

THE HIGH COURT

[2022] IEHC 246
Record No. 2020/7827P

BETWEEN

**TOM O'BRIEN, HILARY LARKIN AND
PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY
COMPANY**

PLAINTIFFS

-AND-

**PATRICK McMAHON AND PATRICK McMAHON (as Administrator *ad litem* of
ANGELA McMAHON, deceased)**

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on the 8th day of April, 2022.

Introduction

1. The plaintiffs seek orders against the defendants restraining them from preventing, impeding, or obstructing the first and second named plaintiffs from taking possession of three properties (all described below), orders restraining the defendants from trespassing on those properties, orders compelling the defendants to forthwith deliver up to the plaintiffs or either of them all keys, fobs, magnetically readable cards, RFID devices, other electronic access devices, access codes and alarm codes in their possession, power and/or procurement relating to the property, and an order directing the defendants to deliver up to the plaintiffs or either of them forthwith all books and records held by them in relation to the properties to include but not limited to any purported licence(s) and/or tenancy agreement(s) in respect of the

properties, and orders directing them to immediately cease occupancy of and to vacate the property.

2. Sadly, the second defendant has died, and the first defendant is now sued as her administrator *ad litem*.

3. The First Property, Clara House, 9 Castleknock Road, Dublin 15, is comprised in Folio DN25442F. The defendants are registered as full owners, and Bank of Scotland registered a charge over it on 9 May, 2006. On 25 April, 2014, the third plaintiff (“Tanager”) became registered as owner of that charge.

4. The Second Property, 50 Castleknock Glade, Dublin 15, is comprised in Folio 59609F. Again, the plaintiffs are registered as full owners, a charge was registered in favour of Bank of Scotland (Ireland) Ltd on 26 October, 2006, and on 25 April, 2014, Tanager became registered as owner of that charge.

5. The Third Property is 14 Castlegate Square, Adamstown Castle, Lucan, County Dublin, and is comprised in Folio 119451L of the register, County Dublin. The defendants are registered as full owners, a charge was registered by Bank of Scotland (Ireland) Ltd as a burden on the property on 20 September, 2007, and on 25 April, 2014, Tanager was registered as owner of that charge.

6. I am satisfied from the affidavits filed on behalf of the plaintiffs in the within motion that loans advanced to the plaintiffs on foot of facility letters dated 3 August, 2003 and 21 July, 2005, in the case of the First Property, facility letter dated 6 December, 2005, in relation to the Second Property, and facility letter dated 17 May, 2006, in relation to the Third Property were secured on each of those properties, and monies are due and owing on foot of each of these loans, which are secured by the respective charges on the property, of which Tanager is the registered owner. Demand has been made for repayment of the loan and no repayment has been forthcoming.

7. By three separate Deeds of Appointment, one in relation to each property, dated 1 August, 2019, the first and second plaintiffs have been appointed as joint receivers over the Properties.
8. Under Clause 8.4 of the Deed of Mortgage in Charge dated 18 September, 2003, in relation to the First Property, the powers of a receiver include a power at para. (f) (x) to sell the property. By virtue of Clause 1.1 (v), “receiver” is defined as meaning a person who is appointed by the Bank in writing “to be the receiver and manager of all or any part of the Property”.
9. The mortgage and charge dated 4 May, 2006, in relation to the Second Property contained, at Clause 8, a provision to the effect that the Bank’s Home Mortgage Conditions would apply to the Mortgage and Charge as though they were set out therein in full and the borrower agreed that he/she had received a copy of the Conditions and had read and understood the Conditions after having been given a real opportunity to become acquainted with the Conditions. This Deed was executed by the defendants in the presence of their solicitor, who witnessed their signatures. Those Conditions are exhibited in the affidavits, and at Clause 1.1 (h), they contain the same definition of “Receiver” as is set out above in relation to the mortgage and charge relating to the First Property, and also contain the same power of sale at Clause 8.4 (f) (x).
10. The Deed of Mortgage in Charge relating to the Third Property is dated 31 July, 2007 and is in the same format as the Mortgage and Charge relating to the Second Property, incorporating the Home Loan Mortgage Conditions, which are in the same terms as set out above in relation to the Second Property.
11. The plaintiffs have submitted all of the essential proofs to show that the debt secured on each property is due and owing and unpaid notwithstanding demand, and that Joint

Receivers have been appointed over each property on foot of the power to that effect in the respective Deeds of Mortgage and Charge in relation to each property.

