THE HIGH COURT

[2023] IEHC 593

[Record No. 2022/1329 P]

BETWEEN

FRANCIS HARTE

PLAINTIFF

AND

PROMONTORIA (ARAN) LIMITED, KEN FENNELL AND MARK DEGNAN

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 19th day of October, 2023

Introduction

1. This is an application by the plaintiff for an injunction restraining the defendants from selling certain property in County Meath.

2. The background to this application is that the plaintiff borrowed a sum of €2.369 million from Ulster Bank on or about 16th February, 2010. This loan was expressed to be a continuation of a previous loan advanced by Ulster Bank to the plaintiff.

3. The plaintiff also entered into a deed of mortgage dated 5th November, 2009 over the plaintiff's lands at Balreask, Trim Road, Navan, County Meath, folio MH11232 ("the property") as security for the said loan.

4. The plaintiff defaulted on his repayments and by letter of demand dated 14th December, 2011, Ulster Bank demanded repayment of the sum of €2,564,302.79 being the sum due and owing at that time

5. Thereafter, Ulster Bank brought summary judgment proceedings against the plaintiff (Record No. 2013/885S) and judgment was obtained in the sum of €1.8 million (approximately) on 5th March, 2013, with a stay on execution for a period of two years.

6. By a Global Deed of Transfer dated 12th March, 2015 between Ulster Bank and Promontoria (Ireland) Ltd ("Promontoria"), Ulster Bank transferred and assigned the plaintiff's loan and mortgage to Promontoria and Promontoria acquired all the rights, title, interest, estates and entitlements under the loan facility and the charge.

7. Thereafter Promontoria was duly registered as the owner of the charge over the said property.

8. On 9th November, 2018 Mr. Harte applied for an extension on the stay of execution of the summary judgment but this application was refused by the High Court.

9. On 12th July, 2019 Promontoria appointed the second and third defendants to be joint receivers over the property.

10. On 15th July, 2019 the second defendant, as joint receiver, wrote to the plaintiff to inform him that he had been appointed as a joint receiver by Promontoria over a number of the plaintiff's properties including the lands and folios at MH 11232.

11. The receivers are currently marketing the property for sale with an asking price of €1.1 million. The plaintiff is of the view that the property is being marketed at an undervalue and in these circumstances the plaintiff brought an application for an injunction to restrain the sale of the property on a number of grounds – including the fact that he believes that the property is being sold at a significant undervalue.

The legal principles applicable to applications for interlocutory injunction

12. The legal principles governing the granting of interlocutory injunctions were recently set out by the Supreme Court in *Merck Sharp and Dohme Corporation v. Clonmel Healthcare* [2019] IESC 65.

13. At paragraph 64 of his judgment, O'Donnell J (as he then was) stated as follows:

"(1) First, the court should 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 upon ending the trial could be granted;

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanimid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the

difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."

A serious issue to be tried

14. The plaintiff has raised a number of issues – all of which he says are serious issues to be tried. I will deal with each of these in turn.

The beneficial interest of Ms. Geraldine Quail

15. The first issue which the plaintiff raises is what he calls *"the beneficial interest of Ms. Geraldine Quail in the property".*

16. Mr. Harte in his grounding affidavit states that, in May 2008, his former wife instituted proceedings against him for a decree of judicial separation, and, on 17th November, 2009, the High Court (Sheehan J.) gave judgment in judicial separation proceedings entitled *D.H. v. G.H. "which acknowledged and confirmed the beneficial interest of Ms. Geraldine Quail, who is Mr. Harte's sister, of 25% of the property".* Mr. Harte states *"I say that this beneficial interest arose from a 25% shareholding of a company which provided funding for*

the purchase of the property". He said that Ulster Bank (and Promontoria) were on notice of the beneficial interest of Ms. Quail in the property as the family law proceedings were linked to High Court plenary proceedings entitled *Ulster Bank Ireland Ltd v. Francis Harte and Carmel Harte* (Record No. 2013/2981P) and *Ulster Bank Ireland Ltd v. Frank Harte* (Record No. 2013/885S).

17. The plaintiff's case on this issue is that because the defendants were on notice of a beneficial interest in the property, held by another person, somehow the defendants lacked the full legal title to sell the property as they were now purporting to do.

