THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2021] IECA 58
Court of Appeal Record Number 2019/444

Costello J.
Donnelly J.
Faherty J.

BETWEEN

LUKE CHARLETON AND ANDREW DOLLIVER

PLAINTIFFS/ RESPONDENTS

- AND -

PAUL COATES

DEFENDANT/ APPELLANT

JUDGMENT of Ms. Justice Costello delivered on the 02 day of March 2021

1. This is an appeal against the judgment of the High Court (Reynolds J.) dated 9 October 2019 ([2019] IEHC 712) where the High Court granted the plaintiffs ("the Receivers") interlocutory injunctions directing the defendant ("Mr. Coates"), his servants or agents or any person having notice of the making of the order to vacate the premises known as 13 Coldwater Lakes, Saggart, County Dublin ("the property"), to remove his possessions from the property and other ancillary orders. The central issue for resolution is whether the Circuit Court has exclusive jurisdiction to grant the reliefs sought having regard to the provisions of s. 3 of the Land and Conveyancing Law Reform Act 2013 and, therefore, whether the High Court erred in granting the Receivers the injunctions they

sought. While Mr. Coates originally raised other grounds of defence, as discussed below, these were not pursued on appeal and it was conceded that the sole basis upon which Mr. Coates claimed to have a defence was the jurisdictional ground based on s. 3.

Background

2. In 2005, Mr. Coates resided at 30 The Green, Cypress Downs, Templeogue, Dublin 16 ("his original family home"). He was also the owner of a residential property at 13 Coldwater Lakes, Saggart, County Dublin (the property). On 19 December 2005, he accepted a Letter of Offer from Ulster Bank Ireland Limited ("the bank"), dated 15 December 2005, offering him a loan facility of €1,000,000 to assist with a personal investment in a capital guarantee bond ("the loan facility"). The term was seven years from the date of first drawdown. The security for the loan was already held and consisted of a mortgage of the property dated 21 October 2005.

3. Mr. Coates failed to repay the loan after the term expired in 2012 and by letter of demand, dated 15 March 2013, the bank demanded repayment of the entire loan then outstanding. In respect of the loan of 15 December 2005, the sum outstanding was €1,011,957.79; the sum outstanding in respect of a prior facility, dated 4 October 2005, was €94,871.67. No repayments had been made in relation to the loan facility. Thereafter, the statutory powers of the bank as mortgagee pursuant to the Conveyancing Acts 1881-1911 became exercisable by the mortgagee.

4. By a Global Deed of Transfer dated 25 February 2016, the interest of the bank and certain associated companies in the loan facility, and associated security, was transferred to Promontoria (Aran) Limited. The property is unregistered land. By a Deed of Conveyance and Assignment dated 12 February 2015, the bank conveyed and assigned its interests in the mortgage to Promontoria (Aran) Limited. Following the transfer of the bank's facilities to Promontoria (Aran) Limited, a letter was written on 1 May 2015 by Link Asset

Services Limited on behalf of Promontoria (Aran) Limited advising Mr. Coates of the assignment of the loan facility and the related security to Promontoria (Aran) Limited.

5. By an Instrument of Appointment of a Receiver, made on 15 December 2016, Promontoria (Aran) Limited appointed Andrew Dolliver of Ernst & Young, 16 Bedford Street, Belfast, Northern Ireland and Luke Charleton of Ernst & Young, Chartered Accountants of Harcourt Centre, Harcourt Street, Dublin 2 ("the Receivers") to be receivers of and over the property pursuant to the Deed of Mortgage, dated 21 October 2005, made between the bank and Mr. Coates.

6. Mr. Charleton wrote on 15 December 2016 to the tenant of the property requiring that any rent be paid to him directly in his capacity as joint receiver. Mr. Coates replied on 19 December 2016 complaining of intermeddling, harassment and undue influence on the part of the Receivers. He said that the property was his personal home and he asserted a right to peaceful enjoyment of it pursuant to the European Convention on Human Rights.

