

# THE HIGH COURT

[2021] IEHC 627

[2021 No. 3730P.]

**BETWEEN**

**PATRICK MUNNELLY AND ANNE MCGLYNN**

**PLAINTIFFS**

**AND**

**START MORTGAGES DESIGNATED ACTIVITY COMPANY, KEN FENNELL**

**AND JAMES ANDERSON**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Allen delivered on the 5<sup>th</sup> day of October, 2021**

## *Introduction*

1. By notice of motion issued on 20<sup>th</sup> May, 2021 and initially returnable for 4<sup>th</sup> June, 2021 the plaintiffs applied for an interlocutory order requiring the second and third defendants (who are receivers appointed by the first defendant) to deliver up possession of a property at 12 Marine Lighthouse, Enniscrone, County Sligo, and an injunction restraining each of the defendants from marketing for sale, selling, entering any further contract for sale or completing any sale of that property.
2. To the knowledge of the plaintiffs, the property had been put on the market for sale in November, 2020; contracts had been exchanged in March, 2021; and the sale had been due to be completed on 14<sup>th</sup> May, 2021. In the event the sale was completed on 21<sup>st</sup> May, 2021 and

the plaintiffs' solicitors were so advised by letter dated 2<sup>nd</sup> June, 2021. In the meantime, this action was commenced by plenary summons issued on 17<sup>th</sup> May, 2021 and on the same day the plaintiffs applied *ex parte* for an interim injunction restraining the completion of the sale. That application was refused but leave was granted for short service of a motion for interlocutory orders.

3. On the return date the plaintiffs' solicitors were provided with an unsworn final draft replying affidavit and the motion was adjourned by consent to allow them to consider the defendants' response to the motion. When the motion came back into the list on 1<sup>st</sup> July, 2021 counsel for the plaintiffs indicated that as the sale of the property had completed, the motion would not be proceeding. This judgment is concerned with the question of where responsibility for the costs of the motion should lie.

#### *The evidence*

4. The affidavit of the first plaintiff, sworn on 17<sup>th</sup> May, 2021, on which the motion was grounded, presented a reasonably straightforward issue.

5. The apartment at Enniscrone the subject of these proceedings was bought by the plaintiffs on 29<sup>th</sup> December, 1999 with the assistance of a loan of IR£120,000 from Irish Life and Permanent plc. I will refer to this as the Enniscrone loan. On 29<sup>th</sup> February, 2000 the plaintiffs executed a charge over the property in favour of the lender. I will refer to this as the Enniscrone charge. The charge, which was in a standard printed form, identified the loan then made as "*the sum initially advanced on foot of this security*" and provided that the property was charged with payment to Irish Life and Permanent plc of "*all present and future advances payable by the Mortgagor.*"

6. In April, 2007 the first plaintiff, only, borrowed €750,000 from Irish Life and Permanent plc to part fund the purchase by him of two apartments at 31 and 32 Rockbrook Court, Athlone, County Westmeath. I will refer to this as the Rockbrook loan. The letter of loan approval stipulated for a first charge over those two apartments and the apartment at 12 Marine Lighthouse, Enniscrone.

7. The premise of the action and motion is that the Rockbrook borrowings are not secured by the charge over the Enniscrone property. The stipulation in the Rockbrook loan approval for a charge over the Enniscrone property is said to show that the Enniscrone charge was solely intended to cover the Enniscrone borrowings.

8. The plaintiffs' borrowings from Irish Life and Permanent plc were the subject of a form of transfer dated 1<sup>st</sup> February, 2019 made between Irish Life and Permanent plc and the first defendant. By letters dated 7<sup>th</sup> February, 2019 the plaintiffs were notified of the transfer to the first defendant of the Enniscrone loan.

9. The plaintiffs' position in relation to the assignment of their loans and security is rather ambivalent. On the one hand the first plaintiff has sworn that neither he nor the second plaintiff has seen "*any meaningful proof of this purported assignment or evidence that [they] were given 'express notice' of such an assignment as required by law.*" On the other hand, the premise of the action is that the first defendant is bound by the terms of the charge and that the plaintiffs agreed to pay to the first defendant the full amount outstanding of the Enniscrone loan.

10. By letter dated 8<sup>th</sup> July, 2020 the first defendant demanded payment of the sum of €79,822.05, said to be the balance outstanding on the Enniscrone loan account as of 30<sup>th</sup> June, 2020, and threatened the appointment of a receiver and the sale of the property in default of payment.

