

THE HIGH COURT

BETWEEN

LUKE CHARLETON AND ANDREW DOLLIVER

PLAINTIFFS

AND

PAUL COATES

DEFENDANT

JUDGMENT of Ms. Justice Reynolds delivered on the 9th of October, 2019

Introduction

1. In the within application, the plaintiffs (“the Receivers”) seek orders directing the defendant, Mr. Coates, to vacate a residential premises situate at 13 Coldwater Lakes, Saggart, Co. Dublin and to remove his personal property therefrom, together with an order restraining Mr. Coates from entering into, remaining upon or interfering with the property.
2. Mr. Coates’s core objection to this application is the contention that the Circuit Court has exclusive jurisdiction to grant the reliefs sought, having regard to the provisions of s.3 of the Land and Conveyancing Law Reform Act, 2013.
3. In essence, therefore, the issues for determination are as follows:
 - (a) Whether these proceedings concern Mr. Coates’s principal private residence such that s.3 of the Land and Conveyancing Law Reform Act 2013 is engaged;
 - (b) Whether the plaintiffs satisfy the criteria set out in *Campus Oil Limited v. Minister for Industry and Energy (No. 2)* [1983] IR 88 for the granting of interlocutory injunctive relief.
4. Before engaging with the issues, it is necessary to set out the factual background.

Background

5. In 2005, Ulster Bank (Ireland) Limited (“the Bank”) and Mr. Coates entered into a loan facility agreement on foot of which the Bank advanced a sum of €1m to Mr. Coates for the stated purpose of assisting with a personal investment in a capital guaranteed bond. The repayment period was stated to be seven years from the first drawdown. The loan advanced to Mr. Coates was secured by a charge over the property, the subject matter of these proceedings. It is common case that at the time of the grant of the security and the drawing down of the funds the security did not constitute the family home of Mr. Coates, who resided at Cypress Downs, Templeogue, Dublin.
6. Mr. Coates subsequently defaulted on the loan repayments and in March 2013 the Bank issued a letter of demand for repayment of the loan.
7. By Global Deed of Transfer dated 25th February, 2016, the interests of the Bank were transferred to Promontoria (Aran) Limited.

8. By Deed of Appointment dated 15th December, 2016, the Receivers were appointed over the said property. Mr. Charleton thereafter wrote to Mr. Coates requesting that all future rents on the property be paid directly to him as joint receiver.
9. By letter dated 19th December, 2016, Mr. Coates threatened to initiate a formal complaint against the receivers with An Garda Síochána alleging intermeddling, harassment, duress and undue influence. In this letter and subsequent correspondence, he stated that he was the owner and “home occupier” of the property at Coldwater Lakes.
10. In subsequent correspondence, Mr. Coates made various allegations against Ulster Bank as well as O’Dwyer Real Estate Management which had been appointed by the joint receivers.
11. By letter dated 12th October, 2017, Mr. Charleton wrote to Mr. Coates asking him to substantiate the claim that the property was a family home. In his reply dated 24th October, 2017, Mr. Coates advised that he had nominated and authorised a Mr. Sutcliff, Accountant of Landsdowne Francs & Company, to act on his behalf.
12. In April 2018, solicitors acting on behalf of the Receivers issued a letter addressed to the occupier of 13 Coldwater Lakes requesting vacant possession within fourteen days and in default thereof advising that legal proceedings for vacant possession would be commenced.
13. By letter dated 14th May, 2018, Landsdowne Francs advised the Receivers’ solicitors that the Receivers had no entitlement to enter into Mr. Coates’s private residence, that Mr. Coates was taking issue with the amount due in relation to his mortgage and further that Mr. Coates was owed a substantial credit due to the sale of an Ulster Bank bond. The letter further pointed out that the bond had been intended to be used to repay the mortgage but was now effectively worthless.