7. Mr. Charleton said that from enquiries which he had made it appeared that the property had been rented. He said that this is consistent with Mr. Coates' address being in Templeogue but that the position had become less clear. By letter dated 12 October 2017, Mr. Charleton wrote to Mr. Coates requesting that he substantiate his claim that the property was his family home. In response, Mr. Coates sent a letter notifying *"To whom it concerns"* that he had appointed Mr. Seamus Sutcliffe of Lansdowne Francs to be his accountant and to act on his behalf in relation to *"my home at 13, Coldwater Lakes, Saggart."*

8. On 10 February 2017, solicitors for the Receivers wrote to Mr. Coates:-

> *"As we have previously advised please note that in accordance with our client's entitlements, that he proposes to enter and manage the property for the purposes of exercising his powers as conferred on him under the Charge and at Law.*

Our client requires either that you peacefully deliver up vacant possession of this property or furnish a copy of any letting agreement that is in place with a tenant should this property be occupied. Our client also requires all rents being received to be furnished directly to them."

9. They wrote again on 25 April 2018, stating that the Receivers had attempted to enter possession of the property for the purposes of exercising their powers and stating that *"pursuant to our clients' appointment that they are entitled to enter, manage and secure possession of the property."*

10. The solicitors called upon Mr. Coates to deliver up vacant possession of the property and indicated that they had instructions to initiate appropriate proceedings against him for delivery up of possession of the property unless vacant possession was delivered within the fourteen days specified.

11. On 14 May 2018, the Receivers' solicitors received a letter from Lansdowne Francs saying that they acted for Mr. Coates. The letter advised that the property is Mr. Coates' private home and stated as follows:-

"We would advise that your client has no entitlements whatsoever to enter our client's private home. Our client is very unwell, and we would urge you to immediately desist from any attempt to enter our client's family home unless you have an Order from the Court.

Our firm has written to the purported Receiver by Registered Post several months ago and our correspondence has been totally ignored.

Our client has significant issue with the amount owed in relation to his mortgage on his family home and is owed a substantial credit due to the sale to him by Ulster Bank of a large Ulster Bank Bond. This bond was to be used to repay his mortgage but is now effectively worthless.

To be extremely clear, our client is willing to discuss directly with your client a settlement for his family mortgage with a necessary deduction for the loss of his Ulster Bank Bond."

12. The Receivers instituted the proceedings and applied for injunctions against Mr. Coates. In the exchange of affidavits that ensued between Mr. Coates and Mr. Charleton, the following position emerged:

1. the property was not Mr. Coates' principal private residence when he took out a loan of €1,000,000 for a commercial investment;
2. the property was offered as security for the commercial borrowings;
3. as of 13 March 2019, the sum outstanding on the loan was €1,010,047.85;
4. Mr. Coates made no repayments of any kind on the loan prior to the institution of the proceedings; he had made minimal repayments thereafter;
5. valuations suggested that the property was worth between €450,000-€750,000;
6. Mr. Coates was offering to pay €750 per month to repay the loan, though there was little clarity on his assets and his income in particular;
7. Mr. Coates stated in a statement of affairs that he owned a "buy to let" property valued at €6.9 million which was subject to an outstanding debt of €4.7 million due to PTSB. He received a rent of €9,000 per month from this property and he repaid PTSB €3,100 per month;

8. Mr. Coates said that he separated from his wife in 2007 and ceased to reside in his original family home from that date;
9. Mr. Coates resided at an unknown address between 2007 and 2015. He expressly declined to give any information in that regard on the basis that it was not relevant to the application;
10. for reasons he did not explain, Mr. Coates commenced to reside in the property from May 2015. Mr. Coates did not notify the bank of his decision or the fact that the property was now, he asserted, his principal private residence;
11. in 2015 and 2016, Mr. Coates continued to use his original family home as his address in relation to VAT affairs and on returns to the Companies Registration Office for companies in which he was a shareholder;
12. there was no information provided to the court as to the use of the property prior to Mr. Coates taking up residence;
13. Mr. Coates said that he was retired and that he was entitled to a pension, though no further details were provided; and
14. Mr. Coates did not assert that he had nowhere else to live if the orders sought by the Receivers were granted.

