



**THE COURT OF APPEAL**

Neutral Citation Number [2022] IECA 137

Record Number: 2021/228

**High Court Record Number: 2020/1910P**

**Donnelly J.  
Noonan J.  
Pilkington J.**

**BETWEEN/**

**STEPHEN TENNANT**

**PLAINTIFF/RESPONDENT**

**-AND-**

**THOMAS REIDY AND CATHERINE REIDY**

**DEFENDANTS/APPELLANTS**

**JUDGMENT (*Ex Tempore*) delivered on the 17th day of June, 2022 by Mr. Justice Noonan**

1. This appeal involves a commonly arising claim by a receiver appointed by a financial institution for an order for possession in respect of lands over which the financial institution holds a charge. As appears to be now the norm, the receiver's application was made by way of a motion seeking an interlocutory injunction. Such motions, when granted, frequently dispose of the entire proceedings in circumstances where, once possession has been obtained, the property is sold and there is often little to be gained by proceeding further with the action. The perhaps unusual feature of the present proceedings is that the defendants/appellants (Mr. and Mrs. Reidy) are not the borrowers from the financial institution in question.
2. Although the facts are set out in some detail in the careful written judgment delivered by the High Court (Stack J.) on the 29th July, 2021, it is I think useful to set out a brief chronology of the relevant events, which appear to be as follows:

- 2006 to 2010 – AIB advanced various loans to Padraig and Janet Ryan on foot of various facility letters which totalled €2.345M.
- 19th May 2008 – The Ryans executed Deed of Charge in favour of AIB over, *inter alia*, the property the subject matter of these proceedings known as Apartment 2, Fishermans Wharf, Manor Court, Adare, County Limerick being the property comprised in Folio 7132L of the Register, County Limerick.
- 23rd May 2008 – The charge was registered on the Folio.
- 26th March 2015 – A demand for payment of the outstanding loans issued from AIB, the Ryans have having fallen into default.
- 14th September 2015 – On or shortly before this date, Mr. and Mrs. Reidy concluded an oral agreement to buy the property from the Ryans for €100,000. Mr. and Mrs. Reidy paid a sum of €5,000 by way of booking deposit to the estate agents retained by the Ryans in relation to the sale of the property.
- 30th September 2015 – AIB were advised of the sale by the Ryans' solicitors. Thereafter, considerable delays ensued as a result of problems with the title to the property.
- 29th April 2016 – The plaintiff/respondent herein, Mr. Tennant, was appointed as receiver over the property.
- 1st October 2016 – The Ryans and the Reidys agreed that the Reidys would go into occupation of the premises on foot of a letting agreement for one year period at a nominal rent of €100 per month. The Reidys had sold their family home in the meantime and as the property being purchased was in poor condition, they were anxious to commence renovations without further delay.
- 5th October 2016 – The Receiver wrote to the occupants of the property, now the Reidys, informing them that he had been appointed.
- 16th October 2016 – Mr. Reidy contacted the Receiver's office and spoke to one of his staff, Ms. Sinead Dillon, with whom he had correspondence. In his replying affidavit herein, Mr. Reidy avers that when he discovered the Receiver's appointment, he immediately contacted his office to ascertain the status of the purchase of the apartment. When he spoke to Ms. Dillon, he says he was clearly and unequivocally told by her that the sale would proceed. He avers further that on the same day, the estate agents asked him to provide proof of funds, which was done. Thereafter, the Reidys claim to have expended some €30,000 on renovating the property, although the High Court found this to be €20,000 and that finding has not been appealed.
- August 2018 – The Ryans' loans were transferred to Everyday Finance DAC ("Everyday") and the appointment of the Receiver was novated to Everyday.

