

THE HIGH COURT

[2021] IEHC 638

[Record No. 2019/5760P]

BETWEEN

MAURICE FOLEY

PLAINTIFF

AND

**PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY AND STEPHEN TENNANT
DEFENDANTS**

JUDGMENT of Ms. Justice Stack delivered on the 27th day of September, 2021.

Introduction

1. This is an application for an interlocutory order restraining the defendants from selling the plaintiff's lands at Ballynoran, Charleville, County Cork, being 9 acres of agricultural land comprised in Folio CK143653F ("the Property"), pending determination of the within proceedings. (The notice of motion actually refers to online sale only, but, as I understand it, the plaintiff wishes to restrain any sale.)
2. The background to the proceedings lies in the advancement of €70,000 by Ulster Bank Ireland Ltd. to Halcon Communications Ltd, the security for which was, first, a joint and several letter of guarantee for the sum of €135,000 signed by Áine Ó Tuama, Brian Moloney and the Plaintiff, together with a first legal charge over the Property.
3. It is not in dispute that the monies advanced have not been repaid. Summary proceedings (Record No. 2011/3701S) were issued by Ulster Bank Ireland Ltd ("Ulster Bank") seeking liberty to enter judgment against the co-guarantors, and the second defendant ("PODAC") was substituted as plaintiff in those proceedings on 27 November, 2017. They appear not to have been progressed but, contrary to the assertion of the plaintiff in his grounding affidavit, they are not material to this application and no submission was made as to their relevance at hearing.
4. These proceedings, however, concern the charge, which was registered as a burden on Folio 143653F on 11 November, 2009, the same date upon which the Plaintiff became registered owner of the Property. Ulster Bank was initially registered as owner of that charge, but as is clear from Entry No. 6 at Part 3 of the Folio, PODAC was registered as the owner of the charge on 9 March, 2017.
5. In essence, the plaintiff seeks the injunctive relief to prevent the defendants from auctioning or otherwise offering the Property for sale on the basis that there is no evidence that PODAC is entitled to exercise the rights of the chargee and, alternatively, on the basis that the Receiver purportedly appointed by PODAC is not validly appointed.

Evidence of transfer of ownership of charge

6. The first of these complaints can be dealt with quite quickly. The plaintiff relies on authorities such as *English v. Promontoria (Aran) Ltd (No. 1)* [2016] IEHC 662. That was a case where Murphy J. held that the documents evidencing the sale of the loan book and associated securities to the plaintiff had not been furnished to the defendant by the

receiver, so as to prove his authority. It was acknowledged in that case at para. 24 that these proofs would not be necessary in a case of registered land.

7. That proposition, which flows from s. 31 of the Registration of Title Act, 1964, as amended, has been reiterated in a number of cases, including *Tanager DAC v. Kane* [2019] 1 I.R. 385, a decision of the Court of Appeal on case stated from this Court.
8. The material fact is that PODAC is registered owner of the charge on foot of which a power of sale is said to arise and on foot of which the Receiver has been appointed. The registration of PODAC as the owner of the charge is proof that the charge has been transferred to it. There is therefore no legal basis to this argument and there is no fair question to be tried on this issue.

