UNAPPROVED
THE COURT OF APPEAL

Appeal Number: 2022 /314
Neutral Citation Number [2024] IECA 12

Whelan J.
Faherty J.
Allen J.

BETWEEN/

PAUL FARRELL

PLAINTIFF/ APPELLANT

- AND -

EVERYDAY FINANCE DAC, KEN TYRELL, KIERAN CONNOLLY, ROSEMARIE CONNOLLY AND THE PROPERTY REGISTRATION AUTHORITY

DEFENDANTS/ RESPONDENTS

Judgment of Ms. Justice Faherty dated the 23rd day of January 2024

1. This is Mr Farrell's (hereinafter *"the plaintiff"*) appeal against the judgment of 5 December 2022 of the High Court (Stack J.) (hereinafter *"the Judge"*) and her Order dated 25 November 2022 (perfected 28 November 2022) dismissing his application for interlocutory injunctive relief against the third and fourth defendants. The plaintiff had sought an interlocutory injunction restraining these defendants from using or enjoying a property known as Unit B1, Baldonnell Business Centre, Baldonnell in the County of

Dublin, being the property comprised in Folio 125860L of the Register of Leaseholders in the County of Dublin (hereinafter "the Property"), pending the trial of the action. He also sought to enjoin the Property Registration Authority (*"PRA"*) not to register the third and fourth defendants as owners of the property. The plaintiff does not appeal against the refusal of relief against the PRA.

2. The appeal hearing proceeded before this Court on 2 May 2023. After the conclusion of the hearing, the Court indicated that it was satisfied that the appeal should be dismissed and that it would set out its reasons for dismissing the appeal later.

3. This judgment sets out both the background to the appeal and the Court's reasons for dismissing the appeal.

4. The third and fourth defendants purchased the Property at a public auction which was held on 24 August 2022. The first defendant (hereinafter *"Everyday"*), as mortgagee, sold the Property to the third and fourth defendants (for €300,000) by transfer dated 27 September 2022. At the time of the hearing in the Court below, and when the High Court judgment was delivered, the third and fourth defendants' application to be registered as owners of the Property was pending in the PRA. They have since been registered as full owners of the Property. The second and third defendants now seek to put the relevant evidence of their registration before this Court. I see no reason why the Court should not accede to this application in light of the provisions of Order 86A, r.4(b) of the Rules of the Superior Courts which provides that *"further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which occurred after the date of the decision from which the appeal is brought"* and, in particular, being satisfied that the new evidence sought to be adduced (the registration of the third and fourth defendants as the legal owners of the Property) was not in existence at

the time of the hearing in the Court below. Furthermore, for reasons set out later in the judgment, I am satisfied that the new evidence has a bearing on the appeal.

5. The within proceedings were issued on 21 November 2022. In the general indorsement of claim on the plenary summons the plaintiff seeks, *inter alia,* declaratory orders that his signatures *"on purported credit agreements dated 23 December 2011 were forged or otherwise procured or secured by deception and/or fraud"* and that the third and fourth defendants were on actual and/or constructive notice of proceedings instituted by Everyday's predecessor-in-title, Allied Irish Bank plc (*"AIB"*) in 2017 and 2018, and of proceedings instituted by the plaintiff in 2019 and that *"the plaintiff had impugned the validity of the purported facility letters dated 23 December 2011".* The plaintiff also challenges the validity of the appointment of the second defendant as receiver over the Property on 22 July 2021 and seeks declaratory orders that the second defendant did not have power to sell the Property to the third and fourth defendants and that the third and fourth defendants were on actual and/or constructive notice of *"the infirmities in the purported contract for sale and/or sale of the Property, including that the Second Named Defendant had no contractual or statutory power of sale in respect of the Property".* He further seeks injunctive relief restraining the third and fourth defendants from, *inter alia*, taking possession of or otherwise holding themselves out as having an interest in the Property, together with an injunction restraining the PRA from taking any steps in relation to the registration of the sale of the Property. Damages are also claimed.

6. As will become clear, the third and fourth defendants purchased the Property from Everyday as mortgagee in exercise of a power of sale contained in a mortgage deed, and not from the second defendant, of which more anon.

7. Of some note is that while the general indorsement of claim asserts essentially that the plaintiff did not in 2011 enter into credit agreements or sign facility letters in 2011, it is

not asserted that he was not at the time of the sale of the Property to the third and fourth defendants indebted to AIB or its successor-in-title, Everyday.

8. The notice of motion seeking interlocutory injunctive relief issued on 21 November 2022. In summary, the relief sought was in the form of orders restraining the third and fourth defendants from:

(1) Taking possession of the Property, marketing it for sale or selling it, or otherwise seeking to deal with the Property;

(2) Trespassing or entering upon or otherwise interfering with the plaintiff's quiet enjoyment of the Property;

(3) Holding themselves out as having any estate or interest in title to, or rights in respect of, the Property;

(4) Holding themselves out as having any entitlement to sell, rent, or otherwise grant any entitlement to possession of any portion of the Property; and

(5) Making any contact with any current tenants of the Property without the prior written consent of the plaintiff.

9. The application came on for hearing before the High Court on 25 November 2022. The affidavit evidence comprised the plaintiff's grounding affidavit sworn 21 November 2022, the third defendant's replying affidavit sworn 22 November 2022, the plaintiff's supplemental affidavit sworn 24 November 2022 and a second replying affidavit of the third defendant also sworn 24 November 2022.

10. The application for interlocutory relief was made against the following factual background. By Deed of Mortgage and Charge (*"the Mortgage Deed"*) made 24 November 2005 between the plaintiff as mortgagor and Allied Irish Banks plc ("AIB") as mortgagee, the plaintiff created a charge ("the Charge") over the Property and other properties owned by him as security for the repayment of all sums then due or which might

thereafter become due to the chargee. The covenants contained in the Mortgage Deed entitled AIB and its successors to appoint a receiver over the secured premises, including the Property, but did not provide for the powers of such a receiver or the formalities by which he or she was to be appointed.

11. In 2017 AIB instituted summary proceedings against the plaintiff bearing record number 2017/458S (*"the 2017 summary proceedings"*). In 2018 it issued possession proceedings against the plaintiff bearing record number 2018/24SP (*"the 2018 possession proceedings"*). As of the date of the appeal hearing, neither had yet been adjudicated upon.

12. In 2019, the plaintiff instituted two actions entitled *Farrell v. Allied Irish Bank* bearing record number 2019/4885P and *Farrell v. Allied Irish Bank & Ors* bearing record number 2019/5608P (*"the plaintiff's 2019 proceedings"*). On 16 July 2019, the plaintiff registered a *lis pendens* in respect of the latter proceedings and registered the *lis pendens* as a burden on Folio 125860L.

13. On 15 August 2019, AIB transferred its Charge to Everyday. Everyday became registered as owner of the Charge on 15 August 2019.

14. By Deed of Appointment made on 22 July 2021 between Everyday and the second defendant, the second defendant was appointed as receiver over assets of the plaintiff including the Property. The occupants of the Property, which include the plaintiff himself, were informed of this appointment by letter of 22 July 2021. While it is not altogether clear when the plaintiff became aware of the second defendant's appointment it would appear to have been within a relatively short period after the appointment.

