THE HIGH COURT

[2021] IEHC 540

[2020/1910 P]

BETWEEN

STEPHEN TENNANT

PLAINTIFF

AND

THOMAS REIDY AND CATHERINE REIDY

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on 29 July, 2021.

1. This is the plaintiff's application for an interlocutory injunction which, though expressed in terms of a prohibitory injunction in the notice of motion is in fact a mandatory injunction seeking possession of a property comprised in Folio 7132L, County Limerick, and known as Apartment 2, Fisherman's Wharf, Manor Court, County Limerick ("the Property"), together with an injunction restraining defendants from interfering with the exercise by the Receiver of his various powers and functions.

2. The defendants have been residing in the Property since 1 October, 2016, but they are not entitled to be registered as owners of it. Instead, they allege that they have entered into an oral agreement with the registered owners of the Property to purchase it for €100,000. The registered owners (hereinafter "the Borrowers") originally acquired the Property with the assistance of a loan from Allied Irish Banks plc. and AIB Bank ("the Banks"). The Borrowers originally borrowed the sum of €2,345,000 from the Banks and this sum is charged on the Property. The Banks registered a charge on the Folio on 23 May, 2008. On 4 May, 2016 they appointed the plaintiff as Receiver over the assets of the Borrowers, including the Property. The Banks subsequently assigned their interest to Everyday Finance Designated Activity Company ("Everyday") by Global Deed of Transfer dated 2 August, 2018, and by Deed of Novation of the same date, the plaintiff's appointment was novated in favour of Everyday. Everyday became registered as owner of the charge on 11 July, 2019.

3. It is not in dispute that Everyday was entitled to appoint the plaintiff as receiver or that it is the registered owner of the charge. It is further not in dispute that the Borrowers are indebted to Everyday. Furthermore, it is clear that Everyday has, on foot of the charge, a right to enter into possession of the Property and that the monies repayable by the Borrowers have been due and owing for more than three months.

4. The plaintiff wrote to the occupants of the Property by letter dated 5 October, 2016, enclosing a copy of this Instrument of Appointment. He also wrote by letter dated 7 October, 2016, to the Borrowers, seeking that they forward any copy leases or similar agreements.

5. The essential submission of the defendants is that they have an oral agreement to purchase the Property from the Borrowers which they say they have partly performed by entering into possession and renovating the Property. They also rely on the doctrine of promissory estoppel on the basis of an alleged representation made to them by an employee of the plaintiff.

Alleged agreement

6. It is important to understand precisely what is asserted by the defendants. They say they lodged a deposit in the sum of €5,000 with an estate agent in Adare on 14 September, 2015. It was accepted by counsel for the defendants at hearing that the sum of €5,000 was paid as a refundable booking deposit to the auctioneer.

7. At the time the booking deposit was paid, the Property was to be purchased by the defendants' son and daughter-in-law but, on inspecting the Property and on discovering the extent of renovation required, the family decided that the defendants would buy it themselves.

8. Nothing seems to have happened until mid-2016 as there were difficulties with the title to the common areas. However, once these were resolved – presumably through solicitors – the defendants moved into the Property on 1 October, 2016 on foot of a lease for one year at €100 per month which they described as a *"licence fee".* The first defendant avers that the agreement with the Borrowers to purchase for the sum of €100,000 was reached in mid-September, 2016 and it was further agreed that the defendants would renovate the Property prior to the conveyance.

9. This agreement was reached after negotiations between the Borrowers and the defendants which stretched back to 2015. It appears from letters and emails written by solicitors acting for both sides of that transaction, and exhibited to the affidavits filed in this application, that those negotiations were progressing in the usual way and it is likely that, as the plaintiff submits, it was not intended that either party would be bound until formal contracts had been signed by both parties and exchanged.

10. However, the uncontroverted affidavit evidence is that this was all superseded by an oral agreement in mid-September, 2016 and, if that is so, then for the purposes of this injunction, I accept that the Borrowers and the defendants concluded an oral agreement in mid-September, 2016.