**11.** By letter dated 31<sup>st</sup> August, 2020 the plaintiffs were notified of the appointment that day of the second and third defendants as joint receivers over the property and were sent a copy of the deed of appointment.

**12.** At some time after the assignment or purported assignment to the first defendant, and before the appointment or purported appointment of the second and third defendants, the plaintiffs engaged a firm called Negotiators and Mediators International to engage with the first defendant in relation to the Enniscrone property. A Mr. McGlynn of that firm is said to have been in communication with the first defendant for about twelve months prior to the appointment of the receivers, trying to negotiate a phased repayment.

**13.** The plaintiffs' case is that in the course of those negotiations it was agreed that the Enniscrone property could be redeemed if the full amount of the Enniscrone loan was paid. It is not said when precisely that agreement is alleged to have been made but what is said is that in or around November, 2020 the plaintiffs agreed to pay the full amount and the first defendant agreed to remove the receivers. The plaintiffs' case is that very soon afterwards Mr. McGlynn was informed that the Enniscrone property was "*cross-charged*" and that it would be sold by the second and third defendants and the proceeds applied to other loans.

**14.** Between December, 2020 and March, 2021 Mr. McGlynn and a solicitor retained by the plaintiffs sought from the first defendant evidence of the alleged "*cross-charge*".

Eventually, the first defendant's position was spelled out in a letter of 1<sup>st</sup> April, 2021 from Fieldfisher LLP to Mr. McGlynn: which was that the charge over the Enniscrone property covered all present and future advances. Those advances, it was said, included the Enniscrone loan – on which the outstanding balance was by then said to be €80,303.62 – and the Rockbrook loan – on which the outstanding balance was said to be €736,899.73. The receivers, it was said, were contracted to sell the property to a third party and the proceeds would be used to discharge the outstanding debt, interest and costs. While Fieldfisher's letter

identified their clients as the second and third defendants it expressly addressed Mr. McGlynn's recent correspondence with Start Mortgages DAC and the question of the security granted by the Enniscrone mortgage.

**15.** By letter dated 6<sup>th</sup> April, 2021 Mr. McGlynn took issue with Fieldfisher's argument as to the extent of the security. He also raised what he identified as a serious issue in relation to the price which had been achieved for the Enniscrone property. Precisely how or when Mr. McGlynn came to know it is unclear, but it was said that the property had been put on the market at €130,000 and that the auctioneers had immediately received an offer of €160,000, which was far short of the €200,000 plus which it was said to be worth.

**16.** The correspondence went back and forth between Mr. McGlynn and Fieldfisher in April, 2021: Mr. McGlynn insisting that the mortgage did not secure anything other than the balance on the Enniscrone loan; and Fieldfisher insisting that it was security for all sums due. In a letter of 29<sup>th</sup> April, 2021 Mr. McGlynn asserted that the plaintiffs had "*validly executed their right to redeem this loan*" in December, 2020.

**17.** In early May, 2021 the plaintiffs instructed a new firm of solicitors, Messrs Paul A. Moore & Co., who wrote to Fieldfisher on 7<sup>th</sup> May, 2021. Mr. Moore protested the manner in which previous correspondence had been dealt with and asserted that "*when our clients indicated their desire and ability to redeem the outstanding mortgage on 12 Marine Lighthouse, your clients' power of sale ceased. Whether Start (which is denied) were still entitled to rely on the property as security for other advances is entirely a separate matter and our clients were entitled to prevent any immediate sale of the security by redeeming the loan on same.*" Fieldfisher, in reply on 7<sup>th</sup> May, 2021, contested the correctness of this assertion and said – as they had said to Mr. McGlynn on 1<sup>st</sup> April, 2021 – that "*Our clients are already contracted to sell the Property to a third party. The proceeds of sale will be used to discharge the outstanding debt (and interest and costs) in the normal way.*"

**18.** By letter dated 14<sup>th</sup> May, 2021 Mr. Moore, citing the advice of counsel, argued that the Enniscrone mortgage was never intended to cover the Rockbrook loan – which was only taken out by the first plaintiff – and that there was no basis for the sale of the property in circumstances in which it had been agreed by Start that the plaintiffs could redeem the mortgage on payment of the “*full outstanding loan monies*” which, it was said, the plaintiffs had agreed to do. The mortgage, it was said, did not confer a power of sale on the receivers and Fieldfisher were asked for immediate confirmation that the “*proposed contract for sale will be immediately vacated.*” On the same day Fieldfisher replied that the purchasers’ solicitors had been copied with Mr. Moore’s correspondence; that the purchasers’ solicitors were satisfied that that no invalidity on the appointment of the receivers or impediment to transfer of title to them had been demonstrated; and that the purchasers intended to complete the purchase.