18. However at paragraph 7 of the plaintiff's affidavit, Mr. Harte also states as follows:

> *"For transparency, I say that Ms. Geraldine Quail has declined to engage in this litigation to assert her beneficial interest in the property against the defendants. However in circumstances where the defendants were on notice of a prior ranking beneficial interest but chose to ignore the prior ranking beneficial interest, I am advised by my solicitors that this seriously affects the validity of any appointment of receivers over the property and I am advised by my solicitors this also highlights the defendant's conduct in the sale of the property towards your deponent and any potential purchaser".*

19. However Mr. Mark Degnan in his replying affidavit on behalf of the defendants, submitted that the plaintiff had no standing to assert any legal claim on behalf of his sister, Ms. Quail.

20. Secondly, the defendants emphasised that the plaintiff had acknowledged that Ms. Quail had declined to engage in this litigation to assert her beneficial interest in the property against the defendants.

21. Thirdly, Promontoria stated that Ulster Bank had made available the loan facility to the plaintiff on the express basis that the plaintiff was full owner of the property and that it

was unencumbered. In those circumstances the defendants submitted that the plaintiff was now estopped from now putting forward a new case based on his sister's alleged beneficial ownership of 25% of the property.

22. The defendants also noted that the plaintiff had chosen not to exhibit a copy of the judgment or a copy of the order made by the High Court.

23. In reply, Mr. Harte stated that he was not trying to assert the beneficial interest of Ms. Quail, or to litigate her interest in the property, but rather to state that he only had a 75% beneficial interest in the property and therefore that any purported appointment of receivers over the entire property was invalid and that the joint receivers and the first defendant could not effect a valid sale of the property.

24. Mr. Harte also said that a copy of the judgment entitled *D.H. v. G.H.* could not be exhibited because it was held in camara. He said that Ulster Bank was a notice party to those proceedings.

25. However in his replying affidavit, Mr. Degnan on behalf of the defendants, stated that because Ulster Bank had been a notice party to the family law proceedings, the first defendant had now obtained a copy of the order in the family law proceedings from Ulster Bank – provided to it solely and exclusively for the purposes of defending these proceedings. Mr. Degnan noted that the order stated at para. 9 as follows:

> *"The Court doth declare that the findings of the Court per the judgment of Sheehan J. made on 17th November, 2009 to the effect that Mrs. Geraldine Quail had a beneficial interest in certain assets of the respondent [Frank Harte] binds the applicant [CH] and the respondent [Frank Harte] but does not bind the notice party [Ulster Bank Ireland Ltd] (who was not a party to the proceedings at that time)".*

26. Mr. Degnan noted therefore that he believed that it was now *clear "beyond any doubt that Ms. Geraldine Quail (the plaintiff's sister) does not hold any beneficial interest in the*

property which binds the first named defendant or which is enforceable against the first named defendant".

27. Mr. Degnan also stated that the defendants obtained a copy of the order without any assistance from the plaintiff and that the court order directly and fundamentally *"contradicts the plaintiff's averments".*

28. In his replying affidavit Mr. Harte said that he was unaware of this part of the order and that it came as a surprise to him.

29. In any event, I am satisfied on the evidence before the Court that the plaintiff has not made out a serious issue to be tried that the alleged or any beneficial interest of Ms. Geraldine Quail is such that it would justify the grant of an injunction restraining the defendants from selling the property in question.

The validity of the receivership

30. The second issue the plaintiff raised is the validity of the receivership. In para. 26 of his affidavit, he stated that he had been advised by his solicitors *"that the appointment of the joint receivers is invalid where full notice of the appointment of receivers was not provided to me and requests and/or inspection of all the documentation around proof of the receiver's authority and identity were rejected".*

31. The plaintiff in his affidavit accepts that, on the 26th March, 2015, he received a "Hello Letter" from BCL Global Ltd (formerly Link Asset Ireland Ltd, formerly Capita Asset Services Ltd) stating that his loan and all security documents had been transferred to Promontoria as of 12th March, 2015. He also accepts that on 22nd September, 2015 the charge registered on the folio of his property in favour of Ulster Bank was transferred to Promontoria.