15. From correspondence dated 3 December 2021, which was before the High Court, it would appear that the second defendant *qua* receiver took possession of the Property in November 2021. However, it appears that possession was later re-taken by the plaintiff or

the tenants in the Property, one of whom is the plaintiff's son (the other is his nephew). That remained the position as of the date of the appeal hearing.

16. On 24 August 2022, the second defendant, acting as agent of the plaintiff, purported to enter into a contract for sale with the third defendant (in trust). As the Judge noted at the hearing of the interlocutory application the second defendant had no power to do this as he had no power of sale and was a rent receiver only, enjoying only the powers contained in the Conveyancing Act 1881 (*"the 1881 Act"*). Thus, as observed by the Judge, had the application for injunctive relief turned on the authority of the second defendant to sign the contract, then a serious question to be tried would have been established.

17. However, by the time the plaintiff applied for injunctive relief, the sale of the Property had been completed. By Deed of Transfer made 27 September 2022 (*"the Transfer"*) Everyday, as transferor and registered owner of the Charge, which is registered as a burden on the Folio, transferred the Property to the third and fourth defendants. The Transfer expressly states that Everyday was acting *"in exercise of its power of sale"* and expressly acknowledges receipt of the entire purchase price of €300,000 provided for in the purported contract for sale.

18. In the Court below, in addition to canvassing a wide range of legal issues as to why the third and fourth defendants should not be allowed to enter into possession of the Property or exercise any of the other rights a person entitled to be registered as owner of registered land would normally enjoy, the plaintiff made a number of arguments as to why the PRA should be restrained from registering the third and fourth defendants as full owners of the Property (the Transfer having been by then lodged with the PRA for registration).

19. At the conclusion of the hearing, the Judge indicated that she was refusing all relief sought. She indicated that it was not necessary to grant injunctive relief against the PRA

because it had not yet processed the application for registration which had been lodged by the third and fourth defendants. She noted that if and when the PRA proceeded to register the third and fourth defendants as full owners, the plaintiff could appeal that registration to the Circuit Court pursuant to s.19 of the Registration of Title Act, 1964, as amended (*"the 1964 Act"*). Accordingly, no injunction against the PRA was necessary. There is no appeal from that finding.

20. Insofar as the third and fourth defendants were concerned, the Judge indicated that she was satisfied to refuse the application for injunctive relief on grounds of the plaintiff's delay in seeking interlocutory injunctive relief. She stated that she would give her written reasons for her decision in early course in deference to the submissions that had been made by counsel for all parties on the effect of the contract for sale and Transfer and so as to enable the plaintiff, should he wish to appeal her decision, to know the full reasons for it.

21. The Judge delivered her written judgment on 5 December 2022. ([2022] IEHC 698) She concluded that the plaintiff had failed to establish an arguable issue to be tried regarding any of his substantive complaints, that the balance of justice weighed in favour of refusing the injunctive relief sought, and that relief should also be refused on grounds of delay.

22. By Order dated 13 December 2022 (perfected 23 December 2022), the PRA were released from the proceedings and the third and fourth defendants' costs of the interlocutory application were reserved to the trial of the action. The Court refused the plaintiff interim relief pending appeal.

The High Court judgment

23. At the outset of her judgment, by way of factual background, the Judge noted that by the mortgage dated 24 November 2005 made between the plaintiff as mortgagor and AIB as mortgagee, the plaintiff had demised his interest in the property to AIB subject to the

proviso for redemption contained therein (clause 5 of the Mortgage Deed). Clause 8.01 provided that the mortgagee *"shall have all the statutory powers conferred on mortgagees by the Conveyancing Acts with and subject to"* the variations set out therein. This power of sale was expressed in the Mortgage Deed to be exercisable *"without the restrictions on its exercise imposed by Section 20 of the 1881 Act"*. The net result of clause 8.01 was that Everyday, as a matter of law, enjoyed the power of sale provided for in s. 19(1)(i) of the 1881 Act which was *"a power, when the mortgage money has become due, to sell, or to concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter as he (the mortgagee) thinks fit…"*. The Judge was prepared to accept that a lawful demand for repayment was necessary before the power of sale could be exercised albeit whether the third and fourth defendants were obliged to enquire into that issue was a matter to be determined.

24. She noted that the mortgage was registered as a burden on the Property, that it was transferred to Everyday on 15 August 2019, and that by instrument of appointment dated 22 July 2021, Everyday had appointed the second defendant as receiver over the Property.

25. She noted that the Property was offered for sale by public auction in June 2022 (with a reserve price of €350,000) and again on 24 August 2022 (with a reserve price of €300,000) and that the contract for sale was executed by the second defendant as the plaintiff's agent. She held, however, that Everyday, as mortgagee, transferred the Property to the second and third defendants *"in exercise of its power of sale"*. That sale had been completed by the time the plaintiff applied for injunctive relief (i.e. almost two months to prior the issuing of the within proceedings).

26. She went on to hold that the third and fourth defendants were the *"full beneficial owners of the Property"* (para. 19) and that full legal title would vest in them upon registration of their ownership, pursuant to s.51(2) of the 1964 Act. She considered the plaintiff a bare trustee of the Property for the third and fourth defendants in the meantime.

27. The Judge addressed the arguments advanced by the plaintiff in respect of the second defendant. She found no serious issue to be tried had been established in respect of the second defendant's appointment. While she was satisfied that the second defendant did not have authority to sign the contract for sale, this did not *"affect the validity of the subsequent Transfer"* (para. 27) of the Property by Everyday to the third and fourth defendants.

28. The Judge was also satisfied that it was not an abuse of process for Everyday to seek to realise its security simply because legal proceedings had previously been instituted by its predecessor-in-title and observed that mortgagees *"are free to pursue alternative remedies".* (para. 52)

29. She next addressed the plaintiff's contention that there was a serious issue to be tried as to whether the third and fourth defendants were on notice of his claim that AIB fraudulently attached his signature (and that of his ex-partner, who was co-owner of one of the properties offered as security for the loans) to Loan Facility Letters dated 23 December 2011 (the plaintiff exhibited unsigned copies of what are said to be the Facility Letters in question in his grounding affidavit). The plaintiff claims that these letters were never accepted and as the demand for payment contained in the letter sent to the plaintiff dated 29 June 2021 expressly referred to them, the power of sale was not exercisable and, hence, the sale to the third and fourth defendants was invalid and should be set aside.

30. In support for his contention that the third and fourth defendants were put on enquiry in relation to the alleged fraudulent conduct on the part of AIB, the plaintiff in his

grounding affidavit exhibited draft replying affidavits which, it appears, he intends to file in the 2017 summary proceedings and the 2018 possession proceedings. These draft affidavits were prepared in April 2022. Therein, the plaintiff alleges that the Facility Letters dated 23 December 2011, relied upon by AIB to issue a demand for repayment, were not in fact signed by him and his then partner, and he claimed that AIB used software or other means to fraudulently affix his and his partner's signatures to the Facility Letters.

31. For his proposition that the third and fourth defendants were put on enquiry in relation to the alleged infirmity in the demand letters arising from the alleged fraud, the plaintiff relied on a letter of 3 December 2021 sent by him to the solicitors acting for the second defendant as the purported vendor of the Property, a letter dated 3 May 2022 addressed to BidX1, the online auctioneers charged with selling the Property, a letter of 8 May 2022, again sent to BidX1, and the plaintiff's draft replying affidavits in the 2017 summary proceedings and the 2018 possession proceedings. The plaintiff argued that by reason of the contents of those draft affidavits and the other documents just referred to, the third and fourth defendants were put on enquiry of his claim that a fraud had been perpetrated on him and he relied on s.3 of the Conveyancing Act 1882 (*"the 1882 Act"*) for the proposition that, by reason of sight of those documents, the third and fourth defendants were fixed with notice of that fraud such that the Transfer was invalid and ought not to be registered.

