

THE HIGH COURT

[2023] IEHC 35

2021 5450 P

Between:

JOHN COUGHLAN AND EITHNE COUGHLAN

Plaintiffs

-and-

TOM O'BRIEN AND HILARY LARKIN

Defendants

JUDGMENT of Ms. Melanie Greally delivered on the 27th day of January 2023.

1. This judgement concerns an application by the Plaintiffs for an interlocutory injunction restraining the Defendant's receivers, appointed by Everyday Finance DAC, from acting as receivers of a commercial property located at Main Street, Newbridge, County Kildare comprised in Folio 49359F, County Kildare (hereinafter the property).
2. Affidavits and supplemental affidavits have been filed by both the Plaintiffs and Defendants advancing their respective claims and providing the relevant factual detail.
3. The Plaintiffs are solicitors by profession and are the registered owners of the property, originally a fire station located in the centre of Newbridge, County Kildare.

4. The property was purchased by the Plaintiffs during the 1990s. In the course of their ownership, it was partially restored by them and later converted into rental units. The first named Plaintiff conducted his practice as a solicitor from the property for a number of years.
5. Rent payable by tenants of the property was and continues to be collected biannually, in the months of January and July.
6. By Deed of mortgage, dated 13th of June 2008, the Plaintiffs borrowed an undisclosed sum from AIB Mortgage Bank and Allied Irish Banks PLC and two charges on the property were duly registered in the Property Registration Authority on the 16th of June 2008.
7. It appears from correspondence that the account went into arrears in 2011.
8. By Deed of transfer dated 14th June 2019 AIB PLC and AIB Mortgage Bank transferred the loan and all rights and entitlements under the mortgage agreement to Everyday Finance DAC. The plaintiffs were advised of the transfer by letter dated 28th June 2019.
9. By letter dated 20th August 2019, the plaintiffs were advised that the future administration of their account would be conducted by Link Asset Services on behalf of Everyday Finance DAC.
10. By letter dated 13th November 2019, the plaintiffs received a letter from Link Asset services seeking payment within 21 days of €727,728.22, being the balance outstanding on the loan.
11. By instrument dated 30th June 2020, Everyday Finance DAC appointed the two Defendants to be receivers *“over all of the assets referred to, comprised in and charged by the Security document and to enter upon and take possession of the same in the manner specified in the Security Document and the Receivers shall have and be entitled to exercise the powers conferred on them by the Security Document and by law”*. The Schedule to

the instrument identifies a Deed of Mortgage dated 13th June 2008 as the Security Document.

12. The first named Plaintiff visited the property in January and February 2021 to collect the rent due and was advised that the tenant had already paid the rent to the Defendants who had contacted the tenants directly.
13. The Plaintiffs subsequently engaged in a protracted course of correspondence with the Defendants seeking documents pertaining to the transfer of the loan and the appointment of the receivers which eventually concluded with the provision of a copy of the Deed of Appointment of the Receivers.
14. A search of the Property Registration Authority website conducted by the Plaintiffs during this period revealed that the application by Everyday DAC for registration as the owner of the mortgage submitted on the 20th of August 2019 was not completed until the 3rd of December 2021.
15. On the basis of the foregoing, the Plaintiffs maintain that, on the 30th of June 2020, Everyday Finance DAC were not entitled to appoint Receivers and the purported appointment of the Defendants as Receivers was therefore invalid.
16. The principles applicable to interlocutory injunctions are well established since the decision in *Campus Oil Ltd v Minister for Industry and Energy (no 2)* [1983] IR 88 and its recent recalibration by the judgment of O'Donnell J. in *Merck Sharpe and Dohme v. Clonmel Healthcare* [2019] IESC 65, [2020] 2 IR 1.
17. The satisfaction of the first limb of the test, being that of whether there is a fair issue to be tried is the controversial aspect of the present application.