32. The plaintiff also says that on 15th July, 2019 he received a letter from Deloitte Ireland informing him that a receiver had been appointed over various properties and that the

letter enclosed a deed of appointment dated 12th July, 2019 of joint receivers Mark Degnan and Ken Fennell over various folios but, he says, not over the folio the subject matter of the proceedings.

33. He said therefore he did not receive any deed of appointment of a receiver over the property the subject matter of these proceedings.

34. The plaintiff also says (at para. 18 of his affidavit) that, on 1st April, 2022 Beauchamp's solicitors furnished a copy of the facility letter, the mortgage, and the deed of appointment of the receiver of Ken Fennell and Mark Degnan dated 12th July, 2019 but he complained that he had not received the Global deed of transfer.

35. However Mr. Degnan stated in his replying affidavit, that it was clear that joint receivers were appointed on 12th July, 2019 by deed of appointment over the property comprised in folio 11232, and, by letter dated 15th July, 2019, the second defendant wrote to the plaintiff closing the copy of this deed of appointment which clearly specified that he had been appointed as joint receiver by Promontoria over the lands contained in folio 11232.

36. In the circumstances, Mr. Degnan states in his affidavit that he believed *"that it is scarcely credible for the plaintiff to now try to put forward a case that he did not have proper notice of the appointment of the receivers or that he did not receive a copy of the deed of appointment".* (See para. 15).

37. It is clear, in my view, based on the evidence before the Court, that the plaintiff did indeed receive proper notice of the appointment of the receivers over the property in question and the matters raised by the plaintiff in this regard do not raise a serious issue to be tried.

The third issue – the plaintiff's complaints that he did not receive copies of certain documents

38. The third alleged complaint of the plaintiff is that he did not receive copies of certain documents which he said were relevant to his position. He said, for example, that he did not

receive the Global Deed of Transfer and various related matters. Again, this is disputed by the defendants and Mr. Degnan in his replying affidavit (at para. 16) states that on 1st April, 2022, the second and third named defendants' solicitors wrote to the plaintiff's new solicitors enclosing the facility letter, the deed of mortgage, the deed of appointment and the copy folio. He also relied on Promontoria's registration of its charge over folio MH11232 and the conclusiveness of the register pursuant to s. 31 of the Registration of Title Act, 1964 as establishing Promontoria's ownership of the charge. He also exhibited the Global Deed of Transfer dated 12th March, 2015.

39. Again, it is clear in my view, that the plaintiff has not raised a serious issue to be tried on this matter.

The fourth issue – the alleged undervaluation of the property

40. The most fundamental issue raised by the plaintiff related to what he alleged to be the sale of the property at an undervalue.

41. The plaintiff states that the property in question is adjacent to the Trim Road, in County Meath. He said that it had been marked for compulsory purchase by Meath County Council as part of a proposed construction of a local "distributor" road in the current Meath Development Plan 2021-2027. He also said that the property was situated at a gateway which would allow access to over 300 acres to be developed into a new hospital and business technology park in the lands adjoining his property. He said that a "part A" planning application for the construction of a road network on the property and the surrounding properties had been approved by Meath County Council.

42. The plaintiff also said that in 2019 he instructed a surveyor to provide a valuation of the property in the light of Meath County Council's upcoming Compulsory Purchase Order ("CPO") with a view to selling the property. The plaintiff says that his surveyor's indicative value of the land was €3,060,000. The plaintiff stated that the property is currently being

marketed for €1.1 million, that his solicitors had written to the defendants querying why the property was being sold for less than its market value and that they had enclosed a copy of the valuation received by the plaintiff on 12th November, 2019. The plaintiff also said that even leaving aside the issue of the CPO, the property had a value of €1.5 million in or about 2019.

43. The plaintiff says that if the defendants proceeded with the sale of the property, this would make it extremely difficult, if not impossible, for the plaintiff to pursue any claim in respect of the potential Compulsory Purchase Order and that, in the circumstances, damages would not be an adequate remedy. He also says, that despite numerous requests, the first defendant has not given the plaintiff a breakdown of his current liability and that he believes that his total indebtedness to the first defendant was only approximately €843,000 which, he says, is less than the price at which the defendants are selling the property. In the circumstances, he says that there would be no prejudice from a postponement of the sale to allow the full action to proceed.