32. In her consideration of the plaintiff's claims, the Judge noted that the 2017 summary proceedings and the 2018 possession proceedings had been adjourned for some time and that there had been no adjudication on the issue the plaintiff had raised in respect of those proceedings. As a result, the assertion of fraud had not been proven in any court of competent jurisdiction. Noting that the affidavits upon which the plaintiff relied were unsworn drafts prepared in April 2022, she observed that even if they had been sworn and

filed, there was no evidence that the third and fourth defendants knew anything about those affidavits, or their contents, either when they entered into the contract to purchase the property or when the Transfer was executed. She noted that the draft affidavits were not included in the Documents Schedule to the contract for sale and that there was no evidence that they were ever sworn or served on the second defendant or Everyday. Consequently, the third and fourth defendants could not have been put on enquiry by those draft affidavits. In this appeal, the plaintiff takes issue with the finding that the third and fourth defendants were not aware of the draft affidavits, an issue to which I shall return.

33. The Judge noted that the contract for sale, exhibited in the third defendant's replying affidavit, disclosed that certain documents had been notified to the third and fourth defendants. She found no evidence that the third and fourth defendants were aware of anything beyond the contents of the documents listed in the Documents Schedule appended to the contract for sale (save the existence of the *lis pendens* which was referred to in the Documents Schedule).

34. She noted that at special condition 4.8 of the contract for sale, the third and fourth defendants were told of the 2017 summary proceedings, but no documents relating to those proceedings were furnished. They were also told of the 2018 possession proceedings but only a copy of the special summons was furnished. The special summons contained a claim for possession pursuant to s. 62(7) of the 1964 Act and, if necessary, an order for sale. The Judge found that it contained *"nothing which would cast any doubt on the entitlement of the mortgagee [Everyday] to execute the Transfer."* (para. 61)

35. The third and fourth defendants were also furnished, again pursuant to special condition 4.8, with the correspondence dated, respectively, 3 December 2021, 3 May 2022 and 8 May 2022, already referred to. Pursuant to special condition 5.2, the third and fourth defendants were obliged to conclusively assume and accept that the statutory power of sale

had become exercisable and were not entitled to raise any requisitions or seek any documentation in relation to same.

36. In the 3 December 2021 letter, as referenced in special condition 4.8, the plaintiff complained to the second defendant's solicitors that the second defendant's entry into possession of the Property in November/December 2021 was illegal. The letter went on to state that as the 2018 possession proceedings had yet to be determined, *"no action…can be taken [by the second defendant]".* It further stated:

> *"Further to the foregoing, I state that no legal actual/purported* ***power of sale*** *can accrue or be purportedly claimed by either* ***Everyday****…or their purported predecessors or successors in title, nor by [the second defendant]…over the properties the subject matter herein. You will also be aware, or in the alternative ought to be aware and fully cognisant of the Lis Pendens registered on said* ***Folio 125860L****…"* (emphasis in original).

In an addendum to the 3 December 2021 letter headed ***"FOR THE AVOIDANCE OF ANY DOUBT"***, it was stated that "There are no **Judgments** registered against the plaintiff in respect of alleged monies owed or there is no **Possession Order** issued against me in respect of said property. These matters have yet to be determined" (emphasis in original).

37. The view of the Judge was that the letter *"does not contend that there would be any difficulty with the power of sale enjoyed by Everyday. This letter therefore cannot ground any relief."* (para. 63) Counsel for the plaintiff, in his submissions to this Court, takes issue with this, again a matter to which I will return.

38. The correspondence of 3 May 2022 was addressed to BidX1. Therein the plaintiff claimed that the Property was unlawfully for sale and that Everyday and/or its agents did not have a power of sale. BidX1 were requested to withdraw the Property from sale with immediate effect. The recipient was asked to note that *"there are ongoing legal*

proceedings regarding this precise matter". Reference was made to a *lis pendens* having been registered on the Property. The letter also stated:

"Please note that the Bank rely on fraudulent paperwork".

39. The version of the 3 May 2022 letter to BidX1, as exhibited in the plaintiff's supplemental affidavit of 24 November at *"PF 2",* in addition to containing the statements recited above, also recited that the plaintiff had attached to the letter a copy of his *"Defense"* to the proceedings.

40. I note that at para. 15 of his supplemental affidavit, the plaintiff complained that the third defendant in his replying affidavit had not exhibited the letters and emails from the plaintiff dated 3 December 2021, 3 May 2022 and 8 May 2022 as appeared in the Documents Schedule to the contract for sale. In his supplemental affidavit of 24 November 2022 sworn, in response, *inter alia*, to this criticism, the third defendant exhibits this correspondence as listed in the Documents Schedule. The version of the 3 May 2022 letter exhibited by the third defendant, and said to be the letter referenced at item 19 of the Documents Schedule, reads as follows, in relevant part:

> *"It has been brought to my attention that your Company [BidX1] has my property unlawfully for sale. Please be advised that there are ongoing legal proceedings regarding this matter. I respectfully ask you to take my property down with immediate effect.* ***Everyday Finance DAC*** *and/or its agents do not have a power of sale.*
>
> *I have attached copy of legal proceedings in respect of the above aforementioned property under Folio no.* ***125860L.*** *for your perusal.*
>
> *This property is the subject matter of High Court proceedings under Record number(s)* ***2017/458S*** *and* ***2018/24SP*** *have yet to be adjudicated and determined.*
>
> *Please note that the Bank rely on fraudulent paperwork.*

For the avoidance of doubt you will be attached personally to these legal proceedings in the event you do not withdraw my private property from sale with immediate effect.

I intend to inform the Auctioneers Regulatory body that you have wilfully accepted the conveyance of said property with due diligence ben (sic) conducted." (emphasis in original)

41. Ultimately, the Judge considered that neither the reference to the existence of the 2017 summary proceedings, the 2018 possession proceedings, the *lis pendens* registered on foot of the plaintiff's 2019 proceeding, nor the allegations that the Property was unlawfully for sale or that Everyday did not have a power of sale, amounted to an allegation that Everyday was purporting to exercise its power of sale on the basis of a fraud. She considered that the only reference that could be of any relevance in the context of the plaintiff's fraud allegation was the statement (in the 3 May 2022 correspondence as listed in the Documents Schedule to the contact for sale) that *"the Bank rely on fraudulent paperwork"*. She noted however that the paperwork in question *"is not identified in any way"* and that *"there was obviously a charge in place, and a previous claim by AIB in the 2018 possession proceedings that monies were due and owing on foot of the 2011 Facility Letters which had been signed and accepted by the plaintiff"*. She observed that it was *"difficult to see how the [the third and fourth] were on notice of the claim being made, or why they should have thought there was any doubt about the existence or exercise of the power of sale by Everyday."* (para. 64)

42. In his 8 May 2022 correspondence, again addressed to the online auctioneers, the plaintiff stated that he had informed the recipient personally on 3 May 2022 *"about ongoing litigation regarding my private dwelling Folio 125860L"* and that the auctioneers had no lawful authority to sell or market his property. The first observation to be made

here is that clearly the Property did not comprise a private dwelling. Reference was also made in the 8 May 2022 email to the auctioneering company trespassing on the Property unlawfully and taking custody of the plaintiff's *"private data/visual images"* which was *"**repugnant to the GDPR Data laws**…"* (emphasis in original). The recipient was reminded that the second defendant's receivership was *"invalid"* as the second defendant had no power of sale. It was said that BidX1 had *"a duty of care to [the] potential buyer/purchaser"* and that *"the legal title within is contaminated"*.

