THE HIGH COURT

[2021] IEHC 167

[2020 No. 5456 P]

BETWEEN

MARTIN CASEY AND DAVID CASEY

PLAINTIFFS

AND

EVERYDAY FINANCE DAC AND DAVID O'CONNOR

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 12th day of March, 2021

SUMMARY

1. This case concerns the plaintiffs, who owe approximately €3.5 million to Allied Irish Banks plc ("AIB"), which debt has been acquired by the first named defendant ("Everyday"). This judgment considers two main issues:

    - first, the claim by the plaintiffs that an interlocutory injunction should be granted against a receiver who is seeking to sell a family farm. They claim that since the farm is agricultural land, it is not therefore commercial property or investment property, and as such they claim that the balance of justice favours the grant of the injunction, and,

    - secondly, AIB obtained a summary judgment against one of the plaintiffs on the 25th February, 2014 in default of appearance in the sum of €3,425,096. Some five and a half years after that judgment was obtained the Supreme Court held in *Bank of Ireland Mortgage Bank v. O'Malle*y [2019] IESC 84 that claims for summary judgment must be set out in more detail than was allegedly done for the judgment obtained in this case. For this reason, and in particular because the judgment was obtained without any appearance by the plaintiffs, they claim that the judgment obtained in February 2014 is invalid.

2. The injunction is refused for the reasons set out below, including this Court' s conclusion that agricultural land inherited from a parent is as much 'commercial' or 'investment' in nature as other non-agricultural property, such as a pub or shop inherited from a parent.

BACKGROUND

3. This is an application by the plaintiffs ("the Caseys") for an interlocutory injunction restraining the second named defendant (the "Receiver") from taking any steps to sell lands comprised in Folio CE22033 and located in Ennis, Co. Clare (the "Lands"). The underlying claim made by the Caseys in the proceedings is that the appointment of the Receiver over the Lands is invalid and they seek a declaration to that effect, along with certain other reliefs. At this stage of the proceedings, the Caseys seek to prevent the Receiver from offering the Lands for sale or from entering into a contract for the sale of the Lands.

4. The application is grounded on the affidavit of the first named defendant ("Mr. Martin Casey"). The averments made therein are adopted in full by his brother, the second named defendant ("Mr. David Casey"). The Caseys seek to prevent the sale of the Lands

and place significant emphasis on the fact that the lands were inherited from their father and have been in the family for some time. The within proceedings were issued on 29th July, 2020 in response to the Caseys' belief that the lands were due to be sold by way of auction at the end of July 2020.

5. The relevant loan facility for the purposes of the present application is one entered into by the Caseys with AIB in 2010. This loan of almost €3 million was offered by way of Letter of Sanction dated 8th September, 2010. The Caseys signed this Letter on 28th October, 2010 thereby accepting the applicable terms and conditions. Those terms included that the loan was to be repayable on demand and was to be repaid in full by 31st March, 2011. Included as security for that loan was a Deed of Mortgage dated 31st July, 2008, wherein the Caseys agreed to charge Folio CE22033 in favour of AIB as security for the monies borrowed under the loan facility.

6. It is common case that the monies due under the loan facility were not repaid by the Caseys by 31st March, 2011, or indeed at any point thereafter. In 2013, summary judgment proceedings (referenced in detail below) were brought against the Caseys, resulting in AIB obtaining judgment in default of appearance against Mr. Martin Casey in the sum of €3,425,096.

7. The Mortgage and the loan were subsequently transferred to Everyday on 11th December, 2018 following the execution of a Global Deed of Transfer dated 2nd August, 2018 between AIB and Everyday. This transfer was not contested by the Caseys. On 19th June, 2019 letters of demand were sent to the Caseys by Link ASI Limited, on behalf of Everyday, demanding payment of the amount then owing under the terms of the loan.

8. By Deed of Appointment dated 8th August, 2019 (the "Deed of Appointment"), the second named defendant (the "Receiver") was appointed over the Lands.