Whether the Receiver has been validly appointed

9. The second objection relates to the formalities for the appointment of a receiver. As is apparent from the title to the proceedings, Mr. Stephen Tennant was originally appointed as Receiver over the assets of the Plaintiff on foot of the registered charge, and he is sued in that capacity. Mr. Tennant was appointed on 17 May 2019, and was discharged on 18 November, 2020. Mr. Damien Harper was appointed in his place on the same date.
10. The plaintiff complains that he was not informed of this until January, 2021, well after the date of an auction of the Property scheduled for 16 December, 2020, and indeed after this application was issued on 15 December, 2020, in order to restrain that or any future sale of the Property. Mr. Harper swore an affidavit on 13 January, 2021, in which he confirms that the plaintiff was informed of his appointment by letter dated 11 January 2021, but he gives no explanation for this delay and it is difficult to avoid the inference that the plaintiff was only told of his appointment because he had brought this application the previous month. Although not the precise issue for determination in *English v. Promontoria (No. 1)* [2016] IEHC 662, it seems to me that the concern of Murphy J. in that case that a receiver should, before demanding possession of a debtor's property, afford proper proof of his authority to make the demand, have equal application to a situation where the identity of the receiver changes, and therefore the debtor should be informed as soon as is reasonably possible of the discharge of a receiver and the appointment of another person in his place.
11. But while it is less than satisfactory that the registered owner of the Property was not informed in a timely fashion of the fact that Mr. Tennant had been replaced as receiver, that does not alter the authority of Mr. Harper to act as such, although it raises a procedural issue to which I refer to at the end of this judgment.
12. It is accepted on behalf of the Defendants that they cannot rely on ss. 19 to 24 of the Conveyancing Act, 1881, as amended, for the purposes of this application and that I must be satisfied that Mr. Harper is now validly appointed by reference to Clause 11.4 of the charge. This provides:

"The Bank may at any time after the security has become enforceable under the hand of any official or manager or by deed appoint or remove a Receiver or Receivers of the Charged Assets..."

It should be noted that the charge defines "Bank" as: "Ulster Bank Ireland Ltd and its successors and assigns", which clearly includes PODAC, and "Charged Assets" refers to the Property.

13. It is immediately apparent, therefore, that it is not necessary that the receiver be appointed by deed. As explained by Cregan J. in *McCleary v. McPhillips* [2015] IEHC 591, at para. 133-134, the phrase "under the hand" means "with the signature of". It is therefore sufficient that the appointment be effected in writing, and signed on behalf of the company by someone with the authority to act on its behalf.
14. Two issues arise in considering how PODAC may exercise its power to appoint a receiver in this case: first, while no statutory provisions relating to the execution of documents (including deeds) was cited to me, as PODAC appears to be registered as a DAC under the Companies Acts, and therefore it would appear that s. 48 of the Companies Acts, 2014 ("the 2014 Act") applies by virtue of the combined effect of s. 10 and s. 964 of the 2014 Act. Section 48 provides that a document or proceedings requiring authentication by a company may be signed by a director, secretary, registered person or other authorised officer of the company, and need not be under its common seal. Secondly, Clause 11.4 requires that an appointment made other than by deed should be made under the hand of "any official or manager" of PODAC.
15. In circumstances where Clause 11.4 does not require appointment by deed, it would therefore appear that only the signature of an individual director, secretary, registered person or other authorised officer of the company to a written instrument of appointment is required to appoint a receiver. It is not contended that any of the signatories to the documents appointing and discharging Mr. Tennant, or appointing Mr. Harper, are "registered persons" within the meaning of ss. 39 and 48 of the 2014 Act, and all of the signatories of the various documents purported on the face of the documents to do so either as director or on behalf of the secretary of PODAC. This is permissible having regard to s.48 of the 2014 Act, but proof of due execution requires evidence that the signature is theirs and that they were director or secretary of PODAC, as the case may be, at the date of the instrument.
16. In addition, Clause 11.4 specifically provides that if the appointment is not done by deed, then it must be "under the hand of any official or manager" of "the Bank". As previously stated "the Bank" is defined in the deed to include successors, and therefore includes PODAC.
17. As debated at hearing, the phrase "any official or manager" appears to have been directed to the fact that the original chargee was a bank, and the question that arises as to whether it can be said that the signatories to the various documents can be said to be

an “*official or manager*” of PODAC so as to render those instruments validly executed. It should be noted that neither “*official*” nor “*manager*” is defined in any way in the charge.