**19.** On 17<sup>th</sup> May, 2021 the plaintiffs applied for an interim injunction restraining the completion of the sale of the property and for short service of a motion for interlocutory orders. In circumstances in which it was clear that the plaintiffs had been aware from 1<sup>st</sup> April, 2021 at the very latest that the property had been sold, and in which there was no evidence of any attempt by the plaintiffs to perform the agreement they claimed had been made in December, 2020, the application for an interim order was refused but the plaintiffs were permitted to give short notice of an application for interlocutory orders.

**20.** The plaintiffs’ motion was issued on 20<sup>th</sup> May, 2021 but – although Fieldfisher were advised by letter of 18<sup>th</sup> May, 2021 of the making of the order for short service – appears not to have been served until 26<sup>th</sup> May. By letter dated 1<sup>st</sup> June Fieldfisher indicated that they were preparing a replying affidavit. By letter dated 2<sup>nd</sup> June, 2021, in reply to a letter of the same date from Mr. Moore seeking an undertaking not to complete the sale, Fieldfisher indicated that the sale had been completed and that they expected the replying affidavit to be

finalised on the following day. A final but unsworn draft affidavit of Elaine De Courcey was sent to Mr. Moore's office by e-mail at 10:00 a.m. on the morning of 4<sup>th</sup> June and the affidavit was duly sworn on 10<sup>th</sup> June, 2021.

*The issue on the motion*

**21.** As I have said, the motion was initially returnable for 4<sup>th</sup> June. It was then adjourned until 11<sup>th</sup> June and from then until 2<sup>nd</sup> July. The first adjournment was to facilitate the swearing and filing of the defendants' replying affidavit. The plaintiffs' solicitors initially contested but later conceded that the final draft replying affidavit had indeed been sent to them by e-mail on the morning of 4<sup>th</sup> June. On the second listing it was indicated that the motion would not be proceeding but that the question of the costs of the application would have to be decided.

**22.** The net legal issue presented by the plaintiffs was whether the Enniscrone charge secured the Rockbrook loan as well as the Enniscrone loan. The replying affidavit of Ms. Elaine De Courcey suggests that the position may be more complicated. Ms. De Courcey has deposed that besides the Enniscrone loan in the joint names of the plaintiffs and the Rockbrook loan in the sole name of the first plaintiff, there are two further joint loans on which the balances as of 17<sup>th</sup> May, 2021 were €35,426.25 and €138,144.98. It is not said what, if any, security – or perhaps I should say what, if any, other security – is held for these borrowings. Absent any response to the affidavit of Ms. De Courcey it is not clear whether the plaintiffs accept or contest the fact of these alleged additional joint liabilities or whether they are secured by the Enniscrone charge, but it seems to me that any case that the plaintiffs would make as to whether the Enniscrone property stood as security for later joint borrowings must be different to their case that it did not stand as security for the Rockbrook borrowings by the first plaintiff only. Again absent any response by the plaintiffs, it is impossible to say

whether the first plaintiff's affidavit ought to have referred to these loans, but it does appear to be rather peculiar that they were not referred to in Fieldfisher's letter to Mr. McGlynn of 1<sup>st</sup> April, 2021 and they are not identified in the eight page extract from the 1,790 page global deed of transfer from Permanent TSB plc to the first defendant which was exhibited by Ms. De Courcey.

### *The arguments*

**23.** The position taken by the plaintiffs' solicitors in correspondence was that the costs of the interlocutory motion should be reserved but in argument Mr. Donelon's submission was either that there should be no order as to costs or that the defendants' costs of the motion should be costs in the cause.

**24.** The motion, it was said, had become moot by reason of the completion of the sale of the property. The issue which had been raised by the motion, it was said, was whether the plaintiffs had been prevented from redeeming the mortgage by paying the balance outstanding on the Enniscrone loan. That, it was said, was an issue that would be revisited at the trial of the action. If the plaintiffs were to succeed on that issue at trial, there was a potential risk of injustice if the plaintiffs were ordered to pay the costs of the motion. Reference was made to my judgment in *O'Neill v. Garda Commissioner* [2021] IEHC 112.