9. As noted above, the monies remain due and owing under the loan facility – a fact not disputed by the Caseys. It is the case therefore that the loans have been in default for almost ten years.

Judgment obtained against Mr. Martin Casey

10. In 2013, proceedings were issued by AIB seeking summary judgment against the Caseys for the sums owed on foot of the 2010 loan facility (that case bearing Record No. 2013/2081 S). No appearance was entered by the Caseys in those proceedings. As a result, on 25th February, 2014 judgment in default of appearance in the sum of €3,425,096 was obtained against Mr. Martin Casey. It should be noted however that no judgment was obtained against Mr. David Casey. By order dated 24th June, 2019, Everyday was substituted in place of AIB in those proceedings.

11. Separately, on 19th June, 2019, Everyday issued a Letter of Demand to Mr. David Casey (an identical letter was also issued to Mr. Martin Casey).

12. During the submissions made on behalf of the Caseys, significant focus was placed on the claim that the summary judgment obtained against Mr. Martin Casey is invalid. In this

regard, reliance was placed on the decision of the Supreme Court in *O'Malley*. The argument is made that the particulars set out in the Special Indorsement of Claim in the summary judgment proceedings were not sufficient to satisfy the requirements of Order 4, rule 4 of the RSC, as required by the decision in *O'Malley*.

13. A key claim therefore by the Caseys is that for this reason the summary judgment obtained against Mr. Martin Casey is invalid and the claim appears to be that if this judgment is invalid then the Receiver could not have been validly appointed.

14. Repeated assertions were made, both in the affidavits of Mr. Martin Casey and in oral submissions, that it is the intention of Mr. Martin Casey to appeal the judgment against him on the basis of the *O'Malley* decision. However, it is common case that no appeal was ever lodged and more significantly, no valid application been made to have the judgment set aside. It is important to note that no challenge was made to the appointment of the Receiver until almost a year after his appointment, and only, it seems, in response to the Caseys' belief that the lands were due to be sold by way of auction on 30th July, 2020 (the proceedings having been issued one day prior, on 29th July, 2020).

THE LAW RELATING TO INTERLOCUTORY INJUNCTIONS

15. The law in relation to the grant of interlocutory injunctions is well-settled and was most recently restated in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2019] IESC 65. It does not need to be restated and it is clear that the primary questions to be addressed are:

- Fair question to be tried?

  The plaintiff must establish that there is a fair question to be tried regarding his entitlement to that injunction.

- *But a strong case has to be made out if mandatory injunction?*

  However, where the interlocutory injunction is mandatory in nature, before such an order will be granted, the plaintiff must show, not merely that there is a fair question to be tried, but that a strong case has been made out.

- *Does balance of justice favour grant of injunction*?

  Once a fair question/strong case has been made out, then the plaintiff must establish that the balance of justice (balance of convenience) favours the grant of the injunction. In considering where the balance of justice lies, an important, but not necessarily determinative issue (per O'Donnell J. in *Merck Sharp & Dohme* at para. 35) is the adequacy of damages.

In this case, the injunction sought is clearly prohibitory, rather than mandatory, in nature and so the Caseys must first show that there is a fair question to be tried, before any entitlement to an interlocutory injunction could arise.

Fair question to be tried – summary judgment incorrectly granted?

16. The first issue therefore is whether there is a fair question to be tried. In this regard, the Caseys claim that there is a fair question to be tried regarding their claim that the summary judgment was incorrectly granted by the High Court in default of appearance against Mr. Martin Casey. On this basis, they appear to claim that the appointment of the Receiver over the lands is invalid.

