

THE HIGH COURT

[Record No. 2018/4201 P.]

BETWEEN

DERMOT DUFFY AND MARY DUFFY

PLAINTIFFS

AND

TOM KAVANAGH AND HAVBELL DESIGNATED ACTIVITY COMPANY

DEFENDANTS

**JUDGMENT of Ms. Justice Pilkington delivered on the 14th day of November, 2019**

1. This judgment is linked to and was heard with a related case entitled "The High Court, Record No. 2017/3007 P., between Tom Kavanagh, plaintiff and Harry Hilliard and Ursula Hilliard, defendants and Dermot Duffy and Mary Duffy, notice parties" ("the 2017 proceedings"). Within my judgment to the 2017 proceedings I also reference these proceedings, which I styled the 2018 proceedings.
2. Whilst these proceedings relate solely to a premises known as 2 Woodford Cottages, Palmerstown, County Dublin ("Palmerstown"), the 2017 proceedings also relate to it, but in addition also deal with other properties and issues within this receivership.
3. Essentially within the 2017 proceedings the receiver (here the first named defendant) seeks certain interim reliefs in respect of certain properties including Palmerstown. This is the only property in which these plaintiffs have an interest and they in turn have issued these 2018 proceedings seeking certain reliefs against the first named defendant receiver appointed over Palmerstown and the second named defendant the holder of charges, executed by the plaintiffs and registered against it.
4. At the outset the second named plaintiff has applied to maintain these proceedings as a person of unsound mind not so found suing through her daughter and next friend Louise Duffy and I acceded to that application.
5. In or about October, 2014, the second named plaintiff instructed Declan O'Connell, solicitor in respect of the execution of an enduring power of attorney. Arising from that, Mr. O'Connell began to make enquiries with regard to his client's interest in Palmerstown.
6. Enquiries by Mr. O'Connell, in dealing with the enduring power of attorney, found a charge granted by Dermot and Mary Duffy ("the Duffys") in favour of Permanent TSB. Thereafter, Mr. O'Connell became aware of the 2017 proceedings and he was concerned that his clients' interests in Palmerstown might be in jeopardy and sought to be joined as a notice party to the 2017 proceedings.
7. In respect of these 2018 proceedings, a plenary summons issued on 11th May, 2018 and a notice of motion issued on 14th May, 2018 seeking certain declaratory, injunctive and other reliefs, including injunctive reliefs restraining the defendants from dealing with any interest of the plaintiffs in the Palmerstown property.

8. The motion is grounded upon an affidavit of Declan O'Connell, solicitor sworn on 10th May, 2018, an affidavit sworn by the first named plaintiff and the daughter and next friend of the second named plaintiff both on the 31st May, 2018. There is a replying affidavit on behalf of the second named defendant, it does not appear that the first named defendant has sworn a separate affidavit in this matter but reference is made throughout to the grounding affidavit sworn by him in the 2017 proceedings and I have had regard to it.
9. The background facts and circumstances have been set out within the 2017 proceedings. However, in summary I will also set them out here. The plaintiffs are the parents of Ursula Hilliard and parents in law of Harry Hilliard ("the Hilliards"). The folio to Palmerstown (117421F) discloses that the Hilliards and the Duffys each acquired an undivided one quarter interest in that property as tenants in common. Mr. O'Connell avers (and the Duffys subsequently confirm) that Palmerstown is tenanted.
10. The affidavits disclose that the Duffys financed Palmerstown from their own resources as follows: -
  - (a) The payment of €157,500.00 as their contribution to the purchase price.
  - (b) The sum of €7,875.00 stamp duty.
  - (c) The sum of €1,150.00 as solicitor's fees.
  - (d) The sum of €30,000.00 for renovations
11. The Duffys are adamant that they never borrowed any monies for the purchase of Palmerstown. The only persons who borrowed monies for the purchase were the Hilliards. Reference is made to the grounding affidavit of Tom Kavanagh within the 2017 proceedings and its exhibits containing mortgage and other documentation executed by the Hilliards in their acquisition of Palmerstown.
12. In respect of the rental of Palmerstown, the plaintiffs aver that an amount of €1,175.00 is paid per month, €150.00 is deducted by the Hilliards as a collection fee and an amount of €1,025 is deposited into the Duffys' account every month. Enquiries by Mr. O'Connell revealed the following: -
  - (a) On 4th April, 2016, the mortgage department of Permanent TSB wrote to the Duffys confirming that they "do not currently have any active mortgages with Permanent TSB."
  - (b) It proved more difficult for Mr. O'Connell to make direct contact with the second named defendant ('Havbell') as his clients were not its customers, which necessitated Mr. Connell assisting the plaintiffs in making a data request pursuant to the Data Protection Acts. There is no doubt that Mr. O'Connell has been assiduous in this matter. In any event, by letter dated 5th May, 2017 from Capita