- March 2019 – Everyday advised the Reidys for the first time that the sale would not now proceed.
  - 9th April 2019 – Everyday, through its solicitors, demanded possession of the premises and that the Reidys vacate within 7 days.
  - 9th March 2020 – The plenary summons herein was issued followed by, on the 28th July, 2020, a notice of motion seeking a mandatory injunction directing the Reidys to deliver up possession to the Receiver.
3. There was remarkably little dispute on the facts, or indeed the law, before the High Court. Most notably, following Mr. Reidy swearing a replying affidavit deposing to his conversation with Ms. Dillon, no further affidavit was delivered on behalf of the Receiver taking issue with that averment. The primary ground upon which the application for the injunction was resisted was that the conversation between Mr. Reidy and Ms. Dillon and the subsequent execution of renovations in reliance on it raised an estoppel in favour of the Reidy's, such that it would be unconscionable to grant a mandatory injunction compelling them to deliver up possession.
  4. In her judgment, the High Court judge accepted, for the purposes of the injunction application, that an oral agreement for sale had been made between the Ryans and the Reidys. She noted that shortly after the Reidys went into occupation, they would have become aware by virtue of the contact from the Receiver that the property had been mortgaged to AIB. She observed, correctly, that a sale of the property could not bind AIB without its consent referring to the well-known case of *Fennell v N17 Electrics Limited (In Liquidation)* [2012] 4 IR 634. She noted the Receiver's evidence that he had received valuations of the property at €120,000, although I note these are not exhibited in his affidavit, and further, that he offered to sell the property to the Reidys for €120,000, being its claimed value. It is relevant to note in that regard that the Receiver was directly involved in negotiating a sales price with an agent acting for the Reidys which culminated in this offer which was rejected
  5. The judge refers to conversation between Mr. Reidy and Ms. Dillon presumably again accepting that it took place, at least for the purposes of the application. She noted that the Reidys were claiming to have part-performed the agreement with the Ryans but noted that this does not bind Everyday or the Receiver.
  6. She then considered the issue of promissory estoppel with particular reference to the judgment of the High Court (Laffoy J.) in *The Barge Inn Limited v Quinn Hospitality Ireland Operations Limited* [2013] IEHC 387. She noted that Laffoy J. held in that case that in order for there to be a successful claim of promissory estoppel, the following had to be established: -
    - (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.
7. The judge considered that (a) was not satisfied because there was no pre-existing legal relationship between the Receiver and the Reidys. She accepted that they had spent the sum of €20,000 or thereabouts in renovating the structure of the property. With regard to key ingredient (d), she was of the view that the required element of unfairness or unconscionability did not exist. It is perhaps a little difficult to follow the judge's reasoning on this point. She appears to have concluded that because the Receiver offered to sell the property to the Reidys for €120,000, and there was uncontroverted evidence that this was its value, the Reidys ought to have accepted this offer and the proceedings would then have been unnecessary. She also appears to have factored into this conclusion the fact that the Reidys had lived rent free in the property for nearly five years. She said that the reality is that no one had sought to oust the Reidys unfairly, again referring to the reasonableness of the offer made by the Receiver. She also considered that ingredient (e) to be absent but beyond merely stating that she gave no reasons for her conclusion.
8. The judge then returned to a consideration of the legal principles relevant to interlocutory mandatory injunctions and here again, there is no dispute between the parties that the judge correctly identified those principles.
9. *Maha Lingam v HSE* [2005] IESC 89 established that the plaintiff must show a strong case that is likely to succeed at the full hearing in order to obtain a mandatory interlocutory injunction. I think it is clear that in summary, the judge considered that the Reidys had raised no arguable defence to the claim and as such, it was not strictly necessary to consider the issue of balance of convenience. However, had it been necessary to do so, she would have reached the conclusion that the balance of convenience favoured granting the injunction. She also rejected the secondary arguments advanced by the Reidys that there had been unconscionable delay in making the application in reliance on the judgment of the High Court in *McCarthy & Anor v McCarthy & Anor* [2021] IEHC 115. In the result, the judge granted the order sought with a stay of six months and made no order as to costs.
10. The battle lines for this appeal are fairly tightly drawn as a result of the helpful submissions, both written and oral, from both sides. In essence, the Reidys complain that the judge fell into error in applying the doctrine of promissory estoppel and further, overlooked the separate issue of proprietary estoppel. It is further said that the judge's assessment of the delay issue was erroneous.
11. I think the first matter to be considered is the one I alluded to at the outset, namely the seeking of orders for possession in a quasi-summary way by the medium of an interlocutory injunction. As I have noted, there is no issue between the parties concerning the application

by the High Court of the principles relevant to the grant of mandatory interlocutory injunctions. The plaintiff has to show a strong case that is likely to succeed at trial. The corollary of this of course is that the defendant must have no arguable defence. As has been said before, anything is arguable but arguability in this context suggests that it must have at least some prospect of success, as opposed to being hopelessly unstateable. I think the judge recognised that the bar for the plaintiff in this application was a high one, whereas the arguability threshold for the defendants was correspondingly low. She nonetheless concluded that there was no arguable defence for the reasons she explained.