17. In particular, they claim that the subsequent case of *O'Malley* makes clear that a financial institution seeking summary judgment should specify clearly how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest. That decision was handed down on 29th November, 2019 some five and a half years after the summary judgment was granted in this case. Nonetheless, the Caseys argue that they should be entitled to challenge the validity of the judgment now on the basis that the application grounding it did not comply with the principle set down in the *O'Malley* decision, particularly as the judgment was obtained in default of any appearance on behalf of the Caseys. However, the fact that the Caseys chose not to enter an appearance in order to defend those proceedings is not a factor in their favour. In this regard, they claim that the law, as confirmed by the Supreme Court in *O'Malley* in 2019 was well settled and so the judgment should not have been granted in 2014. However, whether that is correct or not, they passed up the opportunity to raise that 'well settled' law in their defence and they cannot now seek to rely retrospectively on the *O'Malley* decision as a basis for a claim that the judgment was invalidly obtained.

18. A similar, although not identical, issue arose in *Ulster Bank Ireland Limited v. Kavanagh* [2014] IEHC 299, where judgment in default of appearance was granted and subsequent to the judgment, the High Court in *Ulster Bank Ireland Limited v. Dermody* [2014] IEHC 140 held that evidence of a deponent on behalf of the bank was not admissible to prove the truth of the contents of the bank's records as the deponent was not an officer of the bank, so as to avail of the Bankers Books Evidence Acts 1879-1955. On that basis the defendants in Kavanagh sought to set aside the judgment granted against them in default of appearance, as they claimed that in their case the deponent should not have availed of the Bankers Books Evidence Acts in order to obtain the summary judgment in default of appearance.

19. Baker J. rejected the application to set aside the judgment. At para. 11 *et seq*, she stated:

> "What is asserted in this case is that the affidavit grounding the application in this case was sworn, as that in *Ulster Bank v. Dermody*, by a person who was not an officer of the Bank and therefore the evidence was inadmissible as hearsay. What the defendant argues in effect is that she should be entitled to rely retrospectively on recent jurisprudence that would have offered her a substantive defence to an action commenced more than six years before that jurisprudence evolved.
>
> [….] the defendant was in a position to raise the procedural defences raised by the defendant in *Bank of Scotland v. Stapleton* and *Ulster Bank v. Dermody* in defence of the summary proceedings. In the circumstances, it seems to me that it would be

contrary to the principles of justice and fairness to the plaintiff in this case, that a procedural matter which was not raised in defence seven years ago could be raised now. This arises from the case of *Henderson v. Henderson* (1843) 3 Hare 100, the purpose of which was explained by Kearns J. in *S.M. v. Ireland* [2007] 3 I.R. 283 at 295:

> *"The purpose of the rule is to uphold an important principle of public policy which demands, in the interests of justice, that defendants are not exposed to successive suits where one would do".*

Certainty and finality in litigation is an essential cornerstone of the rule of law and I cannot ignore the fact that to allow the defendant to reopen the matter at this stage some seven years after the proceedings for debt were commenced would offend against this principle.

Summary

In this case, judgment was entered in the Central Office of the High Court. I do not accept that there is a frailty in service. Accordingly, the defendant may set aside the judgment only if she can raise a defence on the merits. She has not averred that she was not indebted to the plaintiff, but rather raises the procedural argument that the means by which the plaintiff sought to establish indebtedness fell foul of the rule against hearsay. She now seeks to take advantage of litigation which occurred in 2013 and 2014 to challenge a judgment obtained seven years ago. In my view, she cannot do so. To allow the defendant to impugn the affidavit of debt would be to offend the rule against retrospectively, and the principles of certainty and finality in litigation. The rules of the Superior Courts permit the court to set aside a judgment in the interest of fairness, and this means fairness to both sides. In balancing the interests of the parties for this test of fairness I cannot accede now to the application by the defendant. The defendant could have, but did not raise the hearsay defence at the time when the affidavit of debt was filed. In addition, the defendant has not sought to show any arguable defence to this case on its merits." [Emphasis added]

And so it is in this case, the Caseys do not argue that they are not indebted to Everyday/AIB, but rather raise a procedural issue regarding the alleged failure by AIB to sufficiently particularise the debt in proceedings which the Caseys could have, but chose not to raise in 2014. It would run contrary to the rule against retrospectivity and the principles of certainty and finality in litigation, and would be unfair to Everyday/AIB, to suggest that the Caseys can now overturn that judgment on grounds which they chose not to rely upon when the matter was dealt with in the High Court. On this basis therefore, this Court has little hesitation in concluding that the Caseys do not have a fair question to be tried regarding the alleged invalidity of the judgment obtained against Mr. Martin Casey some seven years ago.