Discussion

13. The Land and Conveyancing Law Reform Act 2013 was commenced on 24 July 2013. The long title of the Act reads as follows:-

> *"An Act to provide that certain statutory provisions apply to mortgages of a particular class notwithstanding the repeal and amendment of those statutory provisions by the Land and Conveyancing Law Reform Act 2009, to provide for the adjournment of legal proceedings in certain cases and to provide for related matters."*

The long title indicates that the Act is to apply to *mortgages* of a certain class – not proceedings as such – notwithstanding the repeal and amendment of certain statutory provisions. This is a reference to the issue highlighted in *Start Mortgages v. Gunne* [2011] IEHC 275 where it emerged that there were difficulties in relation to proceedings by mortgagees seeking to recover possession of registered land on foot of mortgages created prior to 1 December 2009.

14. Section 3 of the Act, which is at the heart of these proceedings, provides as follows:-

"3. (1) This section applies to land which is the principal private residence of—

(a) the mortgagor of the land concerned, or

(b) a person without whose consent a conveyance of that land would be void by reason of—

(i) the Family Home Protection Act 1976 , or

(ii) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ,

and the mortgage concerned was created prior to 1 December 2009.

(2) Subject to subsection (4), proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates and which land is land to which this section applies shall be brought in the Circuit Court.

…

(4) Subsection (2) does not preclude a person initiating proceedings in the High Court where other proceedings relating to the enforcement of the mortgagee's rights under the mortgage concerned have been commenced in that court prior to the coming into operation of this section where those other proceedings have not been determined."

15. Where proceedings relating to the enforcement of the mortgagee's right under the mortgage have been commenced prior to the coming into operation of the section, a person is not precluded from initiating proceedings in the High Court. That does not arise on the facts in this case.

16. The requirement established in subs. (2), to bring proceedings in the Circuit Court, applies to land to which the section applies. Subsection (1) establishes what is land to which the section applies. It must be land which is the principal private residence of, in this case, the mortgagor of the land concerned, and the mortgage must have been created prior to 1 December 2009. Mr. Coates argues that he is the mortgagor, the property is – and has been since 2015 – his principal private residence and the mortgage was created prior to 1 December 2009 and, therefore, the property is land to which the section applies. The Receivers dispute this vehemently. They say that he cannot unilaterally change the security from an investment security to a principal private residence by choosing to take up residence in the property. But even if he is correct that the property is his principal private residence, that is not sufficient to establish, as he contends, that the High Court lacked jurisdiction to make any orders in these proceedings.

17. If the land is land to which the section relates, the mortgagee who seeks *"an order of possession of land"* is required to bring the proceedings in the Circuit Court where the land, or any part of it, is situated. Section 2(7) of the Act of 2013 sets out definitions applicable to ss. 2 and 3 of the Act. *"Mortgage"* means a deed of mortgage and includes a charge and:-

> *""mortgagee" includes a person deriving title from a mortgagee and a receiver appointed by the mortgagee;"*.

This is an unusual and expanded definition of what would normally be understood as a mortgagee. It means that the provisions of s. 3 can apply to proceedings brought by a

receiver provided the other requirements of the section are met. This was not disputed by the Receivers.

18. In *Charleton v. Scriven* [2019] IESC 28, Clarke C.J., speaking for the court in a case where a receiver was seeking injunctions against a mortgagor, emphasised that if the proposed defence lacks any substance – in that case, whether the receivers were validly appointed – *"there will be a more than adequate basis for suggesting that a strong case has been made out"* by the receiver. The first issue to consider is whether Mr. Coates has raised a defence of substance to the claim by the Receivers that he is wrongfully impeding them in the exercise of their functions. He says that he has, as these are proceedings brought by the Receivers seeking an order for possession of the property, and they are required by law to be brought exclusively in the Circuit Court.

Mr. Coates' case

19. Mr. Coates says that these are proceedings seeking an order for possession of land to which s. 3 applies. This is clear from the pleadings. The Receivers plead that they are lawfully entitled to possession of the property following their appointment as receivers. As such, Mr. Coates is a trespasser *"in withholding possession"* from them. In the statement of claim, they plead:-

> *"6. The Defendant has failed to furnish possession to the Plaintiffs of the Property and the Plaintiffs are concerned that the Defendant may be renting same. By letter dated 25 April 2018, the Plaintiffs' solicitors requested possession of the Property within 14 days, failing which, proceedings would be issued.*
>
> *7. Despite such demand, the Defendant continues to withhold possession of the Property and, it is apprehended, absent a Court Order, he will not comply.*

8. By reason of the foregoing, the Plaintiffs have been caused to sustain loss and damage and are deprived of possession of the Property to which it (sic) is entitled.