**25.** Mr. Brady, for the defendants, argued that the motion had not become moot. The plaintiffs, it was said, were aware from November, 2020 that the property was on the market; from Fieldfisher's letter of 7<sup>th</sup> May, 2021 that contracts for sale had been signed; and from Fieldfisher's letter of 14<sup>th</sup> May, 2021 that notwithstanding the plaintiffs' correspondence the purchasers intended to complete and that the sale was likely to be completed on that day. The plaintiffs, it was said, had asserted the existence of a concluded agreement which, even if



such had been made, which was denied, had not been complied with. The relief claimed by the plaintiffs on the motion was not, it was submitted, something that the trial judge would need to revisit. Rather, it was said, the motion was an application for an injunction based on the facts as presented. On the facts – as presented – the relief for which the plaintiffs contended had already escaped their grasp because contracts for sale had been entered. The central deficit in the application for interim relief was that the plaintiffs had not paid or tendered the sum admittedly due and owing.

### *Discussion and decision*

**26.** Not the least difficulty I have had is to come to a clear conclusion on the question of costs in circumstances in which the motion was not argued. There is considerable force in the submission that the completion of the sale of the property was not a supervening event which rendered the motion moot but the natural and – unless the purchasers were put off by the plaintiffs’ threatened litigation – inevitable end to a process commenced in November, 2020 when the property was put on the market and which progressed to the exchange of contracts (of which, incidentally, it appears that the plaintiffs’ were first notified by Fieldfisher’s letter to Mr. McGlynn of 1<sup>st</sup> April, 2021 rather than their letter to Mr. Moore of 7<sup>th</sup> May, 202). I also accept the defendants’ argument that there was no evidence of the plaintiffs’ readiness, willingness or ability to perform the agreement which they claimed they had in November or December, 2020.

**27.** However, the primary relief claimed in the action is a declaration that the Rockbrook loan – which it is common case is the responsibility of the first plaintiff only – is not secured on the Enniscrone property: and I believe that the plaintiffs have a good argument to make that it is not. Beyond that, I think that the plaintiffs have raised a fair question to be tried as

to whether the position taken and steadfastly maintained by the first defendant might have impeded their ability to redeem. While it might very well be said that the evidential ground was not laid by the affidavit on which the motion was grounded, the ability of the plaintiffs to have redeemed might very well have depended upon their being able to secure alternative funding secured on the property. In practical terms, the plaintiffs might have been able to borrow the balance due on the Enniscrone loan but only on the security of a first charge over the property, which in turn would require a discharge of the first defendant's charge. While the issue identified in the correspondence and the affidavits was whether an agreement had been reached as to the basis on which the Enniscrone property might be redeemed, the true issue may turn on the legal effect of the charge. In other words, the issue may be whether, irrespective of any agreement, the plaintiffs were entitled as a matter of law to redeem. If the plaintiffs were entitled to redeem, the next issue will be whether they were in a position to do so: or would have been in a position to do so if their right to redeem had been acknowledged.

**28.** On the hearing of the costs application on 1<sup>st</sup> July, 2021 it was contended on behalf of the plaintiffs that the motion had become moot by reason of the completion of the sale. It was suggested indeed – as it had been in correspondence – that once the sale had been completed it was not necessary for the defendants to file a replying affidavit. Of that, I am bound to say, I am entirely unconvinced. Following the refusal of the interim application the plaintiffs' solicitors asked twice for undertakings in the terms of the notice of motion. After they had been told unambiguously by letter of 2<sup>nd</sup> June, 2021 that the sale had been completed the plaintiffs' solicitors pressed for delivery of a replying affidavit and it was only following receipt of the affidavit of Ms. De Courcey on 10<sup>th</sup> June, 2021 that the application was withdrawn.

**29.** I am not persuaded that the correct approach to the question of costs is on the basis that the motion became moot by reason of the completion of the sale of the property. By contrast

with the authorities which deal with the question of costs in cases which have become moot, the plaintiffs in this case are not in the position which they set out to achieve, whether by reason of any step taken by the defendants or any supervening event. As far as the completion of the sale is concerned, this is not a case in which the motion was overtaken by events, rather one in which the plaintiffs moved too late. The motion was issued coming up to two months, at least, after the plaintiffs had been made aware of the fact that contracts had been exchanged and nearly a week after the date on which the plaintiffs had been told that the sale was expected to have been completed. In moving for an interim injunction and in issuing the motion the plaintiffs took the chance that the sale might not have been completed as expected and it seems to me that I am justified in inferring from that the plaintiffs' solicitors' requests for undertakings after the interim application had been refused that the plaintiffs hoped that either the defendants or the purchasers would be put off by the pending action and motion.