43. As to the contents of the 8 May 2022 correspondence, the Judge observed:

> *"It does not suggest there is any difficulty with the existence or exercise by Everyday of their power of sale."* (at para.65)

44. At para. 66 of the judgment, the Judge observed that the Charge on foot of which Everyday ultimately exercised its power of sale as mortgagee had been granted in 2005, around the time the plaintiff purchased the Property, *"[p]resumably on the basis, at least in part, of monies drawn down from AIB"*. She addressed the plaintiff's reliance on the fact that he had not drawn any monies in 2011 by commenting that there was nothing on affidavit to the effect that the monies obviously borrowed in 2005 were ever paid off. She opined that the 2011 Facility Letter exhibited suggested that the plaintiff needed to restructure existing loans at that time: hence, it did not seem to the Judge surprising that no monies were drawn down in 2011.

45. At para. 68 she again observed that the result of the documentation disclosed to the third and fourth defendants was that *"the only indication given to them of the claim now made by the plaintiff is the bald assertion made in the email of 3 May 2022, to the effect that the Bank were relying on 'fraudulent paperwork'"*. It was against that factual background that the question of whether there was a serious issue to be tried as to why the

third and fourth defendants should not be registered as full owners of the Property fell to be considered.

46. In considering whether the third and fourth defendants were obliged to enquire further on foot of the information which had been provided to them, and addressing the plaintiff's reliance on s.3 of the 1882 Act, the Judge noted firstly that *"the doctrine of notice does not apply to registered land"* (para. 71), a proposition which flowed from the provisions of the 1964 Act, in particular s. 31(1), s. 37 and s. 44.

47. The Judge next turned to the specific provisions of s. 3 of the 1882 Act relied on by the plaintiff, and to s.21 of the 1881 Act upon which the third and fourth defendants relied.

48. Section 21(2) of the 1881 Act provides:

> *"Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or unjust exercise of the power shall have his remedy in damages against the person exercising the power."*

49. In relevant part, s.3(1) of the 1882 Act provides:

> *"(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless-*
>
> > *(i) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; …"*

50. For the purposes of ascertaining how the provisions of s. 3 of the 1882 Act were to be understood by reference to s. 21(2) of the 1881 Act, the Judge turned to *Bailey v Barnes*

[1894] 1 Ch. 25, where the English Court of Appeal considered the relationship between s. 21(2) of the 1881 Act and s. 3 of the 1882 Act. The issue in the case was whether the purchaser of an equity of redemption was to be treated as having notice, actual or constructive, of a defect in the vendor's title. The Court of Appeal (Lindley L.J., Lopes and A.L. Smith J.J.) held, in essence, that s. 21(2) of the 1881 Act defined the extent of the reasonable enquiries required by s. 3 of the 1882 Act in the case of purchasers from mortgagees purporting to sell under powers of sale, by relieving such purchasers of the necessity of enquiring into the propriety or irregularity of the exercise of the power. As put by Lindley L.J.:

> *"'Gross or culpable negligence' in this passage does not import any breach of a legal duty, for a purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way. In the celebrated judgment of Vice-Chancellor Wigram in Jones v. Smith ([1843] 1 Hare 43), the cases of constructive notice are reduced to two classes: the first comprises cases in which a purchaser has actual notice of some defect, inquiry into which would disclose others; and the second comprises cases in which a purchaser has purposely abstained from making inquiries for fear he should discover something wrong. The Conveyancing Act, 1882, really does no more than state the law as it was before, but its negative form shews that a restriction rather than an extension of the doctrine of notice was intended by the Legislature. The 3rd section runs thus (sub-sect. 1): 'A purchaser shall not be prejudicially affected by notice of any*

instrument, fact, or thing unless - (i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him.' Can we say that Mr. Lilley or his solicitors 'ought reasonably' to have made inquiries into the validity of the sale by Barnes? 'Ought' here does not import a duty or obligation; for a purchaser need make no inquiry. The expression 'ought reasonably' must mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances. Light is thrown on the meaning of 'ought reasonably' by the Conveyancing Act, 1881, s. 21, sub-s. 2, which relieves purchasers from mortgagees purporting to sell under powers of sale from the necessity of inquiring into the propriety or irregularity of the exercise of the power. It is easy to see now that Mr. Lilley's solicitors might have been more suspicious and more cautious; but we are not prepared to say that they ought to have been so when he bought in August, 1890, and unless we can go that length we cannot hold that Mr. Lilley then had notice of anything wrong.

For these reasons we have to come to the conclusion that, in August, 1890, when Mr. Lilley bought the property subject to the mortgage for £6000, he had no notice, actual or constructive, of any defence in his vendor's title."

51. At para. 78, the Judge cited the relevant extract from Wylie, *Irish Land Law*, 6th ed., (Bloomsbury Professional, 2020) at para. 14.61, as follows:

"These provisions are designed to simplify conveyancing by reducing the enquiries which the purchaser is expected to make. He is only obliged to satisfy himself that the power of sale has arisen. However, under the Land and Conveyancing Law Reform Act 2009, he no longer has to, as under the 1881 Act, satisfy himself that the legal date for redemption has passed, which in most cases could be done very easily

by reading the terms of the mortgage deed. The 2009 Act vests the power of sale as soon as the mortgage is created. He is not obliged to make enquiries, which could become extremely complex, into the detailed relations between the mortgagor and the mortgagee during the currency of the mortgage. In particular, he does not have to look at the accounts, if any, kept by the mortgagor and mortgagee as to payments made and received in respect of the mortgage. However, as is their practice in such a statutory provision, the courts will not allow it to be used as an instrument of fraud and it has been stated that a purchaser with knowledge of any impropriety or irregularity about the exercise of the power will not obtain a good title. This does not require of a purchaser from a mortgagee the standard of care in conveyancing matters imposed by the doctrine of notice, but it has been said that he must not shut his eyes to suspicious circumstances." (emphasis added by the Judge)

She noted that Wylie cites *Bailey v. Barnes* as authority for the proposition that a purchaser *"must not shut his eyes to suspicious circumstances".*

52. At para. 80, she summarised the position in the following terms:

"The general legal position therefore appears to be settled: in the absence of knowledge of facts which suggest irregularity or impropriety in the exercise of the power of sale, a purchaser is not bound to make any inquiries into whether the conditions for exercise had been satisfied. Insofar, therefore, as the plaintiff relies on the doctrine of notice and s.3 of the 1882 Act, it is my view that he has not raised a serious question to be tried."

