



THE HIGH COURT

[2024] IEHC 556

[Record No. HP 2023/4965]

BETWEEN

LUCY EWINS

PLAINTIFF

AND

PROMONTORIA SCARIFF DESIGNATED ACTIVITY COMPANY AND DAVID

O'CONNOR

DEFENDANTS

**JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 20th day of
September 2024**

1. This is the plaintiff's urgent application for interlocutory relief heard on 13 September last.

Background

2. The plaintiff is the joint owner, with her estranged husband, of a property at 72 The Rise, Knocknacarra, Galway (hereinafter referred to as "the property") which was purchased by the plaintiff and her estranged husband in 1999 with a mortgage. The mortgage was later transferred and then acquired by the first defendant on 30 November 2018. The plaintiff separated from her husband in 2012 and thereafter she avers that she moved into the property on a permanent basis and that it is her principal private residence. The plaintiff has been in default in her mortgage repayments for many years. The second defendant was appointed as receiver over the property on 20 October 2020 and purported to sell the property by public auction on 24 July 2024.

3. In these interlocutory proceedings, the plaintiff seeks injunctions to restrain the completion of that purported sale and any interference with her peaceful enjoyment of the

property, pending the trial of the action. She also seeks an interlocutory order restraining the first defendant from denying her right to redemption of her mortgage over the property.

The plaintiff's grounds

4. The plaintiff moves on two grounds:-

- (1) The property is her principal private residence ('PPR') and that the purported sale is unlawful as the defendant did not comply with the Central Bank's Code of Conduct on Mortgage Arrears.
- (2) The defendant unlawfully refused to allow the plaintiff to exercise her rights of redemption.

Principal Private Residence

5. The plaintiff avers that the property is her PPR and is supported by her adult son who has averred that he lives in the property with her. This is disputed by the defendants' affidavit which sets out various reasons and evidence (much of which is hearsay, as can arise at an interlocutory stage) why they dispute that and asserts that the plaintiff lives at the same residence she had lived in over the years with her husband in Dublin. The defendants' affidavit also avers that the property has been rented to tenants at various times since 2012 but the plaintiff says this only related to some of the rooms in the house and that she has lived there with other people since 2012.

6. There has been no notice of intention to cross-examine the plaintiff or her son on their affidavits and the defendants challenge the plaintiff's sworn averments largely by second hand and hearsay evidence. In those circumstances the plaintiff's affidavits might have been sufficient to establish a fair question to be tried as to whether or not this property is the plaintiff's PPR. However, the defendants have raised a procedural challenge to the plaintiff's right to move on this PPR point at all in seeking interlocutory relief. These proceedings are the fifth set of proceedings brought by the plaintiff since the appointment of the receiver in 2020 and the second injunction within these proceedings. The plaintiff's previous interlocutory injunction application in these proceedings, which she issued when she was a lay litigant on 14 February 2024, was struck out by consent with costs to the defendant on 18 April 2024 at which time she was represented by her current legal team. That application (a copy of which was exhibited in this application) covered, in almost identical terms, the same issues, averments and evidence in relation to the PPR as the plaintiff seeks to move on in these proceedings.

7. The plaintiff argues that the within application is different insofar as she also relies on what she says was the defendant's denial of her equitable right of redemption that she sought to exercise on 24 July 2024 in advance of the auction. I will come to that second ground further below but, insofar as the plaintiff seeks to move on the stand alone PPR point, which she already sought to litigate and chose to settle with legal advice by way of the consent orders of April 2024, I follow the decision of the Court of Appeal in *Small v. The Governor and Company of The Bank of Ireland & Ors* [2018] IECA 393 and find that aspect of this application to constitute an abuse of process. This is highly relevant in determining where the balance of convenience, or as was referred to by the Supreme Court in *Merck Sharp & Dohme Corp v. Clonmel Healthcare Ltd* [2019] IESC 65, where "the balance of justice" lies.

8. I refuse the plaintiff's application insofar as she moves on the PPR ground.

(2) The plaintiff's right of redemption

9. The plaintiff has a right of redemption pursuant to contract, statute and by way of her equitable right of redemption. The Supreme Court confirmed in *Dellway v. NAMA* [2012] IESC 14 that this constitutes an important property right. The existence of the plaintiff's rights of redemption are not seriously challenged by the defendants, but they assert that what occurred on 23 and 24 July 2024 in advance of the auction taking place, was not a *bona fide* exercise by the plaintiff of those rights. They rely on the email correspondence of those dates in disputing that she ever exercised her right to redeem the mortgage. They also rely on the terms of a draft loan agreement that was exhibited by the plaintiff's negotiator, Mr. Seery, which he averred confirms that the funds were secured and available immediately prior to the auction taking place at 12pm on 24 July. Both documents require examination to establish if they do, as the plaintiff claims, confirm that she invoked her right of redemption and that the first defendant deprived her of that right by proceeding with the auction on 24 July (as averred to by the plaintiff at para. 16 of her first affidavit, sworn on 15 August 2024).