Fair question –deed of appointment does not specify folio?

20. The Caseys also argue that there is a fair question to be tried regarding the validity of the appointment of the Receiver since the folio which is the subject of these proceedings, Folio CE22033, is not referred to in the Deed of Appointment itself. However the Deed of Appointment clearly provides for the appointment of the receiver to all the assets charged by the Mortgage, and the Mortgage by its express terms charges Folio CE22033, so it is difficult to see how this raises a fair question to be tried regarding the validity of the appointment of the Receiver. Indeed, it is clear from the case of *McCarthy v. Langan* [2019] IEHC 651 that this claim has been made previously before the Irish courts and is without substance since Allen J. noted at para. 74 of that case that:

> "Each of the deeds of appointment refers by date and the parties to the deed of charge relied on in support of the appointment. The secured properties are not described in a schedule (or elsewhere) in the deeds of appointment but they are in the deeds of charge, and the appointments are expressly made over "*the assets of the Chargor referred to and compromised in and charged by*" the deeds of charge. The appointments are not invalid by reason of the absence in them of a description of the properties.

Thus, in relation to this claim, this is also not a fair question to be tried.

Fair question – receiver does not have a power of sale?

21. Finally, the Caseys argue that there is a fair question to be tried since they claim that the Receiver does not have a power of sale and on this basis the injunction to prevent him selling the Lands should be granted. However, this issue has also been considered by the High Court in *McGonagle v. McAteer* [2017] IEHC 672. That case concerned an application, like this one, for an interlocutory injunction against the defendant, a receiver, to prevent his selling certain properties. At paragraph 12 of her judgment Stewart J. stated as follows:

> "Regarding the issue of improper exercise of receiver's powers, the plaintiffs' argument relates to the power of sale. Aengus Burns, a colleague of the defendant, swore an affidavit dated 20th July, 2017, on behalf of the defendant […] in which he avers that the defendant's role does not include the exercise of a power of sale. Rather, he prepares the properties for sale, at which point the mortgagee enters into possession and exercises the power of sale under the mortgage deed. The plaintiffs have not set out in any way, either in oral submissions or on affidavit, why this would not be a valid exercise of the receiver's powers. Therefore, no fair question to be tried can be found under this heading either." [Emphasis added]

On this basis it seems clear that there is not a fair question to be tried regarding the powers or the validity of the appointment of the receiver.

22. Thus, the Caseys have failed to establish that there is a fair question to be tried under any of the foregoing headings. That is the end of the matter, since this Court should not prevent a party, in this case the Receiver, exercising its *prima facie* legal rights, by

issuing an interlocutory injunction pending trial, unless there is, at the very least, a fair question to be tried.

23. Before leaving the issue of the 'fair question to be tried', it is to be noted that the Caseys rely to a considerable extent on the decision of Allen J. in *Sammon v. Tyrrell* [2021] IEHC 6 in which Allen J. granted the plaintiffs an interlocutory injunction restraining the sale of secured properties by the defendant receiver. In that case, the plaintiffs, a married couple, had executed charges over lands as security for their personal borrowings. Those loan facilities were repaid by the plaintiffs. Some years later, the plaintiffs signed personal guarantees in respect of loan facilities extended to a group of construction companies owned and directed by the first named plaintiff. Those business loans went into default and the defendants sought to sell the charged lands.