53. The Judge went on to opine that the plaintiff was not without a remedy. If he could substantiate his claims, s. 21(2) of the 1881 Act *"quite explicitly provides that any defect in the exercise of the power is one which sounds in damages against the person exercising it, and not against the purchaser."* (para. 81)

54. In the Judge's view, it was quite clear, as a matter of law, that a purchaser from a mortgagee is under no duty to inquire into the exercise by the mortgagee of his power and that the plaintiff's remedy, if it is indeed the case that power of sale was improperly exercised, was against Everyday.

55. Next, with reference to the caveat in *Bailey v. Barnes* to the effect that where there is actual notice of impropriety or irregularity, a purchaser will not be protected, the Judge turned to the issue of whether the third and fourth defendants could be said to have actual knowledge of the alleged fraud on the part of AIB. The question thus was whether there was a serious question to be tried as to whether the third and fourth defendants had actual notice of the fraud or whether they shut their eyes to suspicious circumstances.

56. She considered what the third and fourth defendants were aware of. She noted that special condition 4.7 of the contract put them on notice of the plaintiff's 2019 proceedings and the *lis pendens* which had been registered as a burden on the Folio on foot of those proceedings. She noted however that the special condition stated that there was no documentation available in relation to the 2019 proceedings. Furthermore, on foot of this special condition, the third and fourth defendants accepted that the *lis pendens* would not be released prior to completion of the sale but that if the plaintiff obtained an injunction pending completion, the sale would be rescinded. The Judge noted that *"no such injunction was applied for, let alone obtained".* While an attempt had been made to apply for an injunction on 1 November 2022 this had failed as the plenary summons in the 2019 proceedings had never been served and had not been renewed. As stated by the Judge:

> *"In the circumstances, the existence of the lis pendens can give no right to the injunctive relief sought here. The effect, if any, of the lis pendens must be determined in those proceedings."* (at para. 86)

57. In the view of the Judge, that left the question whether the fact that the third and fourth defendants were aware prior to the closing of the sale of the bald assertion in the letter of 8 May 2022 that the Bank were relying on *"fraudulent documents"* was sufficient grounds for saying that the Transfer was an instrument of fraud, or that the third and fourth defendants had knowledge of suspicious circumstances. She addressed this in the following terms:

> *"88. The threshold for establishing a 'serious question to be tried' is a low one, but it must nevertheless be established on the basis of some credible evidence. It cannot be the law that once the barest of assertions is made that s. 21(2) is, in effect, disapplied and purchasers are put on enquiry of a matter which, generally speaking, the statute says is a matter between mortgagor and mortgagee. On the facts of this case, none of the claims now being made (that the signatures were fraudulently affixed to two Facility Letters, and that no monies were ever drawn down) are not even referred to in the letter. In my view, the Purchasers were not even aware in outline terms of what was being claimed. This plainly does not meet the threshold of 'suspicious circumstances' as referred to in the authorities.*
>
> *89. I should add that no argument was made on the possibility of cancellation of a registration on the basis of fraud and therefore I have not considered s. 31 in that context.*
>
> *90. In my view, therefore, the Purchasers were not, as a matter of law, bound to enquire, and they are not in fact on notice of any suspicious circumstances such that it could be said that Everyday were acting fraudulently."*

58. At paras. 91-95, the Judge considered other matters raised by the plaintiff also said to constitute a serious issue to be tried but found none met the requisite threshold. The Judge's findings in respect of these matters are not the subject of the within appeal.

59. The Judge went on to hold that even if she was wrong in her conclusions on the serious issue to be tried, the balance of justice in any event favoured a refusal of the relief sought.

60. In assessing where the balance of justice lay, she acknowledged that if the plaintiff succeeded at the hearing of the action in setting aside the Transfer he will have been deprived not only of his place of business but also of the rents from the two tenants that remain on the Property. She noted however that the third and fourth defendants had paid €300,000 for the Property at auction. Insofar as the plaintiff relied on the importance of his property rights, she noted that the third and fourth defendants were *"full beneficial owners of the Property, whereas the plaintiff in executing the Charge, voluntarily conferred on AIB and its successors the right to sell the Property outright".* (para. 99)

61. She considered that pending determination of the action, the Property could be more successfully managed by the third and fourth defendants and that on the evidence to date the third and fourth defendants were more likely to meet financial obligations connected to the Property. She also found it difficult to see how the plaintiff could give a meaningful undertaking as to damages given his *"limited account of his borrowings, indebtedness and income"* and having regard to the direct evidence of his failure to pay service charges and rates. Furthermore, the plaintiff had not asserted that he could repay monies owed on foot of his borrowings. She thus held:

> *"In those circumstances, it seems that the [the third and fourth defendants] are more likely to be able to compensate the plaintiff if it turns out the injunction should have been granted than the plaintiff being able to compensate the [third and fourth defendants] if it turns out that an injunction is wrongly granted."* (para. 103)

62. Insofar as it had been suggested by the plaintiff's counsel that rents could be lodged to a solicitor's account pending determination of the proceedings, the Judge's overall

assessment was that the plaintiff did not have a good track record in this regard. Accordingly, in the Judge's view, *"the object of minimising injustice suggests that the injunction should be refused at this point"*. (paras. 104-105)

63. The Judge next turned the question of delay. In her view, the plaintiff's delay in seeking the interlocutory relief was determinative of the application. She noted that the second defendant wrote to the occupants of the Property by letter dated 22 July 2021 advising them of his appointment. While it was not clear when the plaintiff had become aware of the second defendant's appointment as receiver, he would have been aware at the time of the taking of possession by the second defendant in November 2021 or a short time thereafter. According to the Judge, the essential position was that despite objecting to the appointment of the second defendant as receiver, and the validity of the contract for sale entered into by the second defendant from at least early 2022, the plaintiff had taken no steps to seek injunctive relief. The fact that he had not sought an undertaking from Everyday or the second defendant was also relevant albeit the Judge had little doubt that if such an undertaking had been sought it would have been refused. She found that *"[t]he delay which is material here is the delay in seeking to apply to court"* (para. 112), which delay was at least a year if not sixteen months. She noted that, in the interim, the third and fourth defendants had completed their purchase of the Property. According to the Judge, the delay in issue was sufficient to refuse injunctive relief.

<u>The Appeal</u>

64. In essence, two principal issues arise for determination in the appeal. Firstly, whether the Judge was correct to conclude that the plaintiff had failed to demonstrate a serious issue to be tried on the question of the third and fourth defendants' awareness of the fraud alleged by the plaintiff. Secondly, whether there is any basis for this Court to

interfere with the exercise by the Judge of her discretion to refuse the plaintiff interlocutory injunctive relief.

The standard of review

65. It is important to note that this is an appeal against an interlocutory order. As the relevant authorities demonstrate, as a rule, this Court will only intervene to set aside such an order if there is *"an error of principle"* in the analysis that the Judge made, or if the Judge's judgment would lead to an injustice (see *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327 at para. 35). To borrow the phraseology of Murray J. in *Heffernan v. Hibernia College Unlimited* [2020] IECA 121 at para. 30, the exercise by the Judge of her *"discretion in calibrating these various considerations should not be lightly upset by an appellate court"*.

66. In short, in order to overturn a discretionary order on appeal, an appellant must generally show that the decision under appeal was *"outside the range of judgment calls"* open to the trial judge (*Waterford Credit Union v. J&E Davy* [2020] IESC 9 at 6.3). However, while great weight will be given to the trial judge's assessment, at the end of the day, the decision is ultimately one for the appellate court to make and, thus, this Court can intervene, in an appropriate case, even in the absence of an error of principle (*Trinity College Dublin v. Kenny* [2020] IESC 77).