The Evidence

14. In his grounding affidavit, Mr. Charleton asserts that his initial inquiries in respect of the property “disclosed that the property was occupied by a tenant but later inquiries suggested that the defendant had perhaps moved back into the property”.
15. Mr. Coates filed a replying affidavit in which he maintained that the property had been his principal private residence since May 2015.
16. In a further affidavit, Mr. Coates disclosed that he had separated from his spouse in 2007 and vacated the family home at that time. It is common case however that at the time of execution of the facility on the mortgage in 2005, he resided in the family home in Cypress Downs, Templeogue.
17. Subsequent to the issuing of proceedings, Mr. Coates submitted a substantial financial statement in which he disclosed that he has no capacity to address the liabilities in question.

18. Mr. Coates suffers from ill-health and has no source of income. Further, he has an outstanding loan with the PTSB for €6.9m which is being addressed on an interest only basis. At the conclusion of the hearing herein, Mr. Coates agreed to discharge the sum of €2,000 per month towards the mortgage arrears although it is unclear how he is in a position to do so having regard to his precarious financial circumstances.
19. Since the institution of these proceedings, Mr. Coates has paid the sum total of €3,000 against a total liability of approximately €1.5m.

The First Issue

The Defendant's Position

20. Mr. Coates contends that the property has been his principal private residence since May, 2015 and asserts that the Receivers have failed to afford him an opportunity to avail of the Mortgage Arrears Resolution Process as required by the Code of Conduct on Mortgage Arrears 2013 promulgated by the Central Bank of Ireland. Mr. Coates has exhibited utility bills and other documentation in his affidavits supporting his contention that since May, 2015 the property has been his principal private residence.
21. In the circumstances, Mr. Coates seeks to rely on the relevant statutory provisions of the Land and Conveyancing Law Reform Act 2013 which require proceedings relating to certain mortgages to be brought in the Circuit Court.
22. Section 3 of the Land and Conveyancing Law Reform Act 2013 provides in material part as follows: -
 - “(1) This section applies to land which is the principal private residence of-*
 - (a) the mortgage of the land concerned..*
 - (b) ...*

and the mortgage concerned was created prior to 1 December 2009.
 - (2) Subject to subsection (4), proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates and which land is land to which this section applies shall be brought in the Circuit Court.*
 - (3) ...*
 - (4) Subsection (2) does not preclude a person initiating proceedings in the High Court where other proceedings relating to the enforcement of the mortgagee's rights under the mortgage concerned have been commenced in that Court prior to the coming into operation of this section where those other proceedings have not been determined.”*
23. Whilst the phrase “*principal private residence*” is not defined in the Act of 2013, it is submitted that the definition as provided for in s.2(1) of the Personal Insolvency Act 2012 can be relied upon as follows: -

“principal private residence’ means a dwelling in which the debtor ordinarily resides...”

It is submitted that this property comes within the criteria set out in subs. (1) of s.3, because: -

- (a) the mortgagor in this case is the defendant, and
- (b) the property is his principal private residence, and
- (c) the mortgage in question was created before the 1st day of December, 2009.

24. It is further submitted that the criteria set out in subs. (2) are also satisfied in circumstances where it is contended that each of the Receivers is a “mortgagee” for the purposes of s.3 of the Act of 2013 on foot of the following definition given in s.2(7): -

“In this section and section 3 “mortgagee” includes a person deriving title from a mortgagee and a receiver appointed by the mortgagee...”

25. Mr. Coates’ counsel posits that the instant proceedings are also possession proceedings. The reliefs being sought (*“an Order directing the Defendant...to vacate the premises” and “an Order restraining the Defendant... from entering into, remaining upon or interfering with the property”, etc.*) include (or are equivalent to) an order for possession, and further submits that regard ought to be had to the following definition given in s.3 of the Land and Conveyancing Law Reform Act, 2009 as follows: -

“possession” includes the receipt of, or the right to receive, rent and profits, if any...”

Furthermore, it is submitted that the case pleaded against Mr. Coates in the Statement of Claim herein is that he *“has failed to furnish possession to the Plaintiffs of the Property”* (paragraph 6), that he *“continues to withhold possession of the Property”* (paragraph 7) and that the plaintiffs are *“deprived of the possession of the Property to which [they are] entitled”* (paragraph 8). It is accordingly submitted that these are possession proceedings for the purposes of s.3, notwithstanding their formulation as an action to restrain a trespass.