44. However, the defendants replied that the "preliminary opinion" obtained by the plaintiff was now two and a half years old, that it stated that two hectares of the property would attract a price of €490,000 per hectare and then applied a premium of €1.56 million to reflect the fact that access through the lands releases the development of the lands to the rear of the property. They also pointed out that at least part of this valuation premium relates to a proposed purchase of property (or part of it) by Meath County Council but that by email dated 26th April, 2022 Meath County Council confirmed that it was not seeking to purchase the land at this time.

45. More importantly, the joint receivers stated that they had engaged Lydon Farrell Property Estate agents to advise on the sale of the property, that Lydon Farrell were experienced in the business of selling property of this type and that Lydon Farrell had

recommended a guide price of €1.1 million for the property with the hope of a higher price following bidding.

46. Mr. Degnan in his affidavit stated that the receiver's primary duty was to bring about a situation where the plaintiff's secured debt is repaid and that the property is ready to be sold in its current condition. Mr. Degnan stated that the receivers would discharge their duty to sell the property at the best price reasonably obtainable and that there was no evidence to suggest otherwise.

47. In his replying affidavit, the plaintiff stated that in March 2022, without any notice to the plaintiffs, the second and third defendants unlawfully attempted to sell the property for €1.1 million *"when it was clear that they would never be in a position to validly convey the entirety of the property to any purchaser".* In this affidavit, the plaintiff also says that his solicitors obtained an up to date valuation from Mr. Ciaran Sudway dated 4th April, 2022 which the plaintiff's solicitors provided to the defendant on 13th May, 2022. The second valuation valued the property at between €2.35 million to €3.91 million (to include a premium in respect of the property as a gateway property to adjoining lands).

48. In addition, the plaintiff says that he also obtained a valuation from Churches Estate Agents dated 20th May, 2022 of between €2.4 to €2.6 million which he also sent to the defendants.

49. The plaintiff therefore says, that in circumstances where the first valuation from Mr. Sudway, the second valuation from Mr. Sudway, and the third valuation from Churches Estate Agent all value the property at over €2 million, marketing the property for €1.1 million by the defendants is a significant undervalue and therefore the receivers are in breach of their duty to sell the property for full market value.

50. Mr. Degnan, in his replying affidavit, stated that the joint receivers had now requested a further valuation of the property from REA Grimes Estate Agents which it had obtained on 18th October, 2022. This valuation valued the property at between €900,000 to €1.2 million.

51. In the circumstances, Mr. Degnan stated that the receivers had now obtained valuations from two reputable, independent and suitably qualified property experts, who had both valued the property at €1.1 million (in the case of Lydon Farrell) and €900,000 to €1.2 million (in the case of REA Grimes). In the circumstances the defendants submit that it was entirely proper for the receivers to appoint Lydon Farrell and/or REA Grimes as agents and to follow their advice both in relation to the valuation of the property and the method of marketing and selling the property.

52. Having considered the affidavit evidence in this matter, and the submissions of both parties, I am satisfied that the receivers are entitled to appoint their own property experts, to obtain suitable valuations of the value of the property at its current market price, to act on that advice, and to market and sell the property at a time of their choosing in order to ensure that the plaintiff's secured debt is repaid.

53. I am satisfied on the facts of this case that the plaintiff has not made out a serious issue to be tried that the defendants intend to sell the property at an undervalue.

54. The plaintiff sought to rely on *Holohan v. Friends Provident Century Life Office* [1966] IR 1 in which the Supreme Court held that a mortgagee with a power of sale does not have power to dispose of the mortgagor's property with the same freedom as if it were his own and that the question to be investigated in such an action is whether or not the mortgagee acted as a reasonable man would have acted in selling the mortgagor's property. In that case, the court held that the conduct of the defendants in refusing to consider an alternative mode of sale to that upon which they had decided, and in refusing to examine the possibilities of obtaining a better purchase price by adopting such a method of sale, was unreasonable

conduct on their part and, as a result, the defendants should be restrained from completing the sale.

55. However the facts of that case are quite far removed from the facts of the present case. In the present case, the defendants have obtained opinions and advice from two reputable estate agents, both as to the valuation of the property and also as to the preferred mode of advertising and selling the property. In so doing, in my view, they have acted reasonably. Certainly, there is nothing in their conduct of the proposed sale which would indicate that they are behaving in an unreasonable manner such as to grant the plaintiff an injunction in this case.

