of the Register is brought by an action for amendment or rectification in which *inter alia* the Property Registration Authority would be a defendant or notice party, and such proceedings would almost invariably include other defendants or notice parties such as prior registered owners or other persons asserting an interest. If such proceedings are in being then that might amount to a ground to adjourn the action for possession, or indeed to list it to run after the rectification or amendment proceedings have been concluded (see the judgment in *Tanager DAC v. Kane* at para. 86), but no such proceedings have been commenced or threatened in the present case. Section 31 means that in possession proceedings the proof on foot of which a plaintiff claims an entitlement to

> possession takes as its conclusive starting point the registration on a folio of a charge of which that plaintiff is shown to be legal owner on account of entry on the register."

32. No challenge to the correctness of the register has been brought in respect of the property the subject-matter of these proceedings.

BALANCE OF JUSTICE

33. In circumstances where the plaintiff has failed to make out a serious issue to be tried, it is not strictly speaking necessary to consider the balance of justice. For completeness, however, it should be recorded that the balance of justice weighs against the grant of an interlocutory injunction for the following reasons.

34. Damages would be an adequate remedy for the plaintiff. The property has been vacant since 2018. This is not a case, therefore, where an individual's principal residence is being sold from underneath them. In the event that the plaintiff were to succeed at trial, any breach of his rights would be properly compensated by an award of damages. Conversely, damages would not appear to be an adequate remedy for the defendant charge holder in circumstances where the plaintiff has failed even to offer an undertaking as to damages, still less put forward any evidence that such an undertaking would be meaningful.

35. The plaintiff has not alleged that the sale would be at an undervalue or otherwise objected to the logistics of the proposed sale.

THE EARLIER PROCEEDINGS

36. For completeness, it should be explained that the within proceedings are the second set of proceedings taken by the plaintiff arising out of the mortgage. More specifically, the plaintiff had instituted proceedings on 31 January 2019

("***the first proceedings***"). The first proceedings bear the record number 2019 No. 816 P.

37. The first proceedings raised many, but not all, of the points raised in the present proceedings. The defendants in the first proceedings brought an application to dismiss those proceedings on the grounds, *inter alia*, that they failed to disclose a cause of action. In a reserved judgment delivered on 30 January 2023, the High Court (Phelan J.) dismissed the first proceedings: *Farrington v. Tennant* [2023] IEHC 39.

38. The defendants in the present proceedings seek to rely on that judgment as creating a *res judicata*. More specifically, the defendants seek to argue that those grounds of objection which are common between the two sets of proceedings have been found by the High Court to be unsustainable. There is, however, a potential difficulty for the defendants in relying on that judgment as follows. The first proceedings had been heard and determined on the understanding that the receiver over the property had been Mr. Tennant. It now transpires that, in truth, Mr. Tennant had been replaced by Mr. Harper as receiver. The discharge of Mr. Tennant and the appointment of Mr. Harper occurred on 18 November 2020, that is, well before the hearing of the application to dismiss. The defendants are at pains to emphasise that the failure to disclose this change to Phelan J. was an inadvertent error on their part and have offered an apology. It has also been indicated that it is intended to have the matter relisted before Phelan J. with a view to apprising her of the mistake. It is submitted that this discrepancy in relation to the identity of the receiver does not affect the substance of the findings of the High Court.

39. Given this complication in relation to the status of the earlier judgment, it seems preferable that I determine the application for the interlocutory injunction without reliance upon same. This is especially so in circumstances where the earlier judgment does not expressly address the issues now raised by the plaintiff in respect of the exercise of a power of sale.

CONCLUSION AND PROPOSED FORM OF ORDER

40. For the reasons explained, the application for an interlocutory injunction is hereby refused.

POSTSCRIPT: LEGAL COSTS

41. Following the delivery of this judgment in open court, I heard submissions on the allocation of legal costs. For the reasons which follow, an order was made directing that the plaintiff pay the defendants' legal costs of and incidental to the application for an interlocutory injunction.

42. The position in relation to the costs of an interlocutory application is dealt with under Order 99, rule 2(3) of the Rules of the Superior Courts (as recast). In brief outline, that rule indicates that the High Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon the liability for costs on the basis of the interlocutory application. In other words, the default position is that the High Court, having dealt with an interlocutory application, should attempt to allocate those costs rather than leave them over by way of reserving them to the trial judge or, alternatively, by making them costs in the cause.

43. Order 99 of the Rules of the Superior Courts further provides that the court is to have regard to the provisions of Section 169 of the Legal Services Regulation Act 2015 in considering the awarding of the costs of any action or step in any proceedings, where applicable.

44. Here, the application for an interlocutory injunction was refused on the grounds that the applicant failed to establish a serious issue to be tried. This is not a case where an interlocutory application was determined on factual grounds, on the basis of incomplete evidence, such that the trial judge might be in a better position to determine the allocation of costs, having heard all of the evidence.

45. Accordingly, the costs of the motion can be justly dealt with at this stage. In circumstances where the defendants have been entirely successful in resisting the application on the grounds that there was no serious issue to be tried, they are entitled to their costs. The costs are to include the costs of written legal submissions and all reserved costs. The quantum of the costs is to be adjudicated under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties.

46. The costs order is stayed for twenty-eight days pending an intended appeal to the Court of Appeal, with the stay to continue until the determination of the appeal in the event that an appeal is filed within time.

Appearances

The plaintiff appeared as a litigant in person
Eoghan Cole and Amy Hughes for the defendants instructed by Byrne Wallace LLP

Approved Garrett Simons