A serious issue to be tried?

67. The plaintiff's primary contention is that the Judge fell into error in failing to find that he had established an arguable case that the third and fourth defendants were on notice of the fact that Everyday fraudulently exercised the power of sale and/or that the third and fourth defendants were on notice of suspicious circumstances which ought to have put them on enquiry of such fraud. In the plaintiff's submission, it follows that notwithstanding that the third and fourth defendants paid the mortgagee/Everyday for the

Property (and indeed by now are the registered owners of the Property), they should nevertheless be deprived of any interest in it and should, in fact, be restrained from going into possession of or from using or enjoying the Property in any way.

68. The Plaintiff contends that the Judge erred in her approach to the documents referred to in the Documents Schedule appended to the contract for sale. It is said that the Judge was wrong to conclude as she did with regard to the 3 December 2021 letter in circumstances where the letter specifically referred the recipient to AIB's possession proceedings *"for your perusal",* and where the correspondence expressly stated that *"no legal actual/purported power of sale can accrue or be purportedly claimed by either Everyday… or their purported predecessors or successors in title… over the properties the subject matter herein."* The plaintiff relies on the fact that the letter specifically alerted the recipient to the *lis pendens* which had been registered on Folio 125860L. Counsel also points to the addendum to the 3 December 2021 letter which expressly stated that there were no judgments registered against the plaintiff in respect of alleged monies which might be due and owing and that no possession order had been made against him in respect of the Property.

69. It is also contended that the fact that there was a direct reference to fraud in the email of 3 May 2022 satisfies the low threshold for a finding of a serious issue to be tried. It is said that the Judge erred when she held that the reference *"the Bank rely on fraudulent paperwork"* was not sufficient to satisfy the low threshold. That reference, it is said, met the threshold of *"suspicious circumstances"* referred to in Wylie, to which the third and fourth defendants *"wilfully"* shut their eyes, as per Stirling J. in *Bailey v. Barnes* [1894] 1 Ch. 25. This is particularly so where the third and fourth defendants were purchasing a *"distressed"* asset without vacant possession and when they were aware that the plaintiff

had registered a *lis pendens* against the Property. Counsel asserts that on these factors alone, the threshold for a serious issue to be tried had been met.

70. Counsel also points to the fact that the email of 3 May 2022 expressly stated that *"Everyday ... and/or its agents do not have power [of] sale"* and further alerted the recipient to AIB's possession proceedings bearing record no. 2018/24SP and to the fact that a *lis pendens* had been registered against the Property. It is also said that the Judge erred insofar as she held that the letter of 8 May 2022 did not suggest any *"difficulty"* with the *"existence of exercise"* of the power of sale by Everyday, in circumstances where this correspondence referred to *"ongoing litigation"* and disputed that there was any *"lawful authority"* to sell the Property or that the second defendant had any power of sale.

71. The plaintiff thus argues that the contents of the 3 December 2021 letter, together with the 3 May 2022 and 8 May 2022 correspondence (all of which were in the hands of the third and fourth defendants prior to completion of the sale of the Property), represent a sufficient line of enquiry to satisfy s.3 of the 1882 Act and to trigger *"inquiries and inspections"* that ought reasonably to have been made by the third and fourth defendants.

72. It is also said that insofar that it was suggested that the draft affidavits which the plaintiff intends filing in the 2017 summary proceedings and the 2018 possession proceedings were not attached to the email of 3 May 2022, and insofar as the Judge found that the third and fourth defendants were not aware of those affidavits, the fact of the matter, the plaintiff says, is that the plaintiff had provided sworn evidence (at para. 21 of his supplemental affidavit) that those affidavits were attached to the email of 3 May 2022. Citing, in aid of his submissions, *Bailey v. Barnes* and *National Bank Limited v. Henry* [1981] IR 1, the plaintiff's overall contention is that the Judge had more than sufficient material to find that a serious issue to be tried had been established.

Discussion and decision

73. The issue to be determined is whether the third and fourth defendants were, as the plaintiff contends, on actual notice of the alleged fraud or, at the very least, whether they *"wilfully"* shut their eyes to suspicious circumstances.

74. The plaintiff bears the onus of proving that the Judge erred in her assessment of the facts and of their legal consequences. In my view, he has not overcome the onus that is on him. I am satisfied that the Judge did not err in holding that there was no serious issue to be tried that the power of sale was exercised fraudulently or that the third and fourth defendants were on notice of the alleged fraud or otherwise *"wilfully"* shut their eyes to suspicious circumstances. None of the matters upon which the plaintiff relies meets the (admittedly) low threshold the plaintiff was required to overcome.

75. The starting point for my conclusions in this regard is what the third and fourth defendants knew about the Property when they purchased it from Everyday in exercise of the latter's power of sale under the Mortgage Deed.

76. From the outset, they knew that the plaintiff owned the Property, subject to the Charge in favour of AIB, later transferred to Everyday. This much is apparent from the copy Folio (item 3 in the Documents Schedule) which was furnished to them with the contract for sale. They also knew that the Charge contained a power of sale.

77. The third and fourth defendants also knew that AIB had instituted special summons proceedings against the plaintiff in 2018 seeking possession, as well as summary proceedings in 2017 (Clause 4.8 of the special conditions to the contract and item 21 in the Documents Schedule). As the Judge found, the existence of such proceedings was entirely consistent with repayment of the loan facilities having been demanded and not met, with the result that the power of sale became exercisable.

78. Moreover, the third and fourth defendants purchased the Property in circumstances where it was specifically represented by the solicitors for the vendor that the power of sale had arisen and had become exercisable (Clause 5.2).

79. The third and fourth defendants were also aware that the plaintiff had sent a letter to Everyday's solicitors on 3 December 2021 (Clause 4.8 and item 18 in the Documents Schedule) wherein he complained, *inter alia,* that the second defendant had unlawfully taken possession of his property. As earlier referred to, the letter also disclosed that judgment had not been entered against the plaintiff and that no possession order made had been against him. The absence of any such order does not, however, preclude the exercise of the power of sale following a demand for repayment of monies owed, much less serve as an indicator that fraudulent activity underlay the mortgagee's actions. In short, none of this can be said to give notice of the fraud for which the plaintiff now contends.

80. Whilst the third and fourth defendants also knew that the plaintiff had instituted his own proceedings in 2019 (they were certainly aware (from Clause 4.7 of the special conditions) of the 2019/ 5608P proceedings and the resulting *lis pendens*), it is common case however that they were not provided with a copy of those proceedings, or any order made therein. As it transpired, the 2019 proceedings were not prosecuted by the plaintiff and were not renewed, and indeed later struck out. (The papers before the Court show that the plaintiff made an application to Dignam J. on 7 October 2022, and suggest that he obtained an interim injunction and issued and served a motion returnable for 1 November 2022 which was refused with costs. A further motion was issued on 8 November 2022, on foot of which a final order was made on 30 January 2023 striking out the action with no order). As the Judge noted, in circumstances where the 2019 proceedings were never served (and indeed never renewed), it is difficult to see what might therefore turn on the

fact that the third and fourth defendants were alerted to the 2019 proceedings, or that a *lis pendens* had been registered, without more.