11. This all appears to have been done without recourse to the solicitors for either the Borrowers or the defendants, as the Borrowers' solicitors state, in an email to the plaintiff dated 21 March, 2018, that the defendants went into possession without their knowledge (though presumably it was known to their clients). It is regrettable that the defendants did not act at all times on foot of legal advice as it is clear that, as early as January 2016, their then solicitors, Messrs. Holmes O'Malley Sexton, were aware that the title documents were with the Borrowers' lending institution and were awaiting receipt of same for the preparation of contracts: see the letter of 24 January 2017, exhibited to the first defendant's replying affidavit. The defendants' solicitors were therefore aware no later than January 2016 that the Property was security for a loan and that a lending institution had rights over it.

12. On or about 6 October, 2016, the plaintiff engaged a contractor to carry out a property summary report of the property and it revealed that refurbishment works were being carried out. It appears that the first written notification to the plaintiff that the defendants

were in occupation and had carried out works to the Property appears to have been by letter from the first defendant to the Plaintiff dated 26 January, 2017.

13. There is no evidence as to any advices or information given to the defendants by their former solicitors, but the first defendant avers that the defendants received notice on 9 October, 2016, that the plaintiff had been appointed by AIB as receiver of the Property on 29 April, 2016. The latest date upon which the defendants became aware that the property was mortgaged to AIB, therefore, is 9 October, 2016, just over a week after the defendants went into occupation of the Property.

14. It is common case that Clause 6.1(j) of the Mortgage Conditions contained a covenant by the Borrowers *"[n]ot to convey, transfer, assign, demise or let or part with the possession of the Mortgaged Property or any part thereof or any interest therein without the express prior consent in writing of the Lenders"* and it is also common case that neither the bank nor Everyday has ever provided any written consent to the sale to the defendants.

15. Any sale without that prior written consent cannot bind the Bank or its successor in title: see *Fennell v. N17 Electrics Ltd. (in liquidation)* [2012] 4 I.R. 634, recently approved by the Court of Appeal in *Kennedy v. O'Kelly* [2020] IECA 288. Although those authorities relate to leases created by mortgagors without the consent of mortgagees, they consider covenants of the type contained in Clause 6.1(j) and therefore govern the legal effect of the covenant applicable in this case. There can be no material difference between the effect of such a covenant on an agreement to lease to a third party to which the holder of the security has not given its written consent and the effect of such a covenant on an agreement to sell the property over which security has been given and to which the holder of the security has not given its written consent.

16. As a result, even if the Borrowers do not dispute that they have agreed to transfer their interest to the defendants, that agreement is presumptively void as against Everyday (or, previously, the Banks).

17. As a matter of law, the Borrowers could transfer their interest to the defendants and the defendants could become registered as full owners, but the charge of which Everyday is registered as owner would remain registered as a burden on the Folio. As the sums due by the Borrowers to Everyday appear to be vastly in excess of the value of the Property, becoming registered as full owner on foot of a transfer from the Borrowers would be meaningless as the defendants' interest would remain subject to the rights of Everyday under the Mortgage Conditions, including the right to take possession of the Property, to sell it and to retain the proceeds for itself. An agreement with the Borrowers is, therefore, meaningless without the release of the charge, and that cannot be done without the agreement of Everyday as registered owners of that charge. However, it is not asserted that there was any agreement of any kind with the Banks, Everyday, or the plaintiff as agent of any of those entities.

18. Furthermore, the plaintiff, having received valuations of €120,000 based on the property viewing in shell and core condition, offered in September, 2019, to sell the property to the

defendants for the sum of €120,000. This was refused. The plaintiffs are not paying any rent in respect of the property, and appear to have resided there for almost five years without paying any rent or mortgage, or indeed without paying anything other than a refundable booking deposit to the estate agent, albeit that it is clear that they intended to purchase it for the sum of €100,000.

