



THE HIGH COURT

[2024] IEHC 557

[Record No. HP 2024/4631]

BETWEEN

DECLAN HOULIHAN AND MARGARET ELIZABETH HOULIHAN

PLAINTIFFS

AND

**AIB PLC, AIB MORTGAGE BANK, EVERYDAY FINANCE DAC, EFDAC, LINK
FINANICAL, BCMGLOBAL, BCMGLOBAL ASI LIMITED, RESOLUTE ADVISORY AND
COLIN GAYNOR**

DEFENDANTS

**JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 20th day of
September 2024**

1. This is an application brought by the first plaintiff (hereinafter referred to as “the plaintiff”), apparently with the support of the second plaintiff, for urgent interlocutory injunctive relief preventing the defendants from selling their farm. The application was heard on 13 September 2024 at which the first and second defendants were removed from this application. A public auction is scheduled to take place at 12.00pm on 20 September 2024 and the defendants have been restrained, by previous orders of this court, from accepting any online offers for the lands the subject matter of these proceedings pending further order of the court.

Background

2. The plaintiffs are a mother and son and the plaintiff and his wife are the joint owners of the farm lands the subject matter of these proceedings (hereinafter referred to as ‘the farm’). The plaintiff and his wife also own a separate farm nearby and they reside in a property situated on that second property. The second plaintiff resides in a property situated

on the farm pursuant to what the first plaintiff says is a life interest. Whilst that house in which the second plaintiff resides was originally part of the lands that the receiver put up for sale, the advertisement on the auctioneer's website was changed on 6 September last to remove that house from the sale. The ninth defendant, who is the receiver, has sworn an affidavit on behalf of the third to seventh defendants, in which he averred that that house is no longer part of the proposed sale and in his affidavit, sworn on 12 September 2024, he confirmed his willingness to give an undertaking to the court that he would not market or sell that house pending the determination of the proceedings.

3. The timing of the notification to the plaintiffs of the exclusion of that house from the sale and of the receiver's willingness to give an undertaking, may be relevant to any costs application in these interlocutory proceedings. In terms of the substantial grounds for seeking injunctive relief, those matters should assuage the plaintiffs' concerns in relation to the second plaintiff's house, and does assuage any concerns the court may have had in relation to that point which formed a significant part of the plaintiff's case as set out in his affidavit, sworn on 27 August 2024.

The plaintiff's remaining grounds

4. The plaintiff identified three other grounds on which he moved to seek an injunction restraining the sale of the property:-

- (1) He said he never received the hello or goodbye letters which he says renders the transfer of his original loan from AIB to the first defendant null and void.
- (2) He says the instrument appointing the receiver is flawed as it refers to the receiver as his agent when he never consented to any such appointment.
- (3) The plaintiff disputes the 2004 mortgage.

The hello goodbye letters

5. The plaintiff must establish a fair question to be tried. The plaintiff's averment in relation to the non-receipt of the hello and goodbye letters is very simple, i.e. that he and his wife never received them. In fact, he did receive copies both of those letters and a number of other proposal letters, when copies of all of those letters were furnished to him on 16 July 2024 in response to his letter of 15 July 2024 to the receiver and before the institution of this application. They include letters of 9 November 2022, 2 December 2022, 31 December 2022, 10 February 2023, 21 August 2023, 2 January 2024, 31 January 2024, 19 January 2024 and 11 March 2024.

6. It is difficult to understand how the plaintiff did not receive any of those letters that were sent by ordinary prepaid post, the method of service that was provided for in the facility letter of 7 April 2011 (and the plaintiff does not challenge that letter). There was no suggestion of an incorrect address and the plaintiff acknowledges having previously received correspondence from AIB over the years.

7. I am not satisfied that the plaintiff has established a fair question to be tried that the defendants are not permitted to proceed with the sale of the property on this ground.

(2) The appointment of the receiver

8. The reference to the receiver as the mortgagor's agent in the instrument appointing the receiver is a standard clause. The defendants' counsel says the receiver is the agent of the mortgagor as a matter of law, a position that was not challenged by the plaintiff beyond simply saying that he did not appoint the receiver as his agent. The plaintiff has not established a fair question to be tried on this point.

(3) The 2004 mortgage

9. This point became the main focus of the plaintiff's oral submissions. The plaintiff is a lay litigant which does, understandably, present challenges in the presentation of his case. However, insofar as he relied on what he said was the only mortgage he ever entered into in 2007 at which time he was legally represented, I found it surprising that he had made no attempt to contact his solicitor who had been advising and acting for him at that time. It was also surprising that whilst he relied heavily on what he said was his clearing of a loan in 2004, he made no attempt to exhibit the documentation in relation to that which he said he still had.