Asset Services addressed to Ms. Louise Duffy (daughter and next friend) with regard to Dermot Duffy and Mary Duffy it states as follows: -

"I refer to your letter of 20th April, 2017 to Havbell DAC in respect of a DSAR request for Dermot Duffy and Mary Duffy

This letter is being sent to you by... for Havbell.

Havbell DAC has no borrowings to Dermot Duffy and Mary Duffy and, therefore, the aforementioned are not customers of Havbell DAC. Havbell, therefore, do not hold any personal information for Dermot Duffy and Mary Duffy."

13. Accordingly, this would appear to demonstrate that the Duffys were not debtors of Permanent TSB and, thereafter, Havbell.
14. Mr. O'Connell, thereafter, assisted his clients with a further data access request in respect of their files from their previous solicitors in their acquisition of Palmerstown. As I understand the position from the averments of Mr O'Connell and the documents exhibited: -
  - (a) The same firm of solicitors acted for the Duffys as for the Hilliards.
  - (b) In the normal course, the Duffys' solicitors had given an undertaking that they would register a charge against the Palmerstown property prior to drawdown.
  - (c) Upon it being noticed by solicitors for Permanent TSB that the charge was against the Hilliards' interests only, a demand was made of the Duffys' (and Hilliards) solicitors that they honour their undertaking and register the charge over the entire property.
15. Mr. O'Connell has exhibited the undertaking provided by the Duffys' solicitors for their registration of the mortgage over Palmerstown. It appears to be without any qualifications on title.
16. On the 8th December, 2008, solicitors for Permanent TSB wrote to the Duffys' solicitors in the following terms: -

"In relation to the property.... we note from the folio furnished with your certificate of title herein that the borrowers hold a one quarter share each in the property of tenants in common with Dermot Duffy and Mary Duffy who also hold a one quarter share each in the property and our charge affects only the interest of Harry Hilliard and Ursula Hilliard. This is not acceptable to the bank and is in breach of the terms of your undertaking wherein you undertook to furnish good and marketable title, free from encumbrances with the first legal charge over the entire of the property. We were not aware or advised of the interest of the other parties in the property. We note Dermot and Mary Duffy have completed the deed of confirmation but we would not have agreed to their interests being dealt with in that manner."

17. The reply of 6th February, 2009 is in part as follows: -

“...We wish to confirm that a separate mortgage deed in the names of Dermot Duffy and Mary Duffy was executed on closing but due to an oversight, same was not registered. We are currently arranging to have same lodged to the Property Registration Authority....”

18. On 10th March, 2009, Permanent TSB write again in the following terms: -

“As advised, we were not aware that parties other than the borrowers had an interest in this property. This should have been advised to us prior to the issue of the loan cheque herein. Your undertaking was furnished on the understanding that title was in the joint names of the above named borrowers and we continue to rely upon same. Without prejudice to the foregoing, we enclose herewith request for transfer of the account which should be executed by all parties and returned to us for consideration.”

19. The Duffys’ solicitors then wrote to Permanent TSB on or about 23rd July, 2009 and confirmed that the mortgage had been registered against the plaintiffs’ interests in the property.

20. Finally, in a letter of 1st September, 2009, Permanent TSB wrote to the Duffys’ solicitors and stated: -

“...Your undertaking confirmed that the security in this case was vested in the names of Harry Hilliard and Ursula Hilliard. There is clearly a breach of your undertakings in that two other parties... were also on title and the loan should not have been drawn in such circumstances.