19. On receipt of the letter from the plaintiff to the occupants of the Property, the first defendant contacted the plaintiff's office and he now relies heavily on a telephone call between himself and Ms. Sinead Dillon of the plaintiff's office which took place on 16 October, 2016, in which he says:

> *"I was clearly and unequivocally told by Ms. Dillon that the sale of the premises would proceed."*

20. On the same day, the estate agent who had taken the booking deposit apparently asked the defendants to provide proof of funds for the purchase of the property, which the first defendant says was done.

21. The defendants say that, as a result of Ms. Dillon's representations and the request of proof of funds, the defendants say that they understood that the purchase of the premises would proceed. Given that the defendants place such heavy reliance on Ms. Dillon's representations, it is quite clear that they understood, as of 9 October, 2016, and indeed subsequently, that without the consent of the registered owner of the charge, the sale could not proceed. Having received the said representation, they say that they then spent a sum of approximately €30,000 on *"renovations"*, which are asserted to constitute part performance of the agreement.

22. The problem with that submission is that the defendants do not assert any agreement with the Banks or Everyday that the Property would be released from the charge, and any agreement they may have with the Borrowers does not bind Everyday, or the plaintiff as receiver. Even if I were to accept that the agreement with the Borrowers were enforceable by reason of part performance, it would not avail the defendants as the agreement is with the Borrowers only. To rely on part performance as against Everyday, some kind of agreement (supported by consideration) must be asserted as against Everyday or its predecessors-in-title, the Banks. No such agreement is asserted.

23. On the contrary, it appears from the plaintiff's affidavit that Everyday would have agreed to release the charge if the sale price was increased to €120,000, a sum vastly below the sums secured on the Property but one which the plaintiff had satisfied himself represented the market value of the Property in shell and core condition. However, the defendants rejected this offer: see email of 18 September, 2019.

24. The defendants rely on s.15(1) of the Conveyancing Act, 1881, which provides that, where a mortgagor is "entitled to redeem", he has power to require the mortgagee to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs. However, the Borrowers here are manifestly not "entitled to redeem"

and even the sum of €120,000 previously sought by the Receiver for this Property is a fraction of the sums charged on it. Furthermore, this is a right enjoyed by the Borrowers, who are not party to these proceedings and who do not appear to have invoked s.15 at any stage. This section, therefore, has no relevance in this case.

25. There is, therefore, no evidence of any agreement as between the defendants on the one hand and Everyday or their predecessors-in-title on the other, that the charge registered as a burden on the Property would be released. The sole basis for resisting Everyday's claim to possession, therefore, is based on the doctrine of promissory estoppel.

Promissory Estoppel

26. The Defendants rely on the decision of Laffoy J. in *The Barge Inn Ltd. v. Quinn Hospitality* [2013] IEHC 387 and contend that they satisfy the requirements of promissory estoppel as set out in that judgment.

27. That case concerned an agreement between a landlord and tenant to abate rent in respect of a licensed premises, the tenant's business having become loss-making due to the severe economic downturn. Laffoy J. found as a fact that there had been such an agreement but that it had not been reduced to writing, nor had the 2009 Lease, which was under seal and which reserved the full rent, been varied by Deed. As a result, the Rule in *Pinnel's Case* applied and the agreement was unenforceable for lack of consideration. Accordingly, the tenant claimed that the landlord was estopped from resiling from his promise to abate the rent.

28. Laffoy J. surveyed the leading text books and authorities relevant to the Doctrine of promissory estoppel and approved the statement in McDermott on *Contract Law* (2001) that the following ingredients were essential to a successful claim of promissory estoppel:

    (a) There must be a pre-existing legal relationship between the parties;

    (b) There must be an unambiguous representation by the promisor;

    (c) There must be reliance by the promisee (and possible detriment);

    (d) There must be full element of unfairness and unconscionability;

    (e) The estoppel must be used as a defence and not to create a new cause of action;

    (f) The remedy is a matter for the court.