24. The '*core dispute'* as identified by Allen J. in *Sammon* was whether the plaintiffs' liabilities on foot of the personal guarantees signed by them in respect of the companies' borrowings were secured by the charges executed by them several years earlier in respect of their personal borrowings. In that regard, Allen J. held that there was a fair question to be tried regarding the correct construction of the charges and whether they could be said to secure future liabilities of the plaintiffs.

25. However, it is clear that the 'fair question' identified by Allen J. in *Sammon* is distinguishable from the claims made by the Caseys in the present application. There is no question in the present case of there being a dispute regarding contractual interpretation *akin* to the dispute in *Sammon*. The Caseys do not dispute their indebtedness or the fact that the Lands were charged by them as security over their borrowings. The issues raised by them relate to the *O'Malley* decision and the validity of the receivership. This Court has already held that none of the claims raised by the Caseys present a fair question to be tried and it is clear therefore that the *Sammon* decision cannot be said to have a bearing on the Caseys' application.

26. If this court is wrong and there is in fact a fair question to be tried, then before an interlocutory injunction could be granted it would have to be determined that the balance of justice, including the adequacy of damages, favours the grant of such an injunction.

Balance of justice – damages are inadequate where sale is of a family farm ?

27. As regards the balance of justice, the Caseys place reliance once again upon the *Sammon* case, since in that case it was found that damages would not be an adequate remedy for the plaintiffs. In *Sammon*, the subject lands comprised a '*hobby farm'* used for recreational purposes by the plaintiffs and their family. However, as noted by Allen J. the subject lands also comprised certain other lands which formed part of the gardens surrounding the family home. Allen J. noted that while damages are generally regarded as adequate in cases involving commercial property, this was not the case in this situation involving lands which were alleged to be part of the family home.

28. However, the current case is distinguishable from *Sammon*, since one is dealing with agricultural land and not a family home. There is no suggestion in the present case that

the Lands form part of the gardens of a family home. The *Sammon* case therefore does not assist the Caseys.

Is agricultural land 'commercial' or 'investment' in nature?

29. However, counsel for the Caseys also sought to make a distinction between agricultural land on the one hand and commercial property or investment property on the other hand and suggested that the fact that this is agricultural land/family farmland (and not they claim commercial property or investment property) should weigh in the balance of justice in favour of the grant of the injunction.

30. Agricultural land is a means of earning money for its owner, either by that person directly farming that land or renting that land out to a third party, in much the same way as a person who owns a pub or a shop can work that property themselves (and thus it might be said to be 'commercial' in nature) or rent it out to a third party (in which case it might be said to be 'investment' in nature).

31. In this sense agricultural land, which is in a family for generations, is as much a piece of 'commercial' or 'investment' property as a pub or a shop (which might also be in a family for generations). Each of those properties can and usually do generate income for the benefit of the owner and his family and thus is very different from a family home.

32. Since agricultural land is therefore commercial or investment in nature, it seems to this Court that damages are as much an adequate remedy for someone who makes their living through ownership of a shop or a pub, as someone who makes their leaving through owning farmland. Indeed, in this case, Mr. Martin Casey averred that:

> "part of the lands had planning permission which has lapsed. I say renewal is possible."

This highlights that land, whether part of a family farm or not, is as much an investment or commercial in nature, as other property.

What about if the farm is inherited?

33. Some emphasis was placed by the Caseys on the fact that the land was inherited from their father. However, the sentimental value which a person places on the fact that he has inherited land (or indeed a pub or a shop or other property) does not reduce the rights of third parties who use such assets as security for loans extended to the owners of those properties. This is because the situation of a borrower who inherits a farm, which she then uses as security for borrowings, is no different, in this Court's view, to that of a borrower who inherits a pub or a shop (or indeed other property), which she uses as security. While the courts are understandably protective of family homes, there is no basis, in this Court's view, for distinguishing between a farming business or the business of publicans or shop keeping or indeed any other business when it comes to the rights of such an owner vis-à-vis a bank or other third party. Thus, the fact that a farm or a shop or a pub was in the family for generations, is not a factor that, *per se*, weighs in the balance of justice in favour of the grant of an injunction preventing their sale by a bank/receiver. This is clear from para. 14 of Stewart J.'s judgment in *McGonagle*:

> "While the burden on the plaintiffs at this juncture is simply to establish that they have an arguable case, I find it difficult to conceive, given the background to this matter, any fault in the appointment of the receiver. Even if I were wrong in that view, and the plaintiffs could establish that there is a fair question to be tried, it seems to me that the principle of damages as an adequate remedy provides sufficient protection for the plaintiffs in this case. Much emphasis has been placed on the nature of the lands the subject matter of the receivership. It was argued 1) that the land constitutes part of a family farm that had been in the family for generations, and 2) that the property contained in one of the folios belonged to the first-named plaintiff's late mother. In addressing this argument, I would refer again to my decision in *Hogan (supra).* I hold therein that the sentimental value placed in a specific piece of property by a party is insufficient, in and of itself, to warrant the grant of interlocutory relief, where that piece of property is not the family home." [Emphasis added]

34. The onus is on the Caseys to show that damages would not be an adequate remedy for them should the Lands be sold by the defendants. Aside from pointing to the sentimental value of the Lands (and their claim that agricultural land is not commercial/investment property), the Caseys have not averred as to why damages would be inadequate. As is clear from the decision in *McGonagle*, sentimentality is not a basis for the grant of interlocutory relief.

35. For the foregoing reasons therefore, it seems clear that damages are an adequate remedy for the Caseys, for any damage suffered by them if this injunction were to be refused at the interlocutory stage but was to be granted by a trial judge after she has heard all the evidence.

Adequacy of damages for Everyday

36. As regards adequacy of damages for Everyday, as noted by Stewart J. in *McGonagle*, the Court can have regard to the reality of an undertaking as to damages from the plaintiffs. In this case, summary judgment in the sum of €3,425,096 has already been obtained against Mr. Martin Casey. No monies have been repaid and the loan has been in default for close to ten years. Furthermore, the plaintiffs have not yet, at this stage, given an undertaking as to damages. Rather, Mr. Martin Casey has averred that an undertaking will be given '*should it be demanded'*. However, it seems that any undertaking given by the plaintiffs now, or in the future, would have to be viewed in the light of their indebtedness.

37. It is of course true to say that the defendants have not provided sworn evidence as to what their loss will be as a result of a delay in the sale of the property (if the injunction were granted at the interlocutory stage but refused at trial). Nonetheless one is dealing with an attempt to prevent a receiver exercising his legal right which might lead to Everyday suffering a financial loss as a result of such a delay. For this reason, this Court can take account of the fact that if Everyday were to seek damages from the Caseys, which result from its delay in selling the Lands, no evidence was put before the Court to suggest that the Caseys have sufficient money to meet such an award in light of the level

of their indebtedness. Accordingly, although not the strongest factor (in the absence of sworn evidence as to actual loss), the fact that damages, for any such loss, would not be an adequate remedy for the defendants, is a further factor which weighs in the balance of justice against the grant of the injunction.

CONCLUSION

38. This Court has found that the Caseys have not raised a fair question to be tried regarding the validity of the judgment granted against Mr. Martin Casey, or the appointment and/or powers of the Receiver, such as to justify an interlocutory injunction.

39. Even if they had, it is clear that the balance of justice does not favour the grant of the injunction since damages are an adequate remedy for the Caseys. In particular, the fact that the property is agricultural land and an inherited family farm does not mean that the land could not be described as commercial property or investment property, just as an inherited family pub or shop is commercial/investment property. Since the charged land is commercial/investment property, and not a family home, it could not be said that damages are an inadequate remedy for the Caseys. As such the nature of the charged land is not something which weighs in the balance of justice so as to justify the grant of the injunction.

40. For the foregoing reasons therefore, this Court refuses the interlocutory reliefs sought by the Caseys.

41. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be put this case in for mention one week from the date of delivery of judgment, at 10.45 am.