56. I also note the case of *Edenfell Holdings Ltd* [1999] 1 IR 443 in which the Supreme Court held that the receiver had exercised all reasonable care in selling the property as he had and that it was not for the court to view the matter with hindsight but to look at it from the point of view of the receiver who had dealt with the matter at the time and had expert opinion available to him. In the present case it is clear that the receivers have expert opinion available to them and are acting according to that advice.

57. In the circumstances, I am satisfied that the plaintiff has not raised a serious issue to be tried that the property is being sold at an undervalue.

Transfer of the judgment

58. The Plaintiff also submitted that another serious issue to be tried was that the judgment obtained by Ulster Bank against him had not been assigned to Promontoria and as such, Promontoria had no entitlement to appoint receivers.

59. In Mr. Harte's third affidavit, (para. 13,) he stated that it was clear from the Global Deed of Transfer that there was *"no transfer of the summary judgment which remains in the name of Ulster Bank"*.

60. This raises two questions: (i) whether a judgment debt can be assigned as a matter of principle and, if so, (ii) whether it was assigned in this case. In my view, the answers to both of these questions is yes.

61. In *Director General of Fair Trading v. First National Bank Plc* [2002] 1 All E.R. 97 Lord Bingham, giving the judgment of the House of Lords, stated at para. 3 of his judgment:

> *"The bank's stipulation that interest shall be charged until payment after as well as before any judgment, such obligation to be independent of and not to merge with the judgment, is readily explicable. At any rate since In re Sneyd; Ex p Fewings (1883) 25 Ch D 338, not challenged but accepted without demur by the House of Lords in Economic Life Assurance Society v Usborne [1902] AC 147, the understanding of lawyers in England has been as accurately summarised by the Court of Appeal at p 682 of the judgment under appeal:*
>
> > *'It is trite law in England that once a judgment is obtained under a loan agreement for a principal sum and judgment is entered, the contract merges in the judgment and the principal becomes owed under the judgment and not under the contract.'"*

62. In my view, this statement of principle is also applicable in Irish Law and no case has been opened to me to show otherwise. Indeed both sides seem to agree that this is a correct statement of the law. Thus, if a judgment is obtained under a loan agreement for a principal sum, the contract merges in the judgment and the principal becomes owed under the judgment and not under the contract. In the present case therefore, the debt to Ulster Bank became merged in the judgment obtained by Ulster Bank.

63. I am also satisfied, as a matter of principle, that such a judgment can be assigned. First, a judgment obtained in respect of debt is a judgment debt. (See *Halsbury's Laws of*

England (5th edn, 2021) vol. 13 2021 para. 74.) Secondly, a judgment debt is a chose in action and is therefore capable of being assigned.

64. Moreover, in *Everyday Finance DAC v. Beades* [2021] IECA 48 the Court of Appeal held that an order for possession could be assigned and therefore, in my view, it must follow that a judgment debt can also be assigned. As Ms. Justice Whelan, delivering the judgment of a unanimous Court of Appeal, stated at para. 39 of her judgment:

> *"39. I am satisfied that all the interest, rights, titles and benefits and claims enuring to Permanent TSB as held or enjoyed by them on 8 July 2015 were captured by the terms of the mortgage sale agreement and were intended to and did pass to the purchaser. I am further satisfied that same included the benefit of the order for possession which was obtained by the seller, Permanent TSB, on 6 March 2014 in its capacity as mortgagee.*
>
> *41. The order for possession, as sought and obtained by the mortgagee pursuant to the terms of the mortgage instrument of 23 December 2002, travelled with the ownership of the mortgagee's interest. To the extent that the order for possession required (which it clearly did) an enforcement process pursuant to O. 42, r. 24(a), which is a remedy available to a mortgagee who holds an order for possession of the secured property, all rights and entitlements under the possession order travelled with the mortgagee's title and came to vest in the purchaser by operation of law as is clear from the language of the deed of conveyance and assignment which passed the legal interest. Accordingly, the benefit of all extant rights, entitlements and interests under the above entitled litigation including the order for possession, all other orders thereunder obtained and the continuing rights and entitlements pertaining to the execution of same effectively vested in the purchaser, Cheldon, on 14 October 2015."*

65. I am satisfied therefore that the judgment obtained by Ulster Bank against the plaintiff in the sum of €1.8 million (which was subsequently reduced by €1 million by the plaintiff) could be assigned by Ulster Bank to Promontoria.