29. Because the onus is on the plaintiff to show a strong case for the mandatory order which he seeks, it seems to me that the defendants only have to show a stateable case that they meet the elements of promissory estoppel in order to successfully resist the injunction. However, I am not satisfied that there is a stateable case that the ingredients (a), (d) or (e) are present in this case.

30. Unlike the *Barge Inn* case, there is no pre-existing legal relationship between the plaintiff and the defendants and (a) is not satisfied. The plaintiff's relationship is with Everyday

although, as confirmed in *Ferris v. Meagher* [2013] IEHC 380, he is the agent of the Borrowers for particular purposes. However, there is no legal relationship between the plaintiff and the defendants and the first key ingredient of promissory estoppel is therefore lacking.

31. As regards (b), I think a stateable case can be made that the statement at para. 12 of Mr. Reidy's replying affidavit that Ms. Dillon told him clearly and unequivocally that the sale of the premises would proceed, is sufficient. For the purposes of an interlocutory injunction and given the very low threshold to be met by the defendants at this stage in establishing that such a representation was made, I am of the view that I should take it for the purposes of this application that a statement that the sale would proceed necessarily implied that Everyday would consent to the sale, i.e., would discharge its security, for the price agreed with the Borrowers. It may be that, after full hearing, further evidence as to the conversation with Ms. Dillon will be led and that the conversation occurred in a particular context which makes it clear that the representation was not as unambiguous as I am accepting for the purposes of this application. However, that is a matter for another day.

32. As regards (c), it is evident that, when the defendant sold their previous home in or about mid-2016, they had no expectation at the time of that sale that the consent of the registered owner of the charge to the sale of the Property would be forthcoming. In addition, the booking deposit had been paid approximately a year previously and is in any event refundable if the sale does not proceed. Accordingly, neither of these matters can constitute reliance for the purposes of the promissory estoppel claim.

33. The only action which the defendants say they undertook after the date of Ms. Dillon's representations, was the expenditure of €30,000 which they describe as having been spent on "*renovations".* On this basis, the defendants say that the plaintiff is estopped from denying the existence of the contract to purchase the property.

34. The evidence in relation to the alleged "*renovations"* is exhibited to the first defendant's replying affidavit. As regards reliance and possible detriment, while the invoices exhibited to para. 13 of Mr. Reidy's replying affidavit did not support his assertion that a sum of approximately €30,000 was spent on renovations, those invoices appear to establish, to the threshold required of the defendants at this stage, that a sum approaching €20,000 was extended on renovation of the property. The invoices from which I draw that inference are the undated invoice from O'Connell Electrical Contractors in the sum of €1,038.18, the invoice of 3 November, 2016, issued by Gerard Reidy Construction Ltd, and the invoice from Right Price Tiles dated 13 October, 2016 in the sum of €4,800. (I am not taking into account the illegible invoices exhibited.) The invoices appear to show that from late September, 2016 to at least the end of November, 2016, the defendants were spending money on renovations and personal items (such as furniture and décor) relating to the premises. I am not taking into account the purchase of furniture and décor as those are personal items which are of no value to the plaintiff and can easily be removed by the defendant for use elsewhere if the injunction is granted.

35. However, there are a limited number of significant invoices including one for €1,038.18 (undated) in respect of items which appear to relate to the wiring of the property, as well as a receipt dated 13 October, 2016 for tiles and an invoice dated 3 November, 2016, for the sum of €12,167.00 issued by Gerard Reidy Construction Ltd which appears to relate to matters such as plumbing and flooring of the property. I am prepared to accept, therefore, that the defendants have spent the sum of €20,000 or thereabouts in renovating the structure of the Property.

36. Again, it may be found after full hearing that these works were already in train and were not arranged in reliance on Ms. Dillon's representation, but I am happy to accept for the purposes of this application that the necessary reliance was placed on the representation in question.