9. The Plaintiffs further reserve the right to seek an account from the Defendant in respect of any rents which have been received or other loss occasioned by virtue of the withholding of possession."

20. Mr. Coates argues that the Receivers are asserting that they are entitled to possession of the property and that, as a consequence, he, Mr. Coates, is not entitled to withhold it from them. He points to the fact that in the second paragraph of his grounding affidavit Mr. Charleton says that he makes the affidavit in support of an *"application seeking possession against Mr. Coates"* in respect of the property. The correspondence called upon Mr. Coates to surrender possession of the property to the Receivers. The reliefs sought in the general endorsement of claim are:-

"(1) An Order directing the Defendant, his servant or agent or, any person having notice of the making of this Order, to vacate the premises known as 13 Coldwater Lakes, Saggart, County Dublin.

(2) An Order directing the Defendant, his servant or agent to remove all personal property from the premises at 13 Coldwater Lakes, Saggart, County Dublin.

(3) An Order restraining the Defendant, his servant or agent or, any person having notice of the making of this Order, from entering into, remaining upon or interfering with the property known as 13 Coldwater Lakes, Saggart, County Dublin.

(4) An Order restraining the Defendant from seeking to lease or rent the property at 13 Coldwater Lakes, Saggart, County Dublin, or from holding himself out as so entitled.

(5) Damages for trespass."

21. Mr. Coates submits that reliefs 1 and 2 amount to an action for possession. He refers to the Land and Conveyancing Law Reform Act 2009 which defines *"possession"* as *"includes the receipt of, or the right to receive, rent and profits, if any"*. He says that even if the Receivers seek merely to recover the rents and profits from the property, rather than actual vacant possession of the property, nonetheless they are deemed to be seeking an order for possession. For all of these reasons, he submits that the proceedings seek an order for possession within the meaning of s. 3.

Do the proceedings seek an order for possession?

22. Section 3 of the Act of 2013 requires that proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates, and which is land within the meaning of s. 3, are to be brought in the Circuit Court. The Act of 2013 does not define *"possession"* and it does not adopt the definition of possession set out in the 2009 Act. I am not satisfied that the word *"possession"* as it is employed in s. 3 has the meaning afforded *"possession"* in the Act of 2009. If the Oireachtas had so wished it could have included this definition in the list of definitions which expressly apply to s. 3. I believe that the reference in s. 3 to proceedings brought by a mortgagee seeking an order for possession of land in the Circuit Court is a reference to the proceedings governed by the Rules of the Circuit Court.

23. The Rules of the Circuit Court were amended in 2009 to take account of the reforms introduced by the Act of 2009. S.I. 264 of 2009 amended the Circuit Court Rules by introducing specific rules dealing with actions for possession and well-charging relief. It inserted a new order, Order 5B. Order 5B, Rule 1 states as follows:-

"PROCEDURE IN CERTAIN ACTIONS FOR POSSESSION OR SALE OF LAND AND ACTIONS FOR WELL-CHARGING RELIEF.

1. This Order applies to any proceedings in which the plaintiff claims … (a) recovery of possession of any land on foot of a legal mortgage or charge …".

24. Rule 3(1) requires that proceedings *"shall"* be commenced by a Civil Bill in Form 2R of the Schedule of Forms. The form requires that the civil bill be endorsed "Civil Bill For Possession", but the procedure prescribed differs from that applicable generally to civil procedures in the Circuit Court. A grounding affidavit must be served along with the civil bill which is given a return date before the county registrar. Order 5B, Rule 5(3) (as substituted by S.I. 346 of 2015) requires that a defendant intending to defend proceedings must do so by filing an affidavit rather than by delivery of a defence as would be normal. The proceedings are heard on affidavit, not by oral evidence, unless the county registrar or the court gives leave to adduce oral evidence or the case is referred to plenary hearing. The county registrar or the court may direct that any other person may be put on notice of the proceedings. The new procedure is largely modelled on the special summons procedure applicable to actions seeking possession of lands brought in the High Court.