12. The fact that the plaintiff's right to the remedy must be clear is underscored by some recent judgments of the Supreme Court suggesting that interlocutory injunctions should not routinely become a way of obtaining summary judgment. Thus in *Charleton v Scriven* [2019] IESC 28, Clarke CJ. said (at para. 7.1): -

"Interlocutory injunctions should not be treated as a means of attempting, in practice, to obtain a summary judgment. They are designed to do what they say, that is, to hold the situation until there can be a full trial. While there will inevitably be some cases where the result of an interlocutory injunction may, in practical terms, bring the proceedings to an end, it remains the case that there is an obligation on any party which has obtained an interlocutory injunction not to rest on their laurels, but to bring the matter on for full hearing."

13. The Supreme Court returned to this theme more recently in *Clare County Council v McDonagh & Anor* [2022] IESC 2 where Hogan J., delivering a judgment with which the other members of the Court agreed, said (at p. 45): -

"... [T]he present case involves an application for a mandatory interlocutory injunction. Not only are the principles governing the grant of such interlocutory relief well set out in the decision of this Court in *Merck, Sharpe and Dohme Limited v. Clonmel Chemicals Limited* [2019] IESC 65, [2020] 2 IR 1 (*i.e.*, fair case, adequacy of damages and balance of convenience), but it is also accepted that an applicant for such mandatory interlocutory relief must generally show that the case is particularly strong and powerful: see, e.g. *Attorney General v. Lee* [2000] IESC 80, [2000] 4 IR 68, *Shelbourne Holdings Ltd v. Torriam Hotel Operating Company Limited* [2008] IEHC 376; *Herrera v. Garda Commissioner* [2013] IEHC 311 and, most recently, the judgments of this Court delivered respectively by Clarke C.J. in *Charleton v Scriven* [2019] IESC 28 and Irvine J. in *Taite v Beades* [2019] IESC 92. A further consideration is that, as Irvine J. put it in *Taite* (echoing a point previously made by Charleton C.J. in *Charleton*), an interlocutory injunction should be 'merely a stepping stone' towards a trial and the courts 'must ensure that such relief is not, in practice, treated as a means of obtaining summary judgment against the defendant.' "

14. Clearly therefore, the Court should be slow to grant such an order in the presence of a colourable defence. Although the facts in *Clare County Council v McDonagh* were very different, not least because the plaintiff County Council was a public authority, which itself owed certain statutory obligations to the defendants who were members of the travelling

community, some emphasis is apparent in the judgment of Hogan J. on the fact that the case engaged principles relevant to the individual's dwelling, as it does here.

15. I think this requires a relatively cautious approach by the Court to the grant of what is, in substance and effect, a final order removing the defendants from their family home of some five years. It is undoubtedly correct that the trial judge confined her analysis to promissory estoppel and the six principles thereof set out by Laffoy J. in *The Barge Inn*. She found that the Reidys fell at the first hurdle, in that there was no pre-existing legal relationship between them and the Receiver. Leaving that to one side for a moment, the judge accepted that a stateable case had been made with regard to criteria (b) and (c). She held however that (d) had not been made out and it is here that I have to respectfully part company with the High Court. A clear representation was made to the Reidys by or on behalf of the Receiver that the contract they had entered into with the Ryans would be performed. That has not been denied by the Receiver. Nor has it been denied that on the strength of that representation, the Reidys spent substantial monies on renovating the premises. It can hardly be doubted that they have acted to their detriment in doing so given that they will have lost that sum with little real prospect of recovering it from the Ryans.
16. The Reidys argue that the first criterion referred to by Laffoy J., namely the requirement for a pre-existing relationship, may not be an immutable requirement, at least where proprietary estoppel is concerned. They suggest that there is some authority for the proposition that a pre-existing contractual relationship is not necessary for the successful invocation of the doctrine of estoppel – see *In Re JR, a Ward of Court* [1993] ILRM 657. The Receiver says that does not really avail the Reidys because in that case, Costello J. was talking about non-legal relationships that may involve moral obligations such as that of parent and child or husband and wife.
17. They also rely on the principles of proprietary estoppel elucidated by the English High Court in *Re Basham* [1986] 1 WLR 1498 where the Court said: -