37. As regards key ingredient (d), however, I am clearly of the view that the required element of unfairness or unconscionability does not exist. The essential position in this case is that the defendants anticipated that they would purchase the Property for €100,000. The defendants acknowledge that this agreement was reached with the Borrowers. They do not dispute that they were aware that the Property was the subject of a charge, but they seek, in effect, to enforce the agreement at the price of €100,000 as against the registered owner of the charge.

38. In considering fairness and unconscionability, I must have regard to the fact that, having discovered that the defendants were in occupation and had carried out works, the plaintiff offered to sell the Property to the defendants for the sum of €120,000. The uncontroverted evidence before me is that that was the market value of the Property in shell and core condition, ie, prior to the renovation works: see para. 31 of the plaintiff's affidavit. The plaintiff is obliged to get the best price reasonably obtainable and it is not clear how it is said to be unfair or unconscionable to ask the defendants to pay market value for the Property. Had the defendants accepted this offer, these proceedings would not have been necessary, the plaintiff would have discharged his duty to Everyday, and the defendants would be living uninterrupted in the Property as they apparently wish to do.

39. As part of this ingredient, I must also have regard to the fact that the defendants have resided rent free in the Property for nearly five years, save for the nominal amount of €100 a month which they seem to have paid to the Borrowers for the one year lease from 1 October, 2016. This is not, however, a crucial factor as the defendants appear to have consistently expressed a wish to purchase the Property.

40. Nevertheless, it is my view that there is no unfairness or unconscionability to the defendants. The reality of the matter is that no one has sought to oust them unfairly, the Property has been offered to them at a price which the Receiver was prepared to recommend to Everyday, and they have refused it, insisting instead on purchasing the Property for the lower sum agreed with the Borrowers. They may well believe that was a reasonable price, but Everyday is under no obligation to accept that belief and is entitled to come to its own view on what the market value is. The plaintiff is legally obliged to

obtain the best price reasonably obtainable for the Property, and his averment that he offered to sell at the market value has not been controverted. Furthermore, that value was referable to the Property in shell and core condition, i.e., without the benefit of the defendants' renovation works, so the offer was made on the basis that the monies expended by the defendants should be recognised.

Principles relevant to an interlocutory injunction

41. This is an application for an interlocutory injunction and it is agreed that the plaintiff must establish a strong case that he is likely to succeed at the full hearing: *Maha Lingam v. HSE* [2005] IESC 89. While the plaintiff contends that the Court can proceed, if satisfied that a defendant has not even made out an arguable case, to decide the matter (*Ferris v. Meagher* [2013] IEHC 380), it is conceded that I may look at the question of the balance of convenience, though I am not obliged to do so: *McCarthy v. McCarthy* [2021] IEHC 115.

42. As I have concluded that there is no assertion or evidence or any agreement binding the Banks or Everyday for the release of the charge, and as I am satisfied that the defendants cannot provide any evidence of several of the essential ingredients for a successful claim of promissory estoppel which would prevent Everyday from relying on its legal entitlement to repossess the Property, I am satisfied that the plaintiff has indeed shown that he has a strong case, which is likely to succeed at hearing.

43. Furthermore, the application is one to restrain a trespass and the plaintiff is therefore *prima facie* entitled to an injunction, even if he cannot show loss: see Keane J. in *Keating & Co. Ltd. v. Jervis Shopping Centre Ltd*. [1997] 1 I.R. 512. This flows from the nature of property rights which are not subject to de facto compulsory acquisition by limiting the remedy for trespass to that of damages.