12. That being the case, I now turn to the points raised by the defendants to resist the application of the plaintiffs.

Points raised by the defendants

(i) Whether the relief is mandatory or prohibitory

13. The defendants say that the plaintiffs must meet the test for mandatory relief, in accordance with judgment of the Supreme Court in *Charleton v. Scriven* [2019] IESC 28. It seems clear from para. 5.3 of the judgment of the Supreme Court in that case that many of the reliefs sought by the receivers in that case sought to direct that the rents due from the various properties, all of which were rented, should be paid to the receivers. This was interpreted as being an application for prohibitory relief, whereas those orders which amounted in substance to an order for possession were characterised as being mandatory.

14. A similar situation would appear to apply in this case where, for example, in seeking an order to deliver up all keys, fobs, and other access cards and codes, as well as in seeking an order restraining the defendants from impeding the plaintiffs in taking possession, the plaintiffs are, in reality, seeking possession, and therefore mandatory relief. Accordingly, they must meet the higher test set out in *Maha Lingham v. HSE* [2005] IESC 89 and must show that they have a strong case that they are likely to succeed at the hearing of the action.

15. Insofar, as the notice of motion, however, seeks an order restraining interference with the exercise by the plaintiffs of matters such as the collection of rent (which is not stated explicitly in the Notice of Motion), that application would be prohibitory in nature.

16. It should be borne in mind that the plaintiffs are in possession of the Third Property, but not the first two. Although counsel for the plaintiff stated at hearing that he did not need an order for possession, I find it difficult to construe the notice of motion as seeking anything other than an order for possession. Furthermore, it is not clear that the first two properties are tenanted at the moment and therefore they appear to be in the possession of the defendants.

17. In short, I am satisfied that the substance of this application is to regain possession of the First and Second properties, and to ensure that the plaintiffs' possession of the Third Property continues unimpeded by the defendants. Therefore, in respect of the First and Second properties, the application is mandatory in nature, whereas in respect of the Third Property, it is prohibitory.

18. It should be noted that the plaintiffs gained possession of the Third Property peaceably, with the agreement of a tenant who had been put in place by the defendants, and no issue therefore arises in relation to the manner in which they took possession of the Third Property.

19. However, even applying the higher standard in *Maha Lingham*, it seems to me that the plaintiffs have made out a very strong case that they will succeed at trial. Furthermore, they have indicated that the properties will not actually be sold pending trial, and therefore they are not seeking to finally dispose of the matter prior to trial. Accordingly, there is nothing in the judgment of the Supreme Court in *Charleton v. Scriven* which would, in my view, prevent the grant of the relief sought in the notice of motion.

(ii) Validity of the appointment of the receivers

20. Two essential points were made in relation to this. First, in reliance on the judgment of McDonald J. in *McCarthy v. Moroney* [2018] IEHC 379, the defendant said that the Joint Receivers were not properly appointed because the Deeds of Appointment refer to their

appointment as “receivers” only, and not as “receivers and managers”. This issue was raised (but apparently not fully argued) at interlocutory stage in *McCarthy v. Moroney*, where McDonald J. expressed doubts as to whether the formalities for the appointment of a receiver had been complied with where he or she was said to be appointed as “*receiver*” only and not as “*receiver and manager*”, even though the debenture spoke only of the appointment of a receiver and manager. Those doubts were echoed, again at interlocutory stage, by the Supreme Court in *Charleton v. Scriven*.

21. *Sheedy v. Jackson* [2020] IECA 167 was cited to me on this issue. However, I do not think that that case is relevant here, as that concerned the separate appointment of two receivers, only one of whom had acted to serve a Notice pursuant to general condition 18 of a contract for the sale of land. Accordingly, the question arose as to whether one of the receivers acting alone had power to serve the notice. There is no issue here but that the receivers are acting jointly at all times, and therefore that case does not appear to me to apply.