In order to properly secure this loan, a new loan should be approved in four names with a condition that the existing loan can be redeemed from the proceeds of the new loan.”

21. It appears that no new loan was ever made.

22. It also noteworthy that in the documentation lodged with the PRA for registration of the Duffys’ charge, states that it is in favour of Irish Life and Permanent PLC as a charge for present and future advances and stamped to cover €250,000.00.

23. On 20th January 2017 by indenture of appointment of receiver between the second named defendant and the first named defendant on foot of the security documents recited within that document (comprising the charges executed by these plaintiffs) and in reliance upon their terms, the first named defendant was appointed receiver of the interest held by the plaintiffs (although the security documentation does not appear to make it clear that their combined interest is only in a moiety of Palmerstown).

24. Mr. O'Connell avers that he wrote a very lengthy letter to the first named defendants' solicitor on 28th February, 2018 setting out the position with regard to the Palmerstown property as he understood it and seeking certain undertakings in that regard.
25. The affidavit of the first named plaintiff discloses that he suffered a stroke in 2007 and has lived in a nursing home residential care since January, 2018 and continues to suffer ill health and that he extends his gratitude to his instructing solicitor for his assistance in the matter and in particular in preparing the grounding affidavit on the basis of his instructions. Thereafter it largely mirrors that affidavit.
26. The first named plaintiff, Mr. Duffy says that he did not borrow money from the second named defendant and did not give security over Palmerstown. Mr. Duffy states that both he and his wife wished to maintain the tenancy of Palmerstown and require the rental income. Their entitlement to do so is of course an entirely separate issue. Mr. Duffy avers that the receiver, the first named defendant, should not be appointed over Palmerstown as it is his intention to sell it which will place their income at risk.
27. In respect of the charge executed by the plaintiffs, Mr. Duffy avers as follows:-
- "The second named plaintiff and I were not willing or informed parties to this charge. It appears that a deed of confirmation was relied on. When the second named plaintiff and I executed this document, neither of us expected it to be used to give a charge over our interest in the property."
28. The first named plaintiff further avers that the charge is not valid nor enforceable and that when notified of this, the second named defendant took no steps to mend their hand. Thereafter, in essence Mr. Duffy seeks an order from this Court restraining the receiver from taking any further steps pending resolution of the matter at plenary hearing. He also avers:-
- "The second named plaintiff and I require assistance in our day to day lives and both of us reside in residential care facilities. The rental income from the property is applied to discharge our monthly living expenses. If the rental income was affected, a burden would be placed on the second named plaintiff and I to meet our monthly outgoings, in fact we would require assistance from their family. Damages are not, therefore, an adequate remedy."
29. Ms. Louise Duffy, the next friend swearing an affidavit on behalf of her mother, the second named plaintiff, essentially rehearses the same matters and, in particular, points to the fact that the defendants and both of them were given a chance to "mend their hand" when full details of this matter was sent to them by their instructing solicitor and that their continued refusal to engage has caused suffering, stress and anxiety to two elderly plaintiffs.
30. An affidavit has been filed by Karl Smith on behalf of the second named defendant. Mr. Smith goes through the deed of charge executed by the Hilliards and also the indenture of

confirmation executed by the plaintiffs and witnessed by their solicitor in which he asserts that the beneficial interest held by the plaintiff was conveyed to Permanent TSB, its successors and assigns.

31. Mr. Smith then deals with the registration of the charge by the solicitor acting for the plaintiff on 18th February, 2009 including a family home declaration in respect of each plaintiff signed by them and witnessed by their solicitor. Mr. Smith correctly points out that the plaintiffs' registration was made on foot of a mortgage duly signed and executed by the plaintiffs as confirmed by their solicitors. Mr. Smith then avers: -

"I say and believe that the registration of the charge was entirely in keeping with the intentions of the plaintiffs. Indeed, as exhibited to "DOF" in the grounding affidavit, the plaintiffs executed a power of attorney on or about December 2nd, 2004 prior to the purchase of the company granting their then solicitor, the authority to, *inter alia*, "do every other thing whatsoever which may be necessary or proper for the purchase of the property."