10. The plaintiff, in his oral submissions, made a serious allegation of fraud in relation to the 2004 mortgage. A copy of the 2004 mortgage was exhibited and relied on by the defendants. The plaintiff denied signing that document and suggested that the signature page which was undated and which included what he acknowledged were the signatures of him and his wife, had been taken from another document. Those signatures were witnessed by a solicitor. No attempt was made by the plaintiff to establish the views of that solicitor in relation to what he claimed was a fraudulent document.

11. The folio has an entry date at 27 July 2004 confirming that the plaintiff and his wife were joint owners. That is consistent with the plaintiff's version of events, i.e. that they paid off a loan at that time, particularly given the cancelation on 27 July 2004 of a previous

charge owned by AIB. The next entry in the folio was dated 3 January 2007 which is the charge that was transferred to the defendant and forms the subject matter of these proceedings. That is described as a "[c]harge for present and future advances stamped to cover €583,000 repayable with interest." The defendants assert that this related to a 2004 mortgage, clause 3.01 of which provides:

"The Mortgagor hereby covenants with the Bank on demand to pay to the Bank all moneys and discharge all obligations and liabilities whether actual or contingent now or hereafter due owing or incurred to the Bank by the Mortgagor..."

This was what counsel for the defendant referred to as an "all sums mortgage". The facility letter of 7 April 2011, on which the defendants now rely, provided for a loan of €518,510, the purpose of which is described as "[r]estructure". The security for that facility is clearly set out as an all sums mortgage from the plaintiff and his wife over the farm.

12. Whilst the plaintiff contends the mortgage should have been over a different farm, which he said the money obtained from AIB was used to purchase, he does acknowledge that the monies he received in 2007 were secured on this property and he accepts that he signed the 2011 facility letter which clearly refers to the security over that property. He also does not dispute the existence of a debt, albeit he disputes that this farm was properly used to secure that debt. The plaintiff cannot now seek to challenge, at the interlocutory stage, something that he was or ought to have been aware of when he signed the facility letter (which clearly identifies this farm as security for the debt) and for whatever reason chose not to challenge at the time.

13. The mortgage over this farm was transferred from AIB to the defendants by a Global Deed of Transfer. The plaintiff seems to dispute whether his mortgage should have been over land that he purchased with the money he received from AIB, but in circumstances where he clearly signed up to the 2011 facility letter which confirmed the security over this farm, his views in that regard cannot affect the current validity of that Deed of Transfer.

14. The plaintiff sought to rely on the decision of Murphy J. in *English v. Promontoria* [2016] IEHC 662. However, the *dicta* cited to the court related to unregistered land which is clearly not applicable to the registered land at issue here. In fact, Murphy J. in that case held at paras. 24-25:

"Where the land in issue is registered land, proof of ownership is straightforward in that the register is conclusive as to title. If the stranger is registered as owner of the

first legal charge then he has all the rights and entitlements that flow from the charge.... The position in respect of unregistered land is not so straightforward."

The plaintiff's reliance on this decision and the reference therein to a Deed of Novation are misplaced and inapplicable to the facts in this case.

15. The plaintiff has not established a fair question to be tried in relation to the 2004 mortgage, or the defendants' entitlement to rely on the facility letter of 2011 which the plaintiff and his wife signed.

The balance of convenience

16. The plaintiff acknowledges the existence of a debt but is surprised and concerned at how much it is now claimed is owed on it. Given the plaintiff's acknowledgement of having made little or no repayments since shortly after they received the money in 2011, the court does not find that surprising, albeit it is undoubtedly a matter of understandable distress for the plaintiff and his family. The auction does not affect the plaintiff's family home and the second plaintiff's house is now removed from the lands being put up for auction. The plaintiff has planted crops on the land, as one would expect a farmer to have done. He has also entered into contractual commitments with third parties up to 2027. He must have done so in full knowledge of his debts, particularly given that he said he had been in considerable financial difficulties for many years, so much so that he tried to sell the land in 2012.

17. A further point arises from the absence of any undertaking as to damages from the plaintiff who clearly told the court that he would not give such an undertaking as he was unsure how the damages would be calculated and did not understand why he should give such an undertaking.

18. The balance of convenience is clearly in favour of a refusal of the relief sought. I refuse the plaintiffs' application.