44. As stated by Allen J. in *Wallace v. Kershaw* [2019] IEHC 382, "if, whether in law or in fact, or both, the defendant has no answer to the claim, there can be no risk of injustice in making the order sought." I do not understand the Supreme Court judgment in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2019] IESC 65, delivered only a few weeks after the judgment of Allen J., to have disturbed that position and indeed, as the plaintiff in this case points out, O'Donnell J. stated (at para. 36):

> *"If there is no dispute, then a court will normally grant an injunction (if that is the appropriate remedy) without regard to any question of the consideration of the balance of convenience."*

Of course, there is a dispute between the parties in all cases where an interlocutory injunction is sought, but I think it is clear that O'Donnell J. there was referring to a situation where, notwithstanding the existence of a dispute, in truth the respective legal rights of the parties are indisputable, or to put it in the manner adopted by Allen J., the defendant has no answer to the claim. I regret to say that that is the position here.

45. The situation would be entirely different if the defendants could demonstrate an arguable case that they had an agreement with the plaintiff, Everyday, or the Banks, for the release of the charge, but they do not even assert such an agreement. Similarly, the situation would be entirely different if the representation relied upon and the other matters put in evidence were sufficient to put forward an arguable case for the existence of the essential ingredients of promissory estoppel. However, as already stated, I am satisfied that there is no evidence for several of those essential matters.

46. I am therefore going to refrain from any consideration of the balance of convenience, but had I embarked upon it, I would have been satisfied that the defendant had the means to satisfy a claim in damages.

47. However, I would also have taken into account the fact that the estoppel claim of the defendants, if it succeeded, might not result in a declaration of any interest in the Property but might merely result in some form of compensation for the defendants to reimburse them for the works carried out by them. That latter remedy can be pursued even if the injunction is granted and the grant of the injunction, therefore, does not necessarily dispose of the proceedings.

48. In any consideration of the balance of convenience, I would also have taken into account that, as individuals of relatively advanced years, it might not be appropriate to place too much emphasis on the funds available to them as these funds appear to have been generated by the sale of their previous residence and they may well need those to provide an alternative home for themselves if they failed at full hearing to establish a claim to the Property, rather than expending them on damages and costs. Accordingly, I would have found that the balance of convenience nevertheless favoured the grant of the injunction.

Delay

49. The defendant also relied on *McCarthy v. McCarthy* [2021] IEHC 115 for the proposition that the plaintiff had delayed to the extent that interlocutory relief should be refused. However, that case was decided on the basis that it was exceptional and that four years had passed between the appointment of the joint receivers and the first demand for possession.

50. By contrast, in this case, the plaintiff was appointed by the Banks as receiver on 4 May, 2016, and had taken steps by early October, 2016, to discover whether anyone was in occupation of the Property. It appears from the affidavits that the defendants may not have advised the plaintiff until early 2017 that they had entered into possession and carried out renovations, but it is clear that the defendants were aware of the receiver's appointment a very short time after entry into possession of the Property and before many of the invoices now relied upon were raised. The loans and securities were assigned on 2 August, 2018, and a demand for possession was made on 9 April, 2019. Prior to the institution of proceedings, an offer to sell the Property to the defendant was made.

51. There is no lapse of time, therefore, equivalent to that which occurred in *McCarthy*. On the sale and purchase of a loan book, many properties have to be dealt with and it is reasonable for the lending institutions and their receivers to take some time to ascertain the true position in relation to what may be a large number of properties. I do not think the time which passed in this case went beyond what was reasonable and I do not think it precludes the plaintiff from seeking interlocutory relief. There is no unexplained period of four years' delay, as was the case in *McCarthy v. McCarthy*.

52. Furthermore, the defendants have not in any way altered their position as a result of the delay but have in fact remained in possession of the Property. I do not think there is any culpable delay on the facts of this case. Indeed, the plaintiff might well have been criticised if he had moved immediately to evict the defendants without seeking to come to an agreement with them.

53. Given that the defendants have been in uninterrupted possession for so long, I propose putting a stay on the injunction to be granted in order to permit them to arrange to move, and I will hear the parties in relation to the duration of same and in relation to the costs of this application.