The property referenced being the disputed property in the present proceedings (Palmerstown). He further avers;

"Accordingly, I say and believe that there can be no credible assertion on behalf of the plaintiffs that there was any suggestion of a mistake in the registration of the charge over their portion of the property. Indeed, the plaintiff signed both an indenture of confirmation and a deed of mortgage, both with the effect of providing a charge in favour of the second defendant and both subject to the standard mortgage terms in place at the time. Those terms explicitly empower the second defendant to appoint a receiver such as the first named defendant.

Furthermore, and notwithstanding the implied allegation of criminality contained in para. 41 of the plaintiffs' affidavit, there can be no suggestion of the perpetration of any form of fraud where the plaintiffs, with the benefit of legal advice from their solicitor, executed both the indenture of confirmation and the mortgage deed.

In the circumstances, I say and believe that the charge as registered is valid and that the plaintiffs have failed entirely to demonstrate the existence of a fair issue to be tried between the parties."

32. Mr. Smith also avers that in the 2017 proceedings, the receiver has not sought any reliefs against the plaintiff and nor has he asserted otherwise.
33. Mr. Smith on behalf of the second named defendant essentially advances the proposition that the second named defendant acted upon the documentation furnished to them by the plaintiffs who were legally represented throughout. It was the plaintiffs' solicitors who forwarded the documentation upon which the second named defendants now rely. Whilst that is undoubtedly factually correct, it is not the end of the matter.

34. As matters stand, the second named defendant is now on notice that it has a mortgage registered at entries two and three of folio 117421F – the Palmerstown property in favour of the plaintiffs. They must now be aware from their own enquiries that no monies were advanced to the plaintiffs and in such circumstances in light of these averments of Mr. Smith it would require a hearing of this matter to determine the entitlement of the defendants to rely upon this charge in light of what, on the basis of the documentation, appears to be their present knowledge of the facts and circumstances of this matter. There are specific entries on the folio stating that the second named defendant has acquired the interest in respect of the entries against the plaintiffs. The suggestion that because the plaintiffs executed a power of attorney that their solicitors or other parties were thereafter entitled to take the steps that they did is rejected. In my view it is no answer for the second named defendant to assert that a charge is executed on foot of any power of attorney and thereafter that is an end of the matter.
35. The second named defendant contends, in essence, that it has advanced a mortgage to the Hilliards, in respect of the loan approval form completed by them in which they failed to disclose any other beneficial interest in the property. Furthermore, the plaintiffs executed an indenture of confirmation in respect of their interest in Palmerstown.
36. Within this application the plaintiffs do not deal with the implications of the indenture of confirmation. On behalf of the second named defendant, it is averred that that is sufficient for their purposes that the documentation was duly executed and forwarded to them. However, what the first and second named defendants have yet to clarify is, if their contentions are correct, why, if they contend that the Hilliards' mortgage and the indenture of confirmation by the plaintiffs is sufficient, did they separately and independently act to appoint the first named defendant as receiver over the Duffys' interest on 20th January, 2017.
37. The fact is, from the documentation exhibited in both proceedings, the plaintiffs signed a mortgage and a deed of confirmation following the execution by the Hilliards of their mortgage. The execution of both documents is curious to say the least and neither of the defendants has sought to deal with, let alone explain this apparent discrepancy.
38. Moreover, they have yet to deal with the fact that there are two mortgages over Palmerstown each disclosing a loan of €250,000. They have yet to confirm from their records whether an amount of €500,000 was advanced as the mortgages appear to disclose; €250,000 to the Hilliards and €250,000 to the Duffys. The second named defendant is now on notice of matters that in my view make it incumbent upon them to assess their entitlement as a matter of law to act on foot of the charges registered on folio 117421F in favour them and executed by the plaintiffs.
39. In such circumstances their appointment of the first named defendant as receiver in a document dated 20th January 2017 on foot of such charges also requires clarification. It may well be that at a full hearing of this matter these matters can be properly dealt with; but at this time, with the facts as presently known, the execution of the mortgage, its

registration in favour of the second named defendant and the appointment of the first named defendant over that interest are matters that remain clouded in mystery.