18. It should also be noted that Clause 19 gives a very open-ended right of assignment and transfer to Ulster Bank and its successors in title and further states that any reference to the Bank in the charge “*shall include any assignee, transferee, novatee, mortgagee, chargee, grantee or other disposee and its successors who shall be entitled to enforce and proceed upon and exercise all rights, powers and expressions of the Bank under this deed in the same manner as if named herein.*”
19. It was therefore clearly envisaged in the charge that Ulster Bank might assign its security, and it must have been within the contemplation of the parties to the charge that a person or institution other than a bank might be entitled to stand in the shoes of Ulster Bank in the future. Furthermore, it seems to me that any sensible interpretation of the charge would have to regard a director as being within the definition of “*manager*”, as the usual authority of directors entitles them to manage the affairs of a company. As counsel for the defendants said at hearing, it is the role and not the label which matters.
20. In fact, if one reads the charge as if Ulster Bank was still the chargee, then the reference to an appointment by “*any official or manager*” appears to be very broad ranging and would appear to cover large numbers of the staff of any bank, and not just those in very senior roles. It does not appear to have been intended to be a restrictive requirement.
21. In applying this to corporate assignees who are not banks, it must be recalled that directors execute a managerial role. In my view, a director would fall within the concept of a “*manager*” of a company and therefore the directors of PODAC have the authority to appoint a receiver. Similarly, company secretaries discharge important compliance functions which I think would fall within the definition of “*official*”. In fact, I think any other interpretation would be unworkable and absurd.
22. It is true that Gilligan J. in *Re Belohn Limited* [2013] IEHC 130 approved the dictum of Donovan L.J. in *Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd.* [1961] Ch. 375 that the requirement in a debenture for the appointment of a receiver must be followed precisely. However, I am of the view that on a proper interpretation of Clause 11.4 that PODAC may appoint or remove a receiver under the hand of one of its directors.
23. The plaintiff makes complaint in his affidavits about the validity of the appointment and discharge of Mr. Tennant and the appointment of Mr. Harper, and I will therefore consider the documentation relied upon in respect of each of these three acts.
 - (i) *Appointment of Mr. Tennant, 17 May 2019*
24. The instrument of appointment dated 17 May, 2019, is signed for and on behalf of PODAC by Mr. Albert Prendiville, who is described as “*director*”. His signature is witnessed by Mr. Cian O’Dowd, who is described as “*administrator – capital markets*”.

25. It must be recalled that Clause 11.4 of the Charge provides that the receiver may be appointed either by deed or "*under the hand*" of PODAC. The document executed by Mr. Prendiville on 17 May 2019 does not use the language of a deed and expressly states that it is made by PODAC "*under its hand*".
26. Mr. O'Sullivan, a current director of PODAC, has averred that Mr. Prendiville was a director of PODAC, although he has exhibited a copy of "*list of signatures of directors and authorised signatories dated 15 April 2019*", in which the names of the directors and of all authorised signatories other than Mr. O'Sullivan and Mr. Prendiville are redacted. Mr. O'Sullivan does not give any description of its provenance, or even identify in his affidavit the company to which it relates. However, on its face, it seeks to list the directors and authorised signatories of Intertrust Finance Management (Ireland) Limited ("*Intertrust*").
27. Para. 3 of Mr. O'Sullivan's affidavit is, in general, unsatisfactory. However, it is clearly stated that at the beginning of that paragraph that Mr. Prendiville was the predecessor of Mr. O'Sullivan and that he was a Director of PODAC. No time period for which he was a director is stated but I note that Baker J. accepted in *Kavanagh v. Walsh* [2019] 1 I.R. 619, at para. 15, that it can be inferred from the face of a document that a person was director at the time.
28. Mr. Tennant was therefore validly appointed receiver of the Property on 17 May 2019.