22. However, I think counsel is correct in stating that the Court of Appeal have dealt with this issue subsequent to both *McCarthy v. Moroney* and *Charleton v. Scriven*. It seems that the point was first addressed at full trial by this Court in *McCarthy v. Langan* [2019] IEHC 651, in which Allen J. was satisfied that an individual appointed as a “*receiver*” but vested with all the powers of a receiver and manager set out in the deed of charge, was validly appointed. That approach was comprehensively endorsed by the Court of Appeal in *Fennell v. Corrigan* [2021] IECA 248, which in my view deals definitively with this issue.

23. It appears from *Fennell v. Corrigan* that whether a receiver is properly appointed when described as such in a deed of appointment, even though the underlying deed of mortgage and/or charge refers to the appointment of a “receiver and manager” is a question of construction and not of law. Murray J. stated at para. 33 of that judgment that the starting point of the construction of a deed of appointment must be that the language used in the deed

was intended by the parties to carry the same meaning as it bears in the mortgage on foot of which the appointment was made. In that case, the deed of appointment expressly stated that it was an implementation of the powers conferred by the mortgage. Two of the key phrases in the deed of appointment in that case were, first, that its operative part expressly stated that it was made in pursuance of the powers contained in the mortgage. Secondly, the receiver was appointed to be the receiver over not only the property but the “undertaking, property and assets” of the borrower.

24. The first of these was a clear statement that the intention of the parties was that the deed of mortgage and charge, and the reference to the “undertaking” clearly envisaged that the receiver would have powers of management, and not just of receipt of the rents and profits of the property.

25. The Deeds of Appointment of 1 August, 2019, in relation to each of these three properties, each state explicitly that they are made “in pursuance of the powers contained in the Security Document”, which in each case is defined as the relevant Deed of Mortgage and Charge. They also state at Clause (i) that the Joint Receivers are appointed to be a “receiver” as defined in the Security Document, to enter upon and take possession of the property in the manner as specified in the Security Document, together with the powers conferred on them by the Security Document and by law.

26. Applying, therefore, the approach to interpretation set out by the Court of Appeal in *Fennell v. Corrigan*, it is abundantly clear that the Joint Receivers have, in respect of each of the three properties, been appointed to act as receiver as defined in the respective Deeds of Mortgage and Charge, that is, as receiver and manager exercising all of the powers conferred on them by such Deeds of Mortgage in Charge. Therefore, this point does not have any substance.

27. The second point appears to say that the formalities for appointment had not been satisfied. However, in each case, the relevant Deed of Mortgage and Charge allows for appointment “in writing”. In each case, a Deed has been executed, and signed for and on behalf of Tanager by Mr. Karl Smith, who describes himself on the face of the Deed as “attorney and authorised officer”. Mr. Smith has sworn an affidavit in this application in his capacity as director of Tanager. He does not explicitly refer to the execution of these Deeds. However, nothing has in fact been put in issue and this argument was made very much at the level of theoretical possibility rather than seeking to point to any facts which would suggest formalities had not been complied with. There is a presumption of due execution and nothing has been done to dislodge it in this case. I am accordingly satisfied that the Joint Receivers are validly appointed.

iii. Whether the defendants were consumers

28. A generalised argument was made that the defendants had acted, in taking out the loans and executing the Deeds of Mortgage and Charge, as consumers, and reliance was placed on the decision of the Court of Justice of the European Union in *Costea* case C-110/14, in which the Court of Justice held that a lawyer who had concluded a credit agreement with a bank and agreed to the registration of a mortgage against a building belonging to his law firm acted as a “consumer” for the purposes of Directive 93/13 on Unfair Terms in Consumer Contracts, which was implemented into Irish law by the European Communities (Unfair Terms in Consumer Contracts) Regulations, S.I. 27 of 1995.

29. Counsel for the defendants says that the properties were buy-to-let properties but that this was not their business as the defendants worked in recruitment and IT. The plaintiffs say that the defendants were in the business of being landlords and it was irrelevant that they had other business interests outside of their receipt of rents from the properties.