**30.** I reject the argument or suggestion that it was not necessary for the defendants to have finalised and filed a replying affidavit once the sale had been completed. The demonstrable objective fact is that after the plaintiffs' solicitors had been told that the sale had been completed they continued to press for a replying affidavit. It was only after the replying affidavit was filed on behalf of the defendants that the plaintiffs abandoned their application and on one view it might be said that the defendants successfully saw off the motion. The plaintiffs' initial suggestion that the costs of the motion might be reserved would have potentially put the defendants on the hazard for the plaintiffs', as well as their own, costs. It seems to me that the alternative orders now proposed on behalf of the plaintiffs both acknowledge that irrespective of the outcome of the action it would not be just that the defendants should have to pay the costs of the motion.

**31.** I accept the argument made on behalf of the plaintiffs that the issue as to whether the plaintiffs were prevented from redeeming the mortgage by paying the balance of the Enniscrone loan is one that may be revisited at the trial of the action, but I think that the defendants are correct in identifying the essential issue on the motion as being whether completion of the sale ought to have been prevented pending the trial of that issue.

**32.** It is clear that the defendants have reasonably and necessarily incurred costs in defending the motion. The plaintiffs' suggestion that there might be no order for costs would fix the defendants with those costs irrespective of the outcome of the action. I am quite satisfied that that would not be a just result.

**33.** If, as I have found, the essential issue on the motion was whether the completion of the sale ought to be prevented *pendente lite*, the defendants have succeeded. But, not for the first time, the justice of where the costs should lie is more complicated than identifying the winner on the interlocutory application.

**34.** *O'Neill v. Commissioner of An Garda Síochána* [2021] IEHC 112, upon which the plaintiffs rely, was a case in which, although I had refused all of the reliefs sought by an interlocutory motion, I decided that the justice of the case would be met by making the defendants' costs costs in the cause. I did so – guided by the judgment of McDonald J. in *Paddy Burke (Builders) Ltd. v. Tullyvarraga Management Co. Ltd.* [2020] IEHC 199 and that of Keane J. in *O'Donovan v. Over-C Technology Ltd.* [2020] IEHC327 – on the basis that while the plaintiff had not made out his entitlement to an interlocutory injunction, it would not be just that he should be fixed with the costs of his failed interlocutory application if he made out his case at trial.

**35.** I am persuaded that this is such a case. The primary relief sought by the general indorsement of claim is a declaration that the Rockbrook loan is not secured on the Enniscrone property. The replying affidavit of Ms. De Courcey suggests there were other

joint borrowings by the plaintiffs which were secured on the Enniscrone property but does not go into the detail of what security there may have been for those loans. If, for the sake of argument, the defendants were entitled to apply the proceeds of sale of the Enniscrone property to other joint liabilities of the plaintiffs, the narrow issue as to whether the Rockbrook loan was secured on it may be of no practical significance but in the bigger picture I think that counsel has correctly identified the issue in the action as whether the plaintiffs were prevented from redeeming the mortgage on the Enniscrone property by paying the balance of the Enniscrone loan. The affidavits disclose an issue as to whether, even if the plaintiffs were entitled to redeem the Enniscrone mortgage by paying the balance of the Enniscrone loan, they were ever ready, willing and able to do so but that is not something that can be decided at this stage.

**36.** Without attempting to identify all of the issues and permutations that may eventually emerge or to understand how or why the parties may have been at cross purposes as to what borrowings were secured on the property, it seems to me that one possible outcome of the action is that the plaintiffs may establish that the Enniscrone property was held as security for the Enniscrone loan, only, and that they were – or if their entitlement to do so had been acknowledged would have been – in a position to redeem. If they were to do that, it would follow that the Enniscrone property ought not to have been sold. If the conclusion of the trial judge were to be that the property ought not to have been sold, in my view it would not be just that the plaintiffs should have to pay the defendants' costs of the interlocutory motion. If, on the other hand, the conclusion of the trial judge is that the defendants were entitled to sell the property, justice requires that they should have their costs.

**37.** For these reasons my decision is that the appropriate order in respect of the costs of the interlocutory motion is that the defendants' costs should be costs in the cause.