“I turn then to the law. The plaintiff relies on proprietary estoppel, the principle of which, in its broadest form, may be stated as follows: Where one person, A, has acted to his detriment on the faith of a belief, which was known to and encouraged by another person, B, that he either has or is going to be given a right in or over B's property, B cannot insist on his strict legal rights if to do so would be inconsistent with A's belief. The principle is commonly known as proprietary estoppel and since the effect of it is that B is prevented from asserting his strict legal rights it has something in common with estoppel.”
18. The Reidys further rely on the judgment of Edwards J., then a judge of the High Court, in *An Cumann Peile Boitheimeach Teoranta (Bohemian Football Club Ltd) v Albion Properties Ltd & Ors* [2008] IEHC 447 where he identified the relevant principles as being detriment, expectation or belief, encouragement and no bar to the equity, without any express reference to the need for a pre-existing legal relationship.

19. The Receiver counters this with the argument that proprietary estoppel cannot arise in the circumstances of the present case where he, as Receiver, has in fact no interest in the property. As a matter of strict law, that is quite correct, but I would have thought the equitable principle engaged is flexible enough to recognise the reality of the fact that, although the Receiver appears not to have a power of sale in this case, it is accepted that to the extent his servant or agent made the relevant representation, she did so on behalf of AIB. He has therefore in effect agreed, on the behalf of the Bank, that it will not exercise its powers of sale in a manner inconsistent with the agreement with the Ryans by representing that the sale with the Ryans would proceed. I see no difference in principle therefore.
20. I do not think it is necessary to go a great deal further, although I do not of course overlook the argument made about delay against the Receiver. In this regard the Receiver claimed that for delay to defeat his claim it would have to be accompanied by prejudice to the Reidys from the delay and none had been shown. While that may or may not be correct, prejudice was not a feature of the judgment of the High Court in *McCarthy v McCarthy* where delay on its own was held sufficient to defeat the claim. Here again, however, it cannot, in my view, be said that this defence is not at least arguable. This Court, and indeed the High Court, is not concerned with determining these issues once and for all. That is clearly a matter for the trial. All that is necessary is, as already stated, an arguable case and I think that this is the very least that can be said for the arguments advanced by the Reidys.
21. The Receiver makes a number of points including that the terms of the Deed of Charge itself preclude reliance on any oral representations so that the statement by Ms. Dillon cannot be relied upon. I think that submission is somewhat misconceived in circumstances where the Reidys were not parties to the charge and knew nothing of its terms. Importantly however, in the course of his submissions today counsel for the receiver very fairly conceded that many of the arguments advanced on both sides could be described as "technical" and "fussy". To borrow an analogy from the jurisprudence on granting summary judgment, the forum for such elaborate legal arguments should be the trial and not the hearing of an application for a mandatory interlocutory injunction.
22. Insofar as the balance of convenience becomes relevant in circumstances where the Reidys have an arguable defence, I would again disagree with the trial judge's assessment. I find it difficult to see how the balance of convenience and thus the least risk of injustice, would other than favour a couple in their 70s not being turned out of their home as against any relatively minor prejudice suffered by a financial institution having to await the outcome of the trial before enforcing its security.
23. Finally, I wish to say that this case provides a perfect exemplar of the incurring of costs entirely out of proportion to what is in issue here. What is between the parties is the sum of €20,000. Not alone are costs incurred to date disproportionate to that sum but the effect of allowing this appeal is that the matter will proceed to a full plenary hearing, the costs of which will amount to many multiples of what has gone before. That is even without taking account of the possibility of another appeal. This is not in anyone's interests, and it is most

certainly not in the interests of the Reidys. Indeed, given the amounts involved and the value of the property, it seems to me that this matter should never have come before the High Court at all. However, we are where we are and I would urge the parties in the strongest possible terms to see sense and resolve this matter at the earliest opportunity.

24. For the reasons given therefore, I would allow this appeal, dissolve the injunction granted by the High Court and dismiss the Receiver's application.
25. **Donnelly J.:** I agree with the judgment just delivered by Judge Noonan.
26. **Pilkington J.:** I too agree with the judgment just delivered by Judge Noonan and the orders he proposes.