Plaintiff's Submission

18. The Plaintiff argues that in the period between June 2020 and December 2021, the charges registered to AIB remained registered on the Folio in addition to the charge undergoing registration to Everyday, a fact which it was submitted, left open the question of who had the statutory power to appoint a receiver afforded by Section 62(6) of the Registration Title Act 1964 as amended. It was argued that the dual registration of AIB and Everyday led to the appointment of "Schrödinger's receivers" whose appointment was at the same time valid and invalid.

19. The Plaintiff also points to the potential for abuse and absurdities arising from the continued registration of AIB on the Folio pending completion of the registration of Everyday.

20. The Plaintiff concedes that Rule 60 of the Land Registry Rules provides that registration shall be completed as of the day on which the application is received for registration but makes an argument that Rule 60 is designed for the purpose of establishing priority among charge holders as distinct from conferring powers. In support of this narrow reading of Rule 60 reliance is placed on Section 90 of the Registration of Title Act 1964 which, it was argued, implicitly sets limits on rights which may be exercised pending registration, and which provides:

"Where persons on whom the right to be registered as owner of registered land or of a registered charge has devolved by reason of death of the owner or the defeasance of the estate or interest of such owner or by reason of an instrument of transfer made in accordance with the provisions of this Act, desires to

(a) Transfer or charge the said land or create a lien thereon by deposit of the land certificate (or, where that person is the Land Commission, exercise any other rights of ownership including enforcement of the right to vacant possession), or

(b) Transfer or charge the said charge or create a lien thereon by deposit of the certificate of charge

Before he is himself registered as owner of the land or charge, he may do so subject to any burdens or rights affecting his interest which would have been entered on the register if he had himself become the registered owner and subject also to the provision of this Act with regard to registered dealings for valuable consideration, and in the like manner and with the same effect as if he were the registered owner at the time of execution of the transfer, charge or deposit as the case may be.”

21. The Plaintiffs maintain that the decision of Baker J. in *Harrington v Gulland Property Finance Limited* [2016] IEHC 447, supports their argument in that it uniquely addresses the requirement of registration in respect of transferred mortgages. It is argued that in *Harrington v Gulland*, Baker J. specifically made a distinction between the position of *Gulland* and that of the security holders in the previously decided Court cases of *Kavanagh v McLoughlin* [2015] 3 IR 555 and *Freeman v Bank of Scotland* [2016] IESC 14 on the basis that each of these decisions involved the transmission of the security interest by operation of the provisions of the Central Bank Act 1971.

22. The Plaintiff relies on the passage of Baker J.’s judgement contained at paragraphs 25-27 which states as follows:

“25. The legal issue raised by the plaintiff in the present case is the net question of the effect of Section 64(2) of the Act of 1964 in circumstances where no statutory provision such as that contained in the Central Bank Act 1971 obviates the requirement of registration, as Gulland is not a licensed Bank and no transmission by operation of law can be shown.

26. Instead, the transfer of interest of the mortgage was made by instrument in the statutory form provided by the Land Registry rules for the transfer of an

interest in a charge. The provisions of Section 64(2) are unambiguous and while it is not necessary that the interest of the mortgage be transferred by means of a transfer in the prescribed form, and a different suitable form may be used, the instrument of assignment does not confer on the transferee any interest in the charge until the transferee is registered as the owner of the charge. The statutory provisions are clear, and the transferee does not take any interest in the charge, be that a security interest or contractual entitlement.

27. Accordingly, it seems to me that the Plaintiffs have made out an arguable case that in the absence of registration, or some other means by which the interest in the charge has been transmitted or is deemed by statute not to require registration that the contractual interest in the charge has not become transferred, therefore, Gulland may not, in pursuance of the contractual power contained in that mortgage or charge appoint a receiver. It has not taken an interest in the mortgage because of Section 64 (2)".

23. The Plaintiff does however concede that the statement of Laffoy J. in *Kavanagh v McLoughlin* that the appointment of a receiver is not derived from a statutory power but is a contractual power derived from the relevant security document is not helpful to their submission.