(ii) *Deed of discharge of Mr. Tennant, 18 November, 2020*
29. It was accepted by counsel for PODAC that he would not be in a position to prove due execution of this document as a deed.
30. This deed records that Mr. Donal O'Sullivan, director of PODAC, was present when the common seal of PODAC was fixed thereto. The Deed is also signed by Mr. Brendan Byrne, who signed "*per pro Intertrust Finance Management (Ireland) Limited, as Company Secretary.*"
31. There was controversy at hearing about the position of Mr. Byrne as a director of Intertrust, Intertrust being, apparently, the company secretary of PODAC. It seems to me that this additional signature, and indeed execution by the secretary of PODAC would only be necessary if the instrument was to function as a deed.
32. Mr. O'Sullivan's affidavit establishes that Mr. Byrne was appointed a Director of Intertrust on 24 November, 2017. It does not say that he retained that capacity as of the 18 November, 2020, but the most material issue is that there is nothing on affidavit to show that Intertrust was, at the material time, the Company Secretary of PODAC. As counsel for the plaintiff submitted at hearing, PODAC is relying on the information contained in a rubber stamp which is apparent in the copy documents exhibited in the affidavits. However, given that the formalities for execution were squarely in issue in these proceedings, this should have been confirmed on affidavit.

33. In the circumstances, I do not think the role of Intertrust, and consequently the authority of Mr. Byrne as a Director of that company to execute the deed of discharge, has been established. Section 43 (2) (b) of the 2014 Act provides that any instrument to which a company's seal is affixed shall be signed by a director of it or by some other person appointed for the purpose by its directors or by a committee of them, and shall be countersigned by the secretary or by a second (if any) director of it or by some other person appointed for the purpose by its directors or by a committee of them.
34. On the facts as they appear from the documents exhibited and from the affidavits, this means that, in order for the Deed of Discharge to operate as such, it should have been executed by a director and countersigned by the secretary of PODAC, there being no suggestion that any other person had been appointed as permitted by s.43 (2) (b).
35. There is ample evidence that Mr. O'Sullivan was a director of PODAC for an unspecified period and, as stated above, I can infer from his execution of the purported Deed of Discharge as Director that he was such on the relevant day. There is also evidence that Mr. Byrne was a director of Intertrust for a period from 24 November, 2017. However, there is no evidence that Intertrust was the Company Secretary of PODAC. Consequently, it has not been established that the Deed of Discharge was validly executed as a deed as required by s.48 of the 2014 Act. As no reliance was placed on s. 64 of the Land and Conveyancing Law Reform Act, 2009, I do not need to consider its possible application in this case.
36. The principal argument made by PODAC at hearing was that the failure to prove execution as a Deed is not fatal to proof of the validity of the discharge of Mr. Tennant. In *Re Belohn Limited* [2013] IEHC 130, Gilligan J. approved the reasoning in *Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd.* [1961] Ch 375, which established that a document which was intended to take effect as a deed but failed to do so could nevertheless take effect as an instrument under the hand of the person executing it. The facts of *Re Belohn Limited*, however, are quite different, as in that case a 1981 debenture provided that a receiver could be appointed only by deed and not otherwise. It was therefore essential in that case that the deed of appointment was properly executed as such.
37. That is not the case in this instance, as Clause 11.4 clearly provides, as an alternative to appointment by deed, the power for the Bank, and therefore for PODAC as its successor-in-title, to appoint a receiver "under its hand". I am satisfied that Mr. O'Sullivan was a director of PODAC on 18 November, 2020 and that he executed the document on behalf of PODAC. While the document purported to be a deed, it took effect as an instrument under the hand of a manager of PODAC and constituted a valid removal of Mr. Tennant as receiver.
- (iii) *Appointment of Mr. Harper 18 November, 2020*
38. Mr. O'Sullivan confirms at para. 2 of his affidavit that he executed the Instrument of Appointment of Mr. Harper and that his signature appears on that Instrument, together

with that of Mr. Brendan Byrne, who is described as a director of Intertrust. As already stated, I am satisfied that he was a director of PODAC on 18 November, 2020.