Did Ulster Bank in fact assign the judgment?

66. The next question which arises is whether Ulster Bank did, in fact, assign the judgment in this case?

67. Mr. Degnan in his first affidavit on behalf of the defendants exhibited the Global Deed of Transfer dated 12th March, 2015 wherein Ulster Bank sold, and assigned, a portfolio of loans to Promontoria, including the plaintiff's loan. The very first paragraph in this agreement provides that Ulster Bank assigned and transferred to Promontoria *"all of its right, title, interest, estate, entitlement, benefit, and obligation (past, present and future) in and under each mortgage asset, underlying loan, swap claim and each of the finance documents related to the second closing sale assets and the seller's right, title and interest in and to their ancillary rights and claims and including without limitation"* (and it set out therein all rights constituted by documents listed in Schedule 1 together with any further mortgages and charges.)

68. Schedule 1 to the Global Deed of Transfer sets out the loan assets which were transferred including the loan agreement dated 16th February, 2010 between the plaintiff and Ulster Bank and the mortgage entered into by the plaintiff in favour of Ulster Bank over the said property.

69. This is clearly an assignment of the loan and the mortgage by Ulster Bank to Promontoria.

70. I am of the view that the use of the words of *"all its right, title, interest, estate, entitlement, benefit and obligation in and under each underlying loan"* are sufficiently broad

to include the judgment debt obtained by Ulster Bank when its contract debt merged into the judgment of the High Court.

71. However the matter is put beyond doubt when one considers the meaning of the phrase "Ancillary rights and claims". This phrase is not defined in the Global Deed of Transfer but it is defined in a related document entered into by all the same parties entitled "Mortgage Sale Deed in relation to the portfolio of loan facilities" dated 16th December, 2014 which is referred to in the recitals of the Global Deed of Transfer of 12th March, 2015 and is therefore incorporated by reference into the said Global Deed of Transfer. Moreover, recital B of the said Global Deed of Transfer specifically states that terms defined in the Mortgage Sale Deed shall have the same meaning in the Global Deed of Transfer.

72. In this Mortgage Sale Deed, Section 1 defines the phrase *"Ancillary rights and claims"* as meaning:

[to the extent] *"that the same are capable of being or permitted to be assigned held in trust or otherwise disposed of by each seller) all claims, suits, causes of action, and any other right of the seller (including as an agent of or trustee for another seller only) known or unknown, against any obligor, or any of their respective affiliates, agents, representatives, contractors, advisors, or any other person that is (in each case exclusively and explicitly) based upon, arises out of or is related to assets referred to in the definition of mortgage assets and any fees ancillary to the mortgage assets, including all claims (in contract or in tort), suits, causes of action and any other right of the sellers against any auditor, legal, tax, financial or other professional advisor, or other person arising or in connection with the finance documents".*

73. I have also considered the judgment of the High Court (Dignam J.) in *Doran v. Charleton* [2022] IEHC 331. However I am satisfied that, on the facts of this case, Ulster

Bank did transfer and assign the benefit of this judgment to Promontoria. This fact alone distinguishes this case from *Doran*.

74. I have also considered the judgment of Allen J. in *Hennessy v. Tyrell* [2022] IEHC 109 but in my view, the facts in that case are quite far removed from the facts of this case.

75. I am satisfied therefore based on the affidavit evidence before the Court and submissions that Ulster Bank did indeed transfer and/or assign its judgment to Promontoria and that the plaintiff has not raised a serious issue to be tried on this matter.

76. The plaintiff also argues that Promontoria had not sought to substitute itself as the plaintiff in the action instead of Ulster Bank. However that it is to misunderstand the nature of the procedure brought in this case, which is that Promontoria, having obtained the benefit of the assignment of the loan (and in this case the assignment of the judgment debt), having obtained an assignment of the mortgage and having registered this mortgage on the plaintiff's folio (which is conclusive evidence of the defendant's ownership of the mortgage or charge), has now appointed the receivers to sell the property pursuant to the mortgage. It is therefore executing on foot of the mortgage and not on foot of the judgment.