26. The saver provided for in subs. (4) does not arise in this case, i.e. no High Court proceedings to enforce the mortgagee’s rights were issued prior to the commencement of s.3 of the Act of 2013.
27. Counsel for Mr. Coates urges that it follows from the foregoing that the Circuit Court has exclusive jurisdiction to hear and determine the within proceedings.
28. Notably, Counsel fails to open or indeed rely upon any authorities in support of these propositions.

The Receivers’ Position

29. The Receivers contend that the Code of Conduct on Mortgage Arrears does not apply in the within application because Mr. Coates drew down a commercial mortgage for investment purposes and therefore cannot seek to unilaterally alter the terms of that loan agreement.

30. In this regard, reliance is placed on the decision of White J. in *ACC Bank v. Quinn* [2014] I.E.H.C. 677, as to the applicability of the Code of Conduct on Mortgage Arrears, wherein he stated as follows: -

“These codes apply to a mortgage loan of a borrower which is secured by their primary residence. Primary residence means a property which is (i) the residential property which the Borrower occupies as his primary residence in this State or (ii) a residential property in this State which is the only residential property owned by the borrower.

35. *There may be situations where a lender acquiesces in the use of a property as a primary residence, which has been mortgaged for commercial purposes, and which was not intended to be the primary residence of the borrower. In that case the code would apply. For that to arise there would have to be cogent evidence advanced that the lender had notice that the property was being used as the primary residence of the borrower. There is no independent corroborative evidence advanced by the defendant to suggest that the bank had such notice, and the written documentation suggests the exact opposite.*

36. *The first occasions it had been asserted the code applied was during the course of these proceedings.”*

31. In determining that the defendant was not entitled to have the Code applied in that case because he had drawn down a commercial mortgage for the purposes of purchasing an investment property, White J. stated as follows: -

“The fact that the defendant decided to use the property as his primary residence for periods of time, without any written notice to the plaintiff does not entitle him to have the Code applied.”

32. It is acknowledged by Counsel for the Receivers that this Judgment falls outside the provisions of s.3 of the 2013 Act, which did not apply to pre-existing proceedings seeking possession of land, relying on the statutory provisions or the amended provisions, as appears from s.4(2)(a) of the 2013 Act.

33. Counsel also cites the decision of the High Court in *Fennell v. Creedon* [2015] I.E.H.C. 711, where, in considering whether the Code applied, Murphy J. stated as follows: -

“The Court is not at all persuaded that this contract is one which attracts the protection of the Code of Conduct on Mortgage Arrears. The Code is specified to apply to the mortgage loan of a borrower which is secured by his/her primary residence. This particular loan was not secured by the defendant’s primary

residence. It was only four years after the conclusion of the loan agreement and mortgage that the defendants moved into the property... and converted it into their primary residence."

34. In the Fennell case, the defendants had sought to argue that the only means by which the mortgagee could take possession of a primary residence was through formal repossession proceedings. It was argued that the appointment of a receiver could not be allowed to circumvent the application of the Code by permitting repossession of the residence without a court order. The Court held, at para. 68, that on the basis of the Supreme Court decision in *Irish Life and Permanent v. Dunphy*, [2015] I.E.S.C. 46, the only aspect of the MARP procedure to which a court can have regard is the operation of the moratorium period referred to in paras. 45 and 47 of the Code of Conduct on Mortgage Arrears. The Court noted that on the basis of the Supreme Court decision, the Court had no power to prescribe the method by which a financial institution sought to enforce the security over a primary residence which is the subject of a mortgage.
35. The plaintiffs also submit that as receivers, they are not affected by the provisions of the Code which derives its status under s.117 of the Central Bank Act, 1989 in that the plaintiffs are not licence holders or persons supervised by the Central Bank such that s.117 of the Act does not apply.
36. The stated purpose for this loan was assisting with a personal investment in a Capital guaranteed bond and the security for the loan is the property at Coldwater Lakes. Mr. Coates has failed to divulge where he has resided since 2007 when he purportedly left the family home until he moved into Coldwater Lakes in 2015. Indeed, it is clear that up until 2016 he continued to use his address at the family home for all his official business dealings and communications.
37. The Court cannot ignore Mr. Coates' obfuscation in the face of repeated requests from the Receivers' legal advisors to clarify this issue. Furthermore, the Court is assisted in its deliberations by the decision of the Court of Appeal in *Ken Tyrrell v. Wright and Rope Walk Car Park Limited* [2018] IECA 295, wherein at par. 70, the Court stated as follows: -