10. On 22 July 2024, Mr. Seery wrote to the first defendant's debt servicing agent, Cabot Finance Ltd, proposing payment of a substantial portion of the debt due, which he said "will be funded in the main by Traders Capital" and the remainder from the plaintiff. In his email to which that letter was attached, Mr. Seery asserted that he would "be in possession of the proof of funds tomorrow morning". By email the next day, 23 July, Mr. Seery was advised

that the first defendant was not supporting what was referred to as the plaintiff's "*proposal*". The next day, 24 July, which was the day the auction was due to take place at 12.00pm, Mr. Seery emailed the first defendant's agent at 11.07am advising that he "*had got Hibernian capital on board*" and confirmed that the plaintiff was in funds to pay the full balance. At 11:23am, the defendant's agent emailed asking if the plaintiff is "*in the position to transfer and supply proof of transfer prior to 12pm today?*" At 11:38am, Mr. Seery replied that he would contact the plaintiff and ask her to get proof of funds. However, proof of funds was not what the defendant's agent had asked for in their email and this was pointed out to Mr. Seery in their replying email. There seems to have been a further email sent by Mr. Seery attaching a bank statement dated 24 July 2024 showing a credit of over €19,000. The exact amount is illegible in the exhibited copy and the time of the email is not recorded on the exhibit. The defendants' agent responded by email at 11.59am confirming the defendants' view "*that the offer of full redemption of the account along with discharging any associated costs is not supported and the auction of the property will proceed today as instructed.*" The auction went ahead at 12.00pm and the property was sold to a third party. A further email was sent by Mr. Seery two days later on 26 July stating:-

"Ms Ewin is in funds as I said and I believe her right to redeem subsisted when she made the offer to redeem. I do not believe your client could refuse said offer, and it was clear that she was availing of her right to redeem. In equity Ms Ewin's right to redeem the loan is good".

11. The plaintiff's right of redemption is exactly that, the right to redeem the mortgage upon payment of the debt. The nature of the right was succinctly described by Baker J. in the High Court in *Harrington v. Gulland Property Finance Ltd & anor No.2* [2018] IEHC 445, at para. 145, as "*the right of the borrower to have the security released on repayment*". No repayment was made by or on behalf of the plaintiff prior to the auction on 24 July. It seems that she made an offer to redeem, which is different to a repayment.

12. Counsel for the defendant argued that what occurred here was not even a tender of a mortgage debt. He relied on the decision of Daniel Alexander QC in *Shearer v. Spring Capital Ltd* [2013] EWHC 3148 (Ch), quoted in Cousins on The Law of Mortgages (UK, 4th Ed.) where he said, at para. 124,

"In order for a tender to be valid, the sum for payment must not just be tendered: it must be set aside in some way so that it is, in an effective way, treated as the mortgagee's money to be had on demand..."

Whilst that decision is not binding on this court, it is a sensible analysis of what would be required for a situation falling short of an actual transfer of monies to potentially establish the exercise of a right of redemption.

13. I am satisfied that what took place here prior to the auction on 24 July, was neither a repayment nor a tender of a sum of money that could or should have been treated as the plaintiff's money to be had on demand. It was an indication of monies that were potentially available to the plaintiff subject to various requirements including the execution of an agreement between the plaintiff and the special purpose vehicle that the offer of funding by Hibernian Capital required to be "*established for the purpose of acquiring the property*" (as stated in the letter from Hibernian Capital of 27 July 2024 exhibited by Mr. Seery in his affidavit of 11 September 2024).

14. The funding arrangement put in place by Mr. Seery did not give rise to the exercise of the plaintiff's right of redemption on 24 July 2024 before the 12.00pm auction took place. My view in that regard is fortified by the terms of the draft loan agreement between the plaintiff and a company that Mr. Seery said was the special purpose vehicle set up for the purpose of dealing with the plaintiff's property, a copy of which was exhibited to his second affidavit, sworn on 11 September 2024. Counsel for the defendant described the terms of this draft agreement as "*unorthodox*" and questioned its *bona fides* because it identified the purpose of the loan as improvements to the property rather than the discharge of the previous mortgage, it does not identify an interest rate although it does provide for an amount of €1,900 payable every four weeks representing the interest and purported to create a security interest rather than what counsel said was the more usual situation whereby a mortgage creates the security.

15. The draft agreement requires the plaintiff to provide a Declaration of Trust and a signed and undated conveyance in favour of the lender to be held by the lender. In the event of the plaintiff's default in repaying the capital amount and interest within a period of no longer than eleven months post-drawdown, the lender is permitted by the terms of the agreement to enforce the Declaration of Trust and register the transfer of ownership of the property pursuant to the signed conveyance. However, the agreement makes no reference

to the joint owner of the property, the plaintiff's estranged husband, and he is not a party to the agreement. Without his consent, it is difficult to see how the plaintiff could provide an enforceable Declaration of Trust or conveyance in favour of the lender that the agreement requires. The draft agreement seems incapable of execution in its present format and cannot, therefore, evidence the *bona fides* of what the plaintiff claimed on 24 July was her attempt to exercise her right of redemption.

16. The plaintiff has not established a fair question to be tried that her equitable right of redemption was unlawfully fettered by the defendant and/or that she was deprived of her right of redemption.

17. As this is only the interlocutory application, the plaintiff remains entitled (subject to such further orders of the court as may be sought or made) to litigate her claim in relation to PPR and the right of redemption at trial and to secure whatever remedies including an award of damages that might be considered appropriate should she succeed in satisfying the trial judge that the auction of 24 July 2024 should not have been permitted to proceed. However, at this point in time, the court has not been satisfied that it is appropriate to grant interlocutory relief and/or that the least risk of injustice favours granting the relief sought.

18. I refuse the plaintiff's application.