The notice argument

77. The plaintiff also submits that, in the light of the fact that the amounts owing to Ulster Bank were, at that point, owed pursuant to the judgment, that any notice which was given by letter dated 26th March, 2015 did not constitute "express notice of the assignment" in order to satisfy the requirements of a lawful assignment pursuant to s. 28(6) of the Supreme Court of Judicature (Ireland) Act, 1877 which provides as follows:

> *"(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such*

debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, lie shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

78. The complaint of the plaintiff, in relation to notice under s.28(6) of the Judicature Act, is that because the debt owed by the plaintiff to Ulster Bank was, at the time of the notice (which the plaintiff did receive), a judgment debt and not a mere contractual debt, that this letter of 26 March 2015 does not constitute sufficient notice for the purposes of the Act.

79. In my view this argument is without merit and it is difficult to see how this argument advances the plaintiff's case. First, it is clear as a matter of principle that a judgment debt can be assigned and was assigned in this case; second, the entire argument in relation to notice is only relevant to considering whether the assignment of the debt from Ulster Bank to Promontoria is a legal assignment or an equitable assignment. If the assignor gives notice to the debtor in the prescribed form under s. 28(6), then the assignment is a legal assignment of the debt; if no such notice is given, it is an equitable assignment of the debt. However I am of the view that after the Judicature Act 1877, there is now no distinction of any substance between a legal assignment of a debt and an equitable assignment of a debt. The assignee of a

debt after the Judicature Act is able to sue the debtor in the unified court system whether the debtor has received notice from the assignor or not. The issue therefore of whether the assignment amounts to a legal assignment or an equitable assignment, is in my view, not sufficient to raise a serious issue to be tried for the purposes of granting an injunction in this case.

The balance of convenience/balance of justice

80. The next issue I have to consider is whether the balance of justice is in favour of granting the injunction in this case. As set out in the *Merck* case, the first issue the court should consider under this heading is the adequacy of damages which might be suffered by the plaintiff.

81. In this regard I am mindful of the comments of O'Donnell J. (as he then was) in *Merck* at para. 64(5) of his judgment where he says:

> "*In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy".*

82. Thus, in the present case, I am sceptical of the plaintiff's claim that damages are not an adequate remedy. The plaintiff entered into a commercial loan agreement with Ulster Bank; he granted security over commercial property as part of that loan; he defaulted on his loan and judgment was entered against him; the bank has now transferred the loan to the first defendant and the first defendant has appointed receivers to sell the property to make good the shortfall on the loan. The receivers have appointed two reputable estate agents to advise them of the sale and both estate agents have come in with a property valuation of approximately €1 million to €1.1 million - whilst also indicating that, if the property is pitched at this price, it might encourage more bidders and therefore encourage a competitive bidding process which could result in a higher price being obtained for the property. This is

an entirely reasonable commercial strategy for the estate agents to advise the receivers on, and for the receivers to adopt. It is clear that it is a matter for the receivers to decide on the timing of the sale and, if the property is ready to be sold, then the receivers can decide on the time at which they seek to sell the property. In circumstances where a person, such as the plaintiff, has borrowed money and secured a loan by virtue of a mortgage over property, and then defaults on that loan, they lose control over the time at which, and the circumstances in which, the property will be sold.

83. I also note the statements of Murray J. in *Ryan v. Dengrove DAC* [2021] IECA 38 in which Murray J., giving the judgment of the Court of Appeal, stated as follows:

> *"As I observed in the introduction to this judgment, the authorities show that in 'receiver-injunction' cases involving commercial properties(and I stress the latter part of that description) the position is often adopted that in a dispute between an undertaking that has borrowed monies for wholly commercial purposes, and a secured lender who has obtained, as a condition of that borrowing, security over wholly commercial assets, the dispute is a commercial one, and the remedy for breach by either party of their obligations under those arrangements sounds in damages".*

84. As Murray J. also stated in *Ryan v. Dengrove* at para. 90:

> *"It is not about the inherent value of the property rights of either party and I do not believe that in the particular circumstances of this case the invocation of those rights affects the analysis"*

85. As counsel for the defendants submitted, this case is now all about money and nothing but money. I agree with that submission. I am satisfied on the facts of this case that damages are an adequate remedy and that an injunction should not be granted.