"As was made clear by Murphy J. in her Judgment in Fennell v. Creedon [2015] IEHC 711, merely because mortgagors move into a secured property several years after a commercial loan agreement is entered into is not sufficient to usurp the underlying terms of the mortgage contract".
38. In all the circumstances, the proposition that Mr. Coates is somehow entitled to unilaterally alter the terms of the loan agreement, some ten years after that agreement had been entered into, is simply unsustainable.
39. The Court therefore rejects the arguments that the property constitutes Mr. Coates' principal private residence in circumstances where it is clear that it remains the security for the commercial loan agreement entered into by Mr. Coates in 2005.

The Second Issue

Application for interlocutory injunctive relief

40. The principal arguments proffered on behalf of Mr. Coates in opposition to the grant of such relief are grounded on the pretext that the property is his principal private residence and therefore the only enforcement procedure is through the Circuit Court by provisions of s.3 of the Land and Conveyancing Law Reform Act, 2013. In light of the Court's findings above, clearly these arguments now fall away.
41. In determining the entitlement or otherwise of the Receivers to the reliefs sought, the Court is guided by the principles as enunciated by the Supreme Court in *Charleton and Cotter v. Scriven* [2019] IESC 28.
42. It is well settled that in applications of this nature, the plaintiff is required to establish a higher degree of likelihood of success than the "fair issue to be tried" test. As was set out in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC and endorsed by Clarke C.J. in *Scriven*, the overall approach to be taken is as follows: -
- "The Court must, in all cases, act so as to minimise the risk of injustice".*
43. There is no dispute on the facts that Mr. Coates has defaulted on his obligations in respect of the loan entered into in 2005.
44. The security for that loan is the property which Mr. Coates has chosen to reside in since 2015. Mr. Coates has failed to disclose where he resided from 2007 until 2015 or indeed to explain why it was necessary for him to change residence at that time.
45. Since taking up residence in 2015, he has discharged the sum total of €3,000 against a total liability of approximately €1.5m until an agreement was reached at the end of the hearing for the payment of €2,000 per month pending the resolution of the proceedings. No explanation was forthcoming as to his ability to discharge these monies in circumstances where he suffers from ill health, has no disclosed source of income and has had his application for a pension refused. Indeed, maintaining the upkeep on such a substantial property would only further exacerbate his perilous financial position.
46. Mr. Coates has accumulated additional debts in the sum of approximately €6.9m with the PTSB, which is currently addressed on an interest only basis. Again, there is no explanation forthcoming as to his wherewithal to discharge these payments.
47. In all the circumstances, the Court is satisfied that a strong arguable case has been made out for the granting of the reliefs sought in the within application. The Court will therefore grant the reliefs sought in the plenary summons, on an interlocutory basis, as follows:

"(1) An Order directing the Defendant, his servant or agent or, any person having notice of the making of this Order, to vacate the premises known as 13 Coldwater Lakes, Saggart, County Dublin.

- (2) *An Order directing the Defendant, his servant or agent to remove all personal property from the premises at 13 Coldwater Lakes, Saggart, County Dublin.*
- (3) *An Order restraining the Defendant, his servant or agent or, any person having notice of the making of this Order, from entering into, remaining upon or interfering with the property known as 13 Coldwater Lakes, Saggart, County Dublin.*
- (4) *An Order restraining the Defendant from seeking to lease or rent the property at 13 Coldwater Lakes, Saggart, County Dublin, or from holding himself out as so entitled."*