81. The third and fourth defendants were on notice from the correspondence of 3 May 2022 and 8 May 2022 that the plaintiff had called on BidX1 to withdraw the Property from sale on the basis that Everyday did not have a power of sale.

82. In the 3 May 2022 correspondence, the plaintiff asserted that AIB relied on *"fraudulent paperwork"*. As the Judge identified (and as is clear from the argument on appeal), this constitutes the high watermark of the plaintiff's claim that the third and fourth defendants were aware of the fraud which the plaintiff alleges, namely that AIB had fraudulently appended his signature to loan Facility letters in December 2011. However, the fact of the matter is that no such details were provided in the 3 May 2022 correspondence (or indeed in the other correspondence upon which the plaintiff relies) save the assertion that the bank relied on *"fraudulent paperwork"*. The 3 May 2022 correspondence did not elaborate on what the *"fraudulent paperwork"* comprised, much less what it related to. Furthermore, there was no reference in the version of the 3 May 2022 letter, as listed at item 19 in the Documents Schedule to the contract for sale (and which was thus in the hands of the third and fourth defendants) to the plaintiff's *"Defense"* to the 2017 summary proceedings and the 2018 possession proceedings (which *"Defense"* is said by the plaintiff to comprise the plaintiff's draft affidavits). The fact that there was such a reference in the version of the correspondence of 3 May 2022 as exhibited by the plaintiff in his supplemental affidavit does not put that correspondence in the hands of the third and fourth defendants.

83. As against the bare assertion that *"the Bank rely on fraudulent paperwork"* contained in the version of the 3 May 2022 letter which was admittedly was in the hands of the third and fourth defendants, the third and fourth defendants had available to them the

Mortgage Deed (item 2 in the Documents Schedule) and the knowledge (clear from the relevant Folio) that Everyday were the registered owners of the Charge by which that power of sale had been conferred. Furthermore, it was specifically represented that the power of sale had become exercisable (Clause 5.2 of the Special Conditions). In such circumstances, it is difficult to give credence to the plaintiff's submission that the third and fourth defendants should be imputed with knowledge of the alleged fraud on which the plaintiff relies, or that the plaintiff calling on BidX1 to desist from progressing the sale of the Property constituted *"suspicious circumstances",* in the absence of any specifics of the alleged fraud having been brought to the attention of the third and fourth defendants.

84. The plaintiff would say, however, that the specifics of the alleged fraud were brought to the third and fourth defendants' attention *via* the draft affidavits he had prepared for the purposes of the 2017 summary proceedings and the 2018 possession proceedings. These draft affidavits, as exhibited in the plaintiff's affidavit grounding his application for interlocutory relief, certainly contain an allegation that AIB fraudulently appended the plaintiff's signature to the December 2011 Facility Letters (see exhibit *"PF 8"* to the plaintiff's grounding affidavit). It will be recalled, however, that the Judge found that there was no evidence that the third and fourth defendants ever had sight of these draft affidavits or were aware of their contents at the time they acquired the Property. The question is whether the Judge erred in so finding.

85. As already referred to, what is advanced in this Court on behalf of the plaintiff is his averment at para. 22 of his supplemental affidavit of 24 November 2022, that the reference to his *"Defense"* as contained in the version of the 3 May 2022 letter to BidX1 exhibited to his affidavit is a reference to the draft affidavits he prepared in April 2022, and that those affidavits were attached to the 3 May 2022 email.

86. For the reasons already outlined, I am not persuaded by the plaintiff's counsel's submission that the Judge erred when she concluded that there was no evidence that those affidavits were ever in the hands of the third and fourth defendants. At the risk of repetition, this is in circumstances where the version of the 3 May 2022 letter, as exhibited in the third defendant's supplemental affidavit, and as acknowledged as having been in the hands of himself and the fourth defendant *via* the Documents Schedule prior to the completion of the sale, does not make reference to the plaintiff's *"Defense"* to the 2017 summary proceedings and the 2018 possession proceedings, and where there is no reference at all in that letter to the draft affidavits upon which the plaintiff relies as imputing knowledge of fraud to those defendants. Accordingly, the plaintiff has not pointed to any persuasive factor that could lead to the conclusion that the Judge was wrong in concluding that there was no evidence that the third and fourth defendants knew anything about the draft affidavits, or that the affidavits were ever sworn or served on Everyday or the second defendant.

87. Insofar as counsel for the plaintiff in aid of his submission relied on *Northern Bank v. Henry*, in my view his reliance was misconceived given the entirely different factual matrix at issue in that case. There, the issue was the mortgage by a husband of the leasehold interest in the family home (which he had acquired with his wife's money) to the plaintiff bank by sub-demise to secure the repayment of monies owed by the husband to the plaintiff bank. At the time of this mortgage the bank made no investigation into the husband's title to the house save a search in the Registry of Deeds. The High Court however declared that the husband held the assignment of the leasehold interest in trust for the wife and ordered him to assign it to her. Subsequently, the bank sought a declaratory order that its interest in the family home under the husband's mortgage was superior to the interests of the husband and the wife and that that mortgage stood well charged on the

property. It was held in the High Court and affirmed on appeal by the Supreme Court that the wife's claim to be entitled to an equitable interest would have come to the knowledge of the bank's agents if such inquiries and inspections had been made as ought reasonably have been made by the bank in accordance with the standard described in s. 3(1) of the 1882 Act.

88. Apart altogether from the fact that what is in issue in the present case is the sale by Everyday pursuant to its powers as mortgagee in respect of which the third and fourth defendants could thus avail of the provisions of s. 21(2) of the 1882 Act (subject of course to their having knowledge of any impropriety or irregularity or having wilfully shut their eyes to suspicious circumstances which might have led to a knowledge of impropriety or irregularity (which neither the High Court nor this Court found was the case), it is clear the conclusions arrived at in *Northern Bank v. Henry* turned in no small measure on the haste with which the bank were determined to take the security, instructing only a law agent in Belfast to complete the transaction with the least possible delay and not instructing a lawyer in this jurisdiction, hardly the actions of a reasonable or prudent purchaser as Parke J. observed in the judgment he gave in the Supreme Court.

Summary

89. Here, there can be no doubt but that the third and fourth defendants purchased the Property from Everyday, as mortgagee, in exercise by Everyday of the power of sale provided for in the Mortgage Deed. The plaintiff does not, in this appeal, take issue with the Judge's analysis of the relevant provisions of the 1881 Act, or of the relevant authorities. As s. 21(2) of the 1881 Act provides, the third and fourth defendants were under no duty to enquire into the exercise by the mortgagee of the power of sale. Furthermore, as the legislation and the authorities demonstrate, the third and fourth defendants' title to the Property is not vitiated if there were some impropriety or

irregularity in the exercise of the power of sale. As is well rehearsed by now, the plaintiff can only seek to set aside the Transfer if he can demonstrate that the third and fourth defendants had *"actual knowledge of the alleged fraud"* or otherwise *"wilfully"* shut their eyes to "suspicious circumstances".

90. Absent anything that might impinge on their entitlement to do so, in circumstances where Everyday was the registered owner of the Charge, and the entity entitled to exercise the power of sale, the third and fourth defendants were entitled to assume that Everyday had a valid Charge. For the reasons already set out, considered purely in the context of whether the plaintiff has established a serious issue to be tried, the plaintiff has not established a serious issue to be tried that at the time the third and fourth defendants acquired the Property they were on notice of actual fraud or that there were *"suspicious circumstances"* to which the third and fourth defendants *"wilfully"* shut their eyes.