25. Such proceedings are different to plenary proceedings in many respects. A mortgagee must sue for possession, rather than any receiver appointed by the mortgagee. Furthermore, the mode of enforcement of orders is different. Where an order for possession is granted, it is enforceable through the Office of the Sherriff. In contrast, where a court grants an injunction directing a person to vacate a property in favour of another, such orders are enforced *in personam* by means of orders of attachment and committal.

26. The special procedure for orders for possession of land does not extend to claims in trespass. In cases where a landowner alleges that his neighbour has encroached on his land and he seeks to recover possession of land from that neighbour, he must bring plenary proceedings alleging trespass and seeking orders for possession, if he so wishes, in plenary

proceedings. Counsel for the Receivers pointed out that an action for trespass and an action for possession are different actions, even though they may overlap. I agree with him. To my mind, s. 3 refers to the special procedure for seeking orders for possession which formerly only applied in the High Court but which has been introduced into the Circuit Court in 2009 by statutory instrument, in conjunction with the reforms of the Act of 2009.

27. But this does not mean that the section cannot apply to receivers. It clearly can, or the definition of mortgagee would be otiose. It is necessary to analyse whether any proceedings brought by a receiver actually seek possession of land, within the meaning of s. 3 and the Rules of the Circuit Court, or not. In this case, the Receivers have very limited powers under the deed of mortgage and they do not include the power of sale. They do not have a power of sale under the Conveyancing Acts 1881-1911 either. This was not contested by Mr. Coates and, to my mind, is strongly suggestive that these are not proceedings seeking an order for possession within the meaning of s. 3. Even if the Receivers obtain permanent injunctions after the trial, they cannot sell the property.

28. The Receivers say that their interest is limited. Mr. Coates is interfering with the exercise by them of their powers under the mortgage and that the injunctions sought were required to enable them to exercise those powers. He consented to those powers when he granted the mortgage. Clause 11 of the Mortgage Deed provides:-

> *"At any time after the power of sale has become exercisable the Bank or any Receiver appointed hereunder may enter and manage the Mortgage Property or any part thereof…"*.

Mr. Coates accepted this clause when he granted the mortgage. They argue that a receiver is entitled to seek an injunction to restrain any wrongful interference with the exercise of his or her powers. If, as a consequence, a defendant is ordered to vacate the secured

premises in order to end the interference with the receiver in the exercise of his powers, this does not mean that the proceedings seeking the injunctive relief thereby become *"proceedings brought by a [receiver] seeking an Order for Possession of land to which the mortgage relates"* within the meaning of s. 3 of the Act of 2013.

29. The arguments of the Receivers are persuasive in my opinion. The reliefs sought in the plenary summons and the notice of motion in these proceedings, to my mind, are directed towards facilitating the Receivers in exercising their powers. Mr. Coates is sued in trespass. The Receivers have not sought an order for possession by way of a special summons as they could not do so. Such proceedings would have to be brought by a mortgagee and not the Receivers.

30. The reliefs sought by the Receivers in these proceedings do not come within the scope of proceedings which could have been brought in the Circuit Court pursuant to O. 5B. Section 3 does not purport to debar a receiver from seeking reliefs of the kind sought in these proceedings. It merely requires that proceedings which seek certain reliefs, *i.e.* an order for possession, be brought in the Circuit Court. If no such reliefs are being sought, then s. 3 has no application.

31. To my mind, Mr. Coates' defence to these proceedings based upon s. 3 of the Act of 2013 lacks substance, in the words of the Chief Justice in *Charleton,* and this conclusion leads, in the circumstances of this case, to the conclusion that the Receivers have a strong arguable case that they will succeed at the trial of the action on the issue of the jurisdiction of the High Court to entertain the proceedings.

32. This was the principal ground upon which Mr. Coates sought to defend the proceedings. His second ground of defence was that he had not been afforded the procedures prescribed in the code of conduct on mortgage arrears. In submissions before this court, counsel for Mr. Coates accepted that he could not insist that the code applied to

Mr. Coates in light of the decisions in *Fennell v. Creedon* [2015] IEHC 711 and more recently, in the Court of Appeal, *Tyrrell v. Wright & Ropewalk Carpark Limited* [2018] IECA 295. In light of this concession, it is not necessary to consider this matter further.