24. The Plaintiffs also concede that a later decision of Baker J., *Woods v Ulster Bank Ireland [2017] IEHC 155*, on the face of it, undermines the decision in *Harrington v Gulland*. Paragraphs 38 to 44 which were opened by the Plaintiffs, concerned the appointment by Ulster Bank of receivers two months before the registration of the charge was complete. In striking out the Plaintiffs application for relief, Baker J., without reference to *Harrington v Gulland*, considered herself bound by the decision of Feeney J. in *McEnery v Sheahan [2012] 7 JIC 3004* which judgement considered precisely the operative date on which registration is deemed effective and which stated as follows:

"The facts are that an application for registration of the charge over the mortgaged property was made on the 15th of June 2009 and that charge was ultimately

registered in 2010. Since the charge is now registered, the issue which the defendant raises in relation to non-registration is moot due to the fact that the registration of the charge, which is now complete, is deemed effective from the date of application which is the 15th of June 2009. The Court must proceed on the basis that the registration was effective from the 15th of June 2009, which is prior to the appointment of a receiver.”

25. The Plaintiffs argue that the absence of a reference by Baker J. to her previous decision in *Harrington v Gulland* leaves open the inference that Baker J. viewed her decisions in *Harrington v Gulland* and *Woods v Ulster Bank Ireland* as consistent and further argues that the two decisions are capable of being reconciled because *Gulland*, unlike *Woods*, related to a transferred mortgage and as such was subject to restrictions imposed by Section 90 of the Registration of Title Act, 1964 which, the Plaintiffs argue, have no application to original mortgagees.

26. The fair issue for which the Plaintiff contends is an argument that the rights of an original charge holder differ from those of a transferee pending completion of the registration process. It is submitted that rights of the transferee while registration is pending are limited to those available under Section 90 of the Registration of Title Act, 1964 which, if correct, necessarily precludes and invalidates the appointment of the receivers.

Defendant's Submissions

27. The Defendants maintain that there is no authority for the interpretation of Section 90 and Rule 60 for which the Plaintiffs contend. Relying on the judgment of Feeney J. in *McEnergy v Sheahan* the Defendants maintain the right to appoint a receiver is conferred upon creation of the mortgage, a point which was re-stated and endorsed in *Kavanagh v McLaughlin*, *Harrington v Gulland*, and *Woods v Ulster Bank Ireland*. Further, because the power to appoint a receiver is contractual in nature, the impact of non-registration

affects the transferee's ability to perfect their title but has no impact on the power to appoint receivers. It is maintained that *Woods v Ulster Bank Ireland* and *Harrington v Gulland* are compatible on the basis that in *Gulland* no application for registration was in fact lodged.

28. The Defendant argues that *Harrington v Gulland* does not provide authority for the Plaintiff's argument and points to part of the judgement which refers to the significant fact that the instrument in question was neither registered nor lodged for registration. The Defendant points to *McEnery v Sheahan* as a clear statement of the law in relation to when registration is deemed to be operative, the precise point raised by the Plaintiffs. The Defendants contend that there is a statutory scheme provided for by Section 62 and Section 64 of the Registration of Title Act 1964 which specifically addresses the registration of transfers.

29. They further contend that none of the authorities opened cast any doubt on the established case law and the decision in *David Hughes v Worldport Communications Inc [2005] IEHC 189* applies.

Analysis and Decision

30. The law in respect of registration of charges has been the subject of numerous decisions opened by both the Plaintiffs and the Defendants, most notably, the decisions in *Kavanagh v McLoughlin*, *McEnery v Sheahan*, *Woods v Ulster Bank Ireland*, and *Harrington v Gulland*.

31. In addition, both sides agree that the case of *Worldport* is an authority for the proposition that the Court, notwithstanding its wide discretion, must follow the established authority on the particular point of law unless in accordance with the statements of Clarke J. at page 7 of his judgement, there is a compelling reason to revisit the point:

“Amongst the circumstances where it may be appropriate for a court to come to a different conclusion would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgement sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period.”