91. That was the conclusion of the Judge following a careful analysis of the evidence before her. In my view, neither the Judge's analysis, nor the conclusions derived from such analysis, can be faulted. In short, having duly referenced the relevant legislation and the legal principles derived from the authorities, the Judge correctly determined that there was no basis upon which the plaintiff could assert a serious issue to be tried that the third and fourth defendants were on notice of a fraudulent exercise of a power of sale or that were on enquiry of fraud due to suspicious circumstances to which they *"wilfully"* shut their eyes.

92. It may well be that the plaintiff, aided by the calling of witnesses and/or by discovery (or other procedural tools), will advance at the trial of the action evidence to persuade the trial judge of the case he makes against the third and fourth defendants. Whether he will be successful or not is of course a matter for the trial judge.

The Balance of Justice

93. The plaintiff contends that the Judge erred in finding that the balance of justice did not favour the granting of the interlocutory relief sought. It is said that the Judge placed too much weight and emphasis on the decision of this Court in *Ryan v. Dengrove* [2021] IECA 38 and that she failed to place due emphasis on the fact that the plaintiff had led evidence that the enterprises carried on in the Property in question constituted a *"family run business unit"*- a factor which the plaintiff says distinguishes the present case from a purely *"commercial"* property which was at issue in *Ryan v. Dengrove* . Counsel also points to the plaintiff's supplemental affidavit where it is set out that the plaintiff spent almost €300,000 over the years in connection with the Property. It is said that the plaintiff's *"family run business unit"* is to be contrasted with the third and fourth defendants' interest in the Property which, at all material times, was accepted to be *"commercial"* in nature. For those, and other reasons, it is contended that the plaintiff had the better end of the argument on the question of the adequacy of damages.

94. The plaintiff also says that the Judge failed to give adequate weight to his sworn undertaking to pay the rental income being derived from the two tenants *in situ* in the Property into escrow pending the full trial of the action. It is also submitted that the Judge failed to give due consideration to the fact that the third and fourth defendants bought the Property at more than half its value.

95. Overall, the plaintiff's contention is that having regard to the fact that (i) damages were not an adequate remedy for him, combined with (ii) the undertaking to remit rental income into escrow and (iii) the fact that it was clear that the third and fourth defendants were buying a *"lawsuit",* the balance of justice favoured the granting of the relief sought.

96. On the other hand, counsel for the third and fourth defendants contends that the Judge correctly assessed the balance of justice.

Discussion and Decision

97. Notwithstanding the submissions advanced on behalf of the plaintiff, I do not find that his ground that the Judge erred in finding that the balance of justice favoured refusal of the interlocutory relief sought has been made out.

98. In my view, the Judge correctly identified the factors relevant to the question of the balance of justice, in accordance with recognised legal principles. In line with *Merck Sharpe & Dohme v. Clonmel Healthcare* [2019] IESC 65, [2020] 2 I.R. 1, she considered the question of the adequacy of damages within her overall assessment of where the balance of justice lay. As said by O'Donnell J. (as he then was) in *Merck,* the adequacy of damages will, in most case, be *"the most important element in that balance".* (para. 64.4)

99. In the first instance, I see no basis whatsoever for interfering with the Judge's determination that the third and fourth defendants were more likely to be able to compensate the plaintiff if he is ultimately successful at trial and it turns out that the injunction should have been granted. From the evidence before her, the Judge had a solid basis for the assessment she made in this regard at paras. 102-103 of the judgment. Insofar as it was argued on appeal that it would be unjust to refuse the plaintiff injunctive relief on the basis of an incapacity to pay damages, I am not persuaded by that argument: an undertaking as to damages cannot just be regarded as an empty formula.

100. Secondly, I perceive no error of principle, or afront to the interests of justice, in the Judge's determination that the third and fourth defendants were more likely to be able meet the various financial obligations that attach to the Property. There was ample evidence for the Judge's conclusion in this regard.

101. Thirdly, insofar as the plaintiff takes issue with how the Judge dealt with his offer to pay the rental income from the tenancies into escrow, in my view, his submissions on this issue do not come close to demonstrating that the Judge erred. As was acknowledged his counsel at the appeal hearing, there is currently a shortfall of €3,000 a month in rent being received from the tenants *in situ* (compared presumably to the rent achievable in the open market). There was nothing put before the Court on the plaintiff's part to show how this shortfall could be made good if he is ultimately not successful at trial.

102. Fourthly, I find no merit in the submission that the Judge placed undue emphasis on *Ryan v. Dengrove* or otherwise misconstrued what was said by Murray J. in that case. Relying on *Ryan v. Dengrove*, she was satisfied that the Property constitutes a commercial enterprise, as it undoubtedly is. Thus, principle 5 of the principles set out by O'Donnell J. in *Merck* is apt*: "(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*". (para. 64.5) Insofar as the plaintiff asserts that the enterprises being carried on in the Property are *"family run"* enterprises, that does not, in my view, detract from the purely commercial nature of the Property. Furthermore, there was no plausible evidence led to by the plaintiff to suggest that there was an emotional attachment to the Property of the type considered in *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327 such as might warrant the Judge to attach significant weight to this factor.

103. In finding that damages would be an adequate remedy for the plaintiff, the Judge duly acknowledged the time and effort expended on the Property by the plaintiff and his son and observed that if the plaintiff was successful at trial, he would have a remedy in damages. Again, that was a judgment call well within the competency of the Judge.

104. For the reasons set out above, I am satisfied that there is no basis upon which this Court should interfere with the Judge's assessment that the balance of justice favoured the

refusal of relief. There remains, moreover, the fact that since the hearing in the High Court, the third and fourth defendants have been registered as full owners of the Property. The entry on the register is conclusive evidence of ownership. I agree with the third and fourth defendants' submission (having regard to the principles set out by Clarke J. (as he then was) in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] I.R. 152), that the orderly implementation of the property registration system must carry considerable weight in assessing where the balance of justice lies. Thus, the fact of their registration is a further reason to refuse the relief claimed by the plaintiff.

Delay

105. As can be seen from her judgment, the Judge was satisfied to refuse relief on the plaintiff's delay alone. The plaintiff while acknowledging delay submits that delay should not preclude relief here in the absence of the defendants adducing evidence of prejudice arising on foot of such delay. He contends that the defendants suffered no prejudice.

106. In light of the factual matrix outlined by the Judge at para. 111 of her judgment as relevant to the question of delay, I see no basis upon which her finding that there was undue delay could be impugned. In all the circumstances of this case, and given that I have upheld the Judge's conclusion on the question of where the balance of justice lay, the plaintiff's assertion that his delay was immaterial because no prejudice was suffered by the third and fourth defendants cannot suffice to swing the balance of justice in his favour (even if that be the case that the third and fourth defendants were not prejudiced (and on this I express no opinion)).

Summary

107. For the reasons set out, the appeal is dismissed.

108. The plaintiff has not succeeded in his appeal. It would seem to follow that the third and fourth defendants should be awarded their costs. If, however, any party wishes to seek

some different costs order to that proposed they should so indicate to the Court of Appeal Office within 14 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 14-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

109. As this judgment is being delivered electronically, Whelan J. and Allen J. have indicated their agreement therewith and with the orders I have proposed.