33. Before considering the issue whether the injunctions ought to have been granted, it is necessary to refer to Mr. Coates' argument that the property was his principal private residence from 2015. At para. 39 of her judgment the trial judge held that it was not, and, in my opinion, she erred in so holding. First, this was an interlocutory application and she ought not to have made determinations which will properly be made at the hearing of the action. Secondly, there was a conflict on the evidence and she was not in a position to resolve that conflict as there was no cross-examination of the deponents. Thirdly, while Mr. Coates unilaterally altered the security for his commercial borrowings by residing in a property which was not at the time of the loan, and the granting of the security, his residence, this does not conclusively mean that the property as a result cannot be his principal private residence for the purposes of s. 3. As this is not a matter which requires to be determined to resolve this appeal, I shall leave the resolution of this issue to another case where a decision on the issue is required.

Ought an interlocutory injunction have been granted?

34. The Receivers accepted, given the nature of the reliefs sought, which were effectively mandatory in nature, that they were required to establish a strong case in accordance with the principle set out recently by the Supreme Court in *Charleton v. Scriven*. At paras. 6.12 and 6.13, Clarke C.J. held:-

> *"6.12 Indeed, I would go further and suggest that, having regard to the underlying principle of attempting to fashion an order which runs the least risk of injustice, there may very well be an important distinction to be made in receivership cases between situations where the receivers concerned simply intend to maintain the*

situation pending a trial and ones where the substance of the interlocutory order sought is one designed to, in practice, bring the proceedings to an end. There is considerable logic in the view that, for example, a receiver who wished to obtain possession of residential property or a family farm so that it could be sold would need to make out a strong arguable case for it to be appropriate, having regard to the greatest risk of injustice test, to allow such an order to be made. On the other hand, where the matters are essentially financial or where there are strong grounds for believing that a receiver is necessary to ensure that property is properly managed and maintained pending a trial, very different considerations may apply.

6.13 It is important to emphasise that these observations only arise in circumstances where there is an issue of any substance concerning the validity of the appointment and powers of receivers. Where no real case of any substance is made by a defendant which puts forward a credible basis for suggesting either that receivers were not validly appointed or that receivers, although validly appointed, are seeking to exercise powers which they do not have, then it will not matter whether any interlocutory injunctive relief which the relevant receivers seek can properly be characterised as respectively mandatory or prohibitory, for there will be a more than adequate basis for suggesting that a strong case has been made out. The potential for a distinction between relief which is essentially mandatory, on the one hand, and that which is prohibitory, on the other, arises where there is at least some significant defence put forward which the Court assesses might arguably provide a basis for suggesting that the receivers might fail at trial. In such circumstances, it will be necessary to assess the strength of the defence put up so as to, in turn, determine whether the receivers' case can be characterised as sufficiently strong to warrant the

grant of mandatory relief or whether it may only be possible to say that the receivers' case gives rise to a fair issue to be tried, where only such part of the relief claimed as can properly be described as prohibitory should be granted."

35. The Chief Justice recognised the *"considerable logic"* in a receiver who wishes to obtain possession of a residential property being required to make out a strong arguable case in order to obtain an interlocutory injunction pending trial. However, the Chief Justice also emphasised that if the proposed defence lacks any substance *"there will be a more than adequate basis for suggesting that a strong case has been made out."* For the reasons I have analysed, I do not believe that there is any substance in the defence of this case that the High Court lacked jurisdiction to try the proceedings, and it was effectively conceded that the second ground advanced in the High Court did not afford Mr. Coates a defence to the claim.

36. The test whether, in such circumstances, an injunction ought to be granted, and upon what terms, was addressed by the Chief Justice at para. 6.14 as follows:-

"... it may also be important to have regard to the fact that it is appropriate for a court, in fashioning an appropriate order at an interlocutory stage, to attempt to put in place a regime pending trial which runs the least risk of injustice, having regard to the uncertainty as to what the ultimate result of the trial may be".