30. Whatever may be the correct characterisation of the defendants in this context, I nevertheless find that this argument fails, because it is not clear to me at all what the ramifications of the defendants having the status of “*consumers*” are said to be. Neither the Directive nor the Irish Regulations were opened to the court and no submission was made which purported to identify any unfair term in any Facility Letter or Deed of Mortgage or Charge.

31. This argument was tied in with an objection to the merger of Bank of Scotland (Ireland) Ltd. with Bank of Scotland plc, and this in turn seemed to be directed to an argument that there was some invalidity in that merger which meant that Tanager had not acquired title to the mortgages and loans.

32. As regards the merger, it was alleged that when Bank of Scotland (Ireland) Ltd. merged with Bank of Scotland plc, the defendants had a right to waive their status as consumers and reference were made to the Consumer Credit (Exempt Agreements) Order 2007 in the United Kingdom. Reference was also made to the European Communities (Capital Adequacy of Investment Firms) Regulations, SI 660 of 2006. However, neither the Irish nor the UK regulations were opened to the court nor was this argument developed beyond what I have just recited in this section of the judgment.

33. In any event, these arguments appear to be directed at the merger of Bank of Scotland (Ireland) Ltd. with Bank of Scotland plc which occurred some years ago. Bank of Scotland plc is not a party to these proceedings, however, and Tanager is registered as owner of the relevant charges. It is well established that, absent some evidence of mistake or fraud, the register is conclusive: *Tanager DAC v. Kane* [2019] 1 I.R. 385. Furthermore, if a party wishes to look behind the conclusiveness of the register, as provided for by s.31 of the Register of Title Act, 1964, then they must take the appropriate steps to seek to rectify the registration. That has not been done. In my view, the law in this area is abundantly clear and

is as recently restated by the Court of Appeal in *Tanager DAC v. Kane* and, accordingly, this does not give rise to any defence to the injunctive relief sought.

iv. Delay

34. The defendants objected to the delay in bringing the proceedings and it is certainly the case that delay may justify the refusal of interlocutory relief. Such a situation would arise where lapse of time tended to undermine any assertion of urgency by a person claiming interlocutory relief.

35. In this case, the plaintiffs' solicitor has set out on affidavit the full progress of the application since the date of appointment of the Joint Receivers on 1 August, 2019. Various issues, including efforts by the Joint Receivers to discover who was in occupation of the properties and to seek to take peaceable possession of them, the enactment of the Emergency Measures in the Public Interest (Covid -19) Act, 2020, which prevented any action by the Joint Receivers which would have the effect of evicting the tenants allowed into possession of the properties by the defendants, the need to substitute Tanager for the former owner of the charges and the death of the second defendant, all explain the delay and there is no significant period within that time, other than perhaps the emergency period provided for by s. 8 of the 2020 Act which would require any kind of explanation.

36. There does not therefore appear to have been any unnecessary delay by these plaintiffs in seeking to invoke their rights and therefore the question of whether any such delay would entitle the defendants to resist the exercise by the charge holder of its rights under the various charges does not require to be determined.

Conclusion

37. In my view, the plaintiffs have established a strong case that they are likely to succeed at trial in establishing their entitlement to enter into possession of the properties, receive the rents paid by any tenant in occupation of them, and ultimately to sell them.

38. Furthermore, the balance of convenience does not favour refusal of the relief in circumstances where the plaintiffs will be mark for any damages which might be payable should the injunctive relief turn out at trial to have been wrongly granted. By contrast, it does not appear from the history of the dealings between the defendants and the Joint Receivers that it will necessarily be the case that any rents achieved from the properties will be accounted for and/or available to the plaintiffs should the injunction be refused.

39. There was a final submission made on behalf of the defendants about the transfer of titles to another entity which the defendants claimed had been “using receivers who use money from criminals” and a PULSE number was given in court. None of this is on affidavit, and therefore it cannot be considered. I would only make the comment that if serious allegations of this nature are to be made, not only should they be on affidavit, but they should be substantiated. There is no evidence of any improper, let alone criminal, behaviour on the part of the plaintiffs in this case.

40. I will therefore grant the relief sought in the notice of motion.