32. The authorities cited during this application provide clarity in relation to matters which are fundamental to the Plaintiff's application:

(1) The power to appoint a receiver is contractual and exists independently of Statute.

This point was addressed by Laffoy J. in *Kavanagh v McLoughlin* which states at paragraph 109:

“There is nothing in the Act of 1964 which limits or restricts the contractual power to appoint receiver once it is exercisable”

A similar view was taken by Baker J. in *Woods v Ulster Bank Ireland* in which she said:

“Furthermore, the joint receivers were appointed under a contractual power and did not require that at the time of the exercise of that power the charge be the registered owner of the charge”.

(2) The right to appoint a receiver is effective from the date of execution of the mortgage deed and by logical extension, in the case of a transferred mortgage, from the date of execution of the Deed of Transfer.

Feeney J. considered this point in *McEnery V Sheahan* and at paragraph 7.1 stated as follows:

“The facts in this case demonstrate that the right to appoint a receiver was conferred immediately upon the creation of the mortgage. Even though as of that date the mortgagee could not exercise that right but could only do so when the mortgage monies became due, the entitlement to do so and the

circumstance which would permit the exercise of the entitlement were identified and required no further agreement.”

(3) The powers and protections conferred by the Registration of Title Act 1964 are engaged by the registration of charge.

Laffoy J. in *Kavanagh v McLoughlin* at paragraph 117 of her judgement said *obiter*:

“Having regard to the foregoing, I am satisfied that, absent any specific statutory provision relieving BOS from the mandatory obligation of becoming registered owner of the a charge in respect of which it wishes to exercise any of the powers conferred, or to avail of any of the protections afford, by s. 62 of the Act of 1964, it must become registered as the owner of the relevant charge on the relevant folio, if it wishes to exercise the statutory powers conferred by the Act of 1964.”

(4) Registration is deemed to be effective from the date on which the application for registration is made.

This point was definitively addressed by Feeney J. in *McEnery v Sheahan* at paragraph 10.1 which states:

“The facts are that an application for registration of the charge over the mortgaged property was made on the 15th of June 2009 and that charge was ultimately registered in August 2011. Since the charge is now registered, the issue which the defendant raises in relation to non-registration is moot due to the fact that the registration of the charge, which is now complete, is deemed effective from the date of application which is the 15th of June 2009. The Court must proceed on the basis that the registration was effective from the 15th of June 2009, which is prior to the appointment of a receiver.”

McEnery was applied in *Woods v Ulster Bank Ireland* when Baker J. said as follows:

“This is a recent and authoritative judgment of the High Court, with which I agree and by which I am bound.”

33. The Court does not view *Harrington v Gulland* as an authoritative decision for differentiating between receivers appointed under a transferred mortgage and those appointed by an original mortgage holder. *Gulland* was a decision made at the interlocutory stage of proceedings and has not featured in any subsequent judgement relating to the issue of registration (including the judgement of Baker J. in *Woods v Ulster Bank Ireland*).
34. More decisive, however, is the fact that in *Gulland* an application for registration had not been lodged.

The “Schrödinger’s receiver” argument

35. This argument in support of differing registration rules for transferees of charges is based on potential for uncertainty arising from the dual registration of the original charge holder and the transferee pending completion of the registration process. The Plaintiff points to absurdities which may arise from the continued registration of the original charge holder on the Folio, most notably a statutory right under Section 62 (6).
36. This argument is, in my view, manufactured and fails to recognise the contractual obligations created by the Global Deed of Transfer, executed on the 14th of June 2014, by which the seller, AIB, transferred the charges and all rights relating to the underlying loans and finance documents to the buyer, Everyday DAC, and I consider the likelihood of the transferor seeking to enforce previously held rights after execution of the Deed of Transfer to be a highly improbable scenario.