37. Counsel for Mr. Coates argues that the trial judge failed to address this aspect in her judgment. At para. 42, she stated that the approach to be taken was to act so as to minimise the risk of injustice. In submissions it was argued that, should the injunctions stand, and should Mr. Coates subsequently succeed at trial, damages would not compensate him for having to vacate his home and that *"[s]imilar considerations apply in respect of the balance of convenience".*

38. Mr. Coates adduced no evidence before the High Court as to the probable, or indeed possible, impact upon him should the court order him to vacate the property. This is particularly significant for a number of reasons. Firstly, he deliberately refused to inform the High Court where he resided between 2007 and 2015. As it is unclear where he resided during that period, it is equally unclear whether it is open to him to return to live at that residence. Secondly, Mr. Charleton's affidavits show that he is the owner of other properties. Again, Mr. Coates chose not to avail of the opportunity to address the inference that these might be available to him as alternative residences. Thirdly, the property was not his principal private residence when he entered into the commercial borrowings with Ulster Bank, and he granted security for a commercial loan over property which was not his principal private residence. He never asserted that he was obliged to reside in the property from 2015, which leaves the court to infer that this was a voluntary, unilateral change of use by him. If the court is required to engage in a balancing exercise, Mr. Coates has simply placed nothing on his side of the scales for the court to balance.

39. On the other hand, the Receivers pointed to the fact that, in respect of this commercial loan of €1,000,000, plus accrued interest, Mr. Coates has repaid €3,000. Mr. Charleton points to the very high level of indebtedness to PTSB (€6,900,000) and to Mr. Coates' apparent total absence of means. Mr. Coates purported unilaterally to alter the terms upon which he granted security for this loan on foot of which the monies were advanced to him.

40. In *Tyrrell v. Wright* [2017] IEHC 92, the first named defendant sought to resist an interlocutory injunction sought by a receiver on the basis, *inter alia*, that he lived with his family at the secured property and he had *"nowhere else to live"* if the injunction was granted. The defendant was the owner of another property (where he had previously resided) but which was then let to a tenant. I held that the first named defendant could not

seek to resist the plaintiff's application for an injunction on the basis that he had nowhere else to live in circumstances where he had taken no steps to secure alternative accommodation in a house he owned and had let to tenants, despite the fact that the plaintiff was seeking to realise the security to repay a commercial loan.

41. In this case, there is a strong inference that Mr. Coates may have alternatives open to him, but he has deliberately chosen not to place any relevant information in this regard before the court. He must accept the consequences that flow from this decision.

Conclusion

42. Mr. Coates has not raised an arguable defence to these proceedings. The sole ground upon which he maintains that the High Court erred in granting the injunctions in this case is that the proceedings were required to be brought in the Circuit Court, pursuant to the provisions of s. 3 of the Land and Conveyancing Law Reform Act 2013. The Receivers did not seek an order for possession within the meaning of s. 3, and on this basis Mr. Coates' defence of these proceedings is bound to fail. The corollary is that the Receivers have a strong arguable case for the reliefs they sought in the High Court.

43. The Receivers cannot perform their functions if the reliefs are not granted. Mr. Coates has made minimal repayments on a debt in excess of €1,000,000. The value of the security is considerably less than the debt outstanding. He has considerable debts due to other creditors and, insofar as one can ascertain, a very modest income. There is no reality to the repayment of the loan, or even the partial repayment, other than through a realisation of the security. The reliefs sought are a necessary precursor to such realisation, albeit that the Receivers have no power of sale. These facts favour the granting of an injunction.

44. On the other hand, Mr. Coates has not really assisted the court in relation to arguments why the injunctions should be refused, notwithstanding the fact that the

Receivers are entitled to possession against the mortgagor in possession of the secured property. Applying the test of the least risk of injustice, based on the evidence before the court, notwithstanding that the effect of the order is to require Mr. Coates to vacate his residence, I see no reason to refuse the reliefs sought by the Receivers. For these reasons, I would refuse the appeal and affirm the order of the High Court.

45. Mr. Coates has failed in his appeal. My preliminary view is that costs should follow the event and that the Receivers are entitled to the costs of the appeal, to be adjudicated in default of agreement. If Mr. Coates wishes to argue that a different order as to costs should be made, he has fourteen days from the date of the delivery of this judgment to apply to the Office of the Court of Appeal to have the matter listed for a short hearing on the costs and the form of the order. Any such request should be on notice to the solicitors for the Receivers. In default of such an application, the order will issue without further reference to the parties.

46. As this is being delivered electronically, Donnelly J. and Faherty J. have indicated their agreement with this judgment and the orders I propose.