39. It follows from my findings in relation to the Deed of Discharge of the same date that there has been no proof of Intertrust's status as Company Secretary of PODAC nor is there any proof of Mr. Byrne's status as director of Intertrust on that date. On the contrary, a document, the status of which is not entirely clear, dated 15 April 2019 has been exhibited by Mr. O'Sullivan. This purports to show the names of the directors and authorised signatories of Intertrust on 15 April 2019 but the names of the Directors are redacted. I am unclear as to why this document was exhibited.
40. This document is clearly described as an Instrument and is said to be "*signed under hand as set out below*". However, Mr. O'Sullivan and Mr. Byrne, acting in the same manner and capacity as in the Deed of Discharge of Mr. Tennant, then attested to the affixing of the common seal of PODAC, which is indicative of course of a deed.
41. It follows from my conclusions in relation to the Deed of Discharge, above, that proof of due execution as a deed has not been forthcoming in relation to this document but it is sufficient if the document can operate as an instrument under hand, and therefore, Mr. Harper's appointment is valid.
42. Both parties referred at hearing to *Fenell v. Boles* [2020] IEHC 534, and I am satisfied that my findings are consistent with that judgment.
43. I would also add that it is not necessary to rely for my findings on para. 3 of Mr. O'Sullivan's affidavit, which appears to be directed at establishing the authority of both Mr. O'Sullivan and Mr. Prendiville to execute documents on behalf of PODAC, but which I think fails in that objective. Mr. O'Sullivan says at para. 3 that he and Mr. Prendiville were "duly elected or appointed qualifying and acting as directors or authorised signatories." It does not say whether they were elected or appointed, or whether they were directors or authorised signatories. In fact, the phrase appears to have been transcribed from the exhibit, a document which lists 19 individuals, two as directors and 17 as authorised signatories. It is entirely appropriate for such an internal corporate document to use a global phrase to refer to a list of individuals, but it is inappropriate to transcribe it into an affidavit where the position of two particular individuals are in issue.
44. Similarly, para. 3 of the affidavit states that Mr. O'Sullivan and Mr. Prendiville were authorised to execute "*Transaction, Ancillary and Supplemental Documents*", which appears to be a category of documentation defined in a written document which is not exhibited (although the exhibited list may have been scheduled to it, as it also uses this term), but it is not defined in the affidavit, so in fact, the affidavit does not establish the types of document which Mr. O'Sullivan and Mr. Prendiville were authorised to sign on behalf of Intertrust. However, in light of my findings above these issues are not relevant.

Conclusion

45. I am satisfied on the evidence before me that each of the documents was valid to achieve its intention and that Mr. Harper has been validly appointed receiver of the Property by PODAC and that PODAC has succeeded to the right of Ulster Bank to effect such an appointment. I do not think there is a fair question to be tried as to these matters.
46. Accordingly, I do not need to consider the balance of convenience but had that been necessary, it would favour the grant of the relief sought. I do not think the balance of convenience would be affected by the fact that there is a second charge and several judgment mortgages registered against the Property. The amounts outstanding have not been proven nor has the value of the Property been stated. It is therefore not established that the plaintiff has no equity or interest in the Property. In any event, even if he did not, that would not mean that a person who might have no authority to act as receiver could proceed to deal with the Property, nor could an assignee of a charge proceed to exercise the rights of the charge if a legitimate question was raised as to whether those rights had been assigned. If a fair question was raised as to the legal rights and powers of the defendants, any exercise of those rights and powers would have to await resolution of their entitlement to act.
47. However, no such issue or question has been raised here, and it is therefore not necessary to consider the balance of convenience.
48. I will therefore refuse the relief sought in the notice of motion herein.
49. Finally, it seems to me that the Plaintiff should have reconstituted his proceedings to substitute Mr. Harper from Mr. Tennant or should at least have added him as a defendant. However, as I understand matters, the defendants, who are jointly represented, have addressed themselves to the validity of Mr. Harper's appointment, and Mr. Harper will abide by any order made in this application. I will hear the parties as to whether Mr. Harper should be added as a co-defendant or whether he should be substituted in place of Mr. Tennant, and as to the costs of this application.