Other factors

86. Counsel for the defendants also submitted that, apart from the fact that damages were an adequate remedy, there were a number of other factors which should weigh in the balance against granting an injunction. First, he submitted that it was noteworthy that the plaintiff was not opposed to the sale but only to who was conducting the sale and the price they might obtain. I agree with this submission. Secondly, the defendants submit that there is no evidence of a sale at an undervalue in circumstances where the receivers had retained two responsible estate agents. As set out above, I agree with this submission also.

87. The defendants also state in their affidavit that they would suffer significant prejudice if interlocutory relief were granted which impeded the enforcement of the mortgage security. They also state that as at 19th May, 2022 the substantial sum of €846,340 is due and owing by the plaintiff to Promontoria, and if the plaintiff obtains an injunction, it would prevent the defendants enforcing the security at the most opportune time with resulting loss and damage to them.

88. I have considered whether there are any other factors in this case – apart from the adequacy of damages – that would justify the granting of an interlocutory injunction pending the trial of the action. However, I am satisfied, based on the affidavit evidence before the Court and on the submissions, that there are no such other factors which would justify the granting of an injunction.

The undertaking as to damages

89. The plaintiff has offered an undertaking as to damages in his grounding affidavit. However the defendants take issue with this undertaking and state that Ulster Bank (and now Promontoria) obtained a judgment against the plaintiff in the sum of €1.8 million on or about 6th March, 2015 with a stay of two years. As set out above, the plaintiff sought to extend this stay subsequently but this was refused by the High Court on 9th November, 2018.

90. As a result of the challenges to his ability to substantiate his undertaking as to damages, the plaintiff swore an affidavit setting out his assets. This appeared to show a figure of net assets in excess of €5 million. However, this was based on an approximate valuation of the property in dispute of a sum of between €2.4 million and €2.6 million in circumstances where the defendants only valued that property at approximately €1 million. On one view therefore, this overstates the plaintiff's assets by a sum of between €1.4 and €1.6 million.

91. Moreover, the plaintiff also estimated the value of other lands he owns at Trim Road, Navan, County Meath at a sum of €2.9 million. It is difficult to evaluate this in circumstances where no valuation of this land has been put before the Court, and in circumstances where the said sixteen acres appears to be also at the Trim Road, Navan, County Meath and therefore could also be significantly over valued.

92. The plaintiff submitted that given that the property is likely to sell for a sum in excess of €1 million, and given that his debt is only in excess of €800,000, this will generate a surplus for him with which he can substantiate his undertaking as to damages. However I do not accept this submission. First, on the facts as they stand at the present time the plaintiff is not in a position to satisfy his undertaking as to damages as there is an unsatisfied court judgment against him for a sum in excess of €800,000. Secondly, the plaintiff is assuming that the property will be sold for a sum in excess of €1 million. That assumption may be correct or it may not be correct. Only time will tell. The property could be sold at a price below €1 million if market conditions are adverse. Therefore the assumption of the plaintiff that he will receive funds in excess of the debt from the sale of the property is inherently speculative.

93. The plaintiff says that he repaid the sum of €1 million to Ulster Bank to reduce the liability on the outstanding judgment. However the position is that the plaintiff – even on his own case – is indebted to Ulster Bank (and now Promontoria) for a sum in excess of

€800,000 and there is an unsatisfied judgment for a sum in excess €800,000 entered against the plaintiff.

94. I am of the view, as a matter of first principles, that where a party has failed to satisfy an outstanding court judgment for a debt, then his undertaking as to damages is without substance.

95. For these reasons, I am of the view that the plaintiff's undertaking is illusory and without substance and on that ground alone I would refuse the application for an injunction.

Conclusion

96. I would therefore refuse the application for an injunction on the grounds that:

i. the plaintiff has not established a serious issue to be tried;

ii. damages would be an adequate remedy;

iii. the balance of justice is in favour of refusing the application; and

iv. the plaintiff's undertaking as to damages is without substance.