Section 90 argument

37. Section 90 of the Registration of Title Act 1964 as submitted by the Plaintiff was, in fact, substituted by Section 63 of the Registration of Deeds and Title Act 2006. The substituted section states: -

(1) This section applies to a person—

(a) on whom the right to be registered as owner of registered land or a registered charge has devolved by reason of the death of the owner or the defeasance of the owner's estate or interest or by reason of a transfer made in accordance with this Act or under a lease, and

(b) who, before being registered as such owner, wishes to take any of the following actions in relation to the land or charge:

(i) in the case of registered land—

(I) transferring or charging it or any part of it,

(II) creating a lien by deposit of the land certificate,

(III) granting a lease,

(IV) creating an easement or a profit à prendre, or

*(V) where the person is the Minister for Agriculture and Food, exercising any other rights of ownership, including enforcing the right to vacant possession,
or*

(ii) in the case of a registered charge—

(I) transferring or charging it, or

(II) creating a lien by deposit of the certificate of charge.

(2) A person to whom this section applies may take any of the actions mentioned in subsection (1) in the like manner and with the same effect as if the person were the registered owner at the date of the action concerned, but subject to any burdens or rights affecting the person's interest which would have been entered on the register if the person had become the registered

owner and subject also to the provisions of this Act with regard to registered dealings for valuable consideration.

38. The Plaintiff's argument is taken to extend to the substituted section above. The argument maintains that section 90, by implication, confines the powers of the transferee to those listed in the section and any powers which are not specifically permitted by the Section are not exercisable. The success of this argument depends on an acceptance by the Court that Section 90 covers charges whose registration is pending in the literal sense and that the reference in subsection 1(b) to "before being registered" is to be construed other than in accordance with Rule 60 of the of the Land Registry rules and the decision of Feeney J. in *McEnery v Sheahan*.

39. Rule 60 of the Land Registry Rules 2012 to 2013 states:

"Except as otherwise provided by statute, or as provided in Rules 51, 61(3) and 161, registration shall be completed as of the day on which the application is received for registration."

The land registry rules provide for statutory exceptions and specified exceptions within the rules.

40. Section 90 apparently restricts the powers of unregistered transferees to those listed in Subsection 1(a) and 1(b), but I am quite satisfied that Section 90 is not directed to persons or entities who are registered, but to persons who have *an entitlement to register*, those who have either not applied for registration or who are, by virtue of statutory provisions or exceptions contained within the land registry rules or otherwise, ineligible to be *deemed* registered. Section 90 has no application to transferred charges which are registered or deemed registered.

41. Sections 62 and 64 of the Registration of Title Act 1964 address the registration of charges and the transfer of charge. Section 62 (6) provides as follows:

On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a legal mortgage under Part 10 of the Land and Conveyancing Law Reform Act 2009, and the registered owner of the charge shall for the purpose of enforcing his charge have all the rights and powers of a mortgagee under such a mortgage including the power to sell the estate or interest which is subject to the charge.

Section 64(4) provides as follows:

On registration of the transferee of a charge, the instrument of transfer shall operate as a conveyance by deed of within the meaning of the Conveyancing Acts and the Transferee shall –

- (a) have the same title to the charge as a registered transferee of land under this Act has to land, under a transfer for valuable consideration or with valuable consideration as the case may be and*
- (b) have for enforcing his charge the same rights and powers in respect of the land as if the charge had been originally created in his favour.*

42. In light of the above, the court is satisfied that upon execution of the Deed of transfer on the 14th of June, 2014, and by operation of the provisions of Section 64 (4)(b) of the Registration Title Act 1964 on the 20th of August 2019, both dates which precede the date upon which the receivers were appointed, the transferee had stepped into the shoes of the original mortgagee and acquired all of the enforcement rights previously held by the transferor, both contractual and statutory. Accordingly, the Defendant's point pertaining to the invalidity of the receiver's appointment is moot.

43. In my view, the law is clear and is not in need of any further clarification.

44. The threshold which must be met in order to establish a fair issue, while set at an achievable level, has not been met in this case. I am therefore dismissing the Plaintiffs application.

45. The Court invites further submissions which flow from its decision.