40. The first named defendant in his grounding affidavit sworn in the 2017 proceedings does aver quite clearly (paragraph 15) that monies are owed to the second named defendant by the plaintiffs to these proceedings. That aspect of the matter has not been clarified and would appear incorrect.
41. Likewise, the plaintiffs have to be mindful of any legal entitlement to the entirety of the rental monies from this property in the circumstances of this case. They clearly have an interest in the Palmerstown property which does not extend to the entirety of it. As I say it may well be that all of these matters could be clarified at a full hearing of the matter. Certainly, the documentation discloses sufficient inherent contradictions that have not been resolved or indeed explained that, in my view, make it appropriate on the facts of this case to grant limited interlocutory injunctive relief.
42. Mr. Smith in his affidavit on behalf of the second named defendant claims that the plaintiffs may not be in a position to furnish an undertaking as to damages and might not be in a position to honour it. On the facts of this case where the defendants appear to be on notice of a mortgage in respect of which no borrowings were advanced and who have, it appears, no more than attributed the difficulties that arise from that to the plaintiffs and particularly their solicitors, it is incumbent upon the second named defendant, given the facts as outlined, to pursue this aspect of the matter further or to provide details as to their legal position is intending to rely upon their existing security in so far as these plaintiffs are concerned, in circumstances where significant doubts exist regarding the mortgages executed by the plaintiffs.
43. On the facts of this case (and some of the relevant matters were disclosed within the 2017 proceedings and appear within that judgment) we appear to have the remarkable situation that the plaintiffs executed a mortgage over the Palmerstown property where no borrowings were sought by them or extended to them. Application was then made on foot of that mortgage to register charges against each of these plaintiffs in respect of folio 117421F. It appears to be on the basis of that documentation that the first named defendant was appointed receiver over their interests in the Palmerstown property in January 2017. If the mortgages executed by the plaintiffs were to be impugned (and there would, on the basis of the information available to me, appear to be a reasonable basis for that assumption) then certain implications might flow in respect of the appointment of the first named defendant as it was done expressly on foot of the mortgages executed by the plaintiffs, not any deed of confirmation executed by them or otherwise.
44. In my view, therefore, the plaintiffs have satisfied the threshold test of a fair or reasonable case to be tried pursuant to the *Campus Oil criteria* (*Campus Oil v Minister for Industry and Energy (No 2)* [1983] I.R. 88) principles. In my view not to grant limited interlocutory relief(s) on the facts of this case would create a serious and disproportionate risk of injustice (*Okunade v Minister for Justice, Equality and Law Reform* [2012] 3 I.R.



152) In my view there are matters where the interests of justice require that the issues set out above require clarification. In the circumstances of the case, I believe that the balance of convenience favours the plaintiffs in that regard. With regard to the question as to the adequacy of damages, in my view the questions surrounding this transaction in so far as these plaintiffs are concerned, raises sufficiently serious issues that this criteria is, on the specific facts of this case, a less important one than the resolution of what is clearly a situation that requires proper clarification. In my view the balance of convenience clearly favours the grant of relief and in my view, on the facts of this case, that the plaintiffs are potentially persons of limited means is a fact to which I have had regard. However, in this case to deny reliefs on that ground would be to potentially occasion them serious injustice. These are deserving plaintiffs.

45. For the avoidance of doubt, were any of the reliefs sought to be properly interpreted as seeking mandatory relief(s), then I am further satisfied that the principles initially stated by the Supreme Court in *Maha Lingham v Health Service Executive* [2005] IESC 89 being a likelihood of success at the hearing of an action are also satisfied on the facts of this case.
46. I also note that by letter dated 28th February 2018, the plaintiffs' solicitor wrote to the solicitors for the defendant setting out the position in some detail. Whilst I note that it has been emphasised within the 2017 proceedings that no reliefs are sought against these plaintiffs, in my view the appointment of the receiver over the interests of the plaintiffs in Palmerstown in January 2017 and their continued reliance upon the security furnished to them by the plaintiff's solicitors on their behalf necessitates the grant of limited injunctive relief upon the very unusual facts of this case.
47. The plaintiffs have sought numerous and varied reliefs within their notice of motion and, in my view, a restricted form of interlocutory relief would be appropriate on the facts of this case. I will hear the parties further as to the precise nature of that relief and any other orders including the question of costs