

**APPROVED**

**[2022] IEHC 399**



**THE HIGH COURT  
CIRCUIT APPEAL**

2022 No. 45 CA

BETWEEN

**MACRAY PROPERTIES LIMITED**

**PLAINTIFF**

**AND**

**PHILIP SHERIDAN**

**DEFENDANT**

**JUDGMENT of Mr. Justice Garrett Simons delivered on 11 July 2022**

## **INTRODUCTION**

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The appeal is against an order granting the plaintiff company an interlocutory injunction restraining the defendant from interfering with the collection of rent from the tenants of a residential property. The plaintiff company is the registered owner of the property.

## **PRINCIPLES GOVERNING INTERLOCUTORY INJUNCTIONS**

2. The principles governing the grant of interlocutory injunctions have recently been clarified by the Supreme Court in *Merck Sharp & Dohme Corporation v.*

**NO REDACTION REQUIRED**

*Clonmel Healthcare Ltd* [2019] IESC 65; [2020] 2 I.R. 1. In brief, a court hearing an application for an interlocutory injunction should consider whether the moving party has established that there is a “*serious issue*” to be tried (sometimes referred to as an “*arguable case*” or a “*fair issue to be tried*”). If so, the court should then proceed to consider how matters should best be regulated pending the trial. This involves consideration of the balance of justice (sometimes referred to as the balance of convenience).

3. The preferable approach is to consider adequacy of damages as part of the balance of justice, rather than as a separate step in a three-stage test. It is not simply a question of asking whether damages are an adequate remedy. An interlocutory injunction should not be *granted* merely because the moving party can tick the relevant boxes of arguable case, inadequacy of damages, and ability to provide an undertaking as to damages. By the same token, an interlocutory injunction should not be *refused* merely because damages may be awarded at trial.
4. If the balance of justice is finely balanced, then it might be appropriate for the court to consider, even on a preliminary basis, the relative strengths and merits of each party’s case as it may appear at the interlocutory stage. This will be necessarily dependent upon the proceedings presenting a legal issue upon which the court could confidently express a view, and also dependent upon any facts relevant to the disposition of that issue being supported by credible evidence (*Ryan v. Dengrove DAC* [2021] IECA 38).
5. One of the factors which may be relevant to the balance of justice is whether the grant or refusal of an interlocutory injunction would have the effect of suspending the operation of an order or measure of a public authority. The

Supreme Court in *Okunade v. Minister for Justice* [2012] IESC 49; [2012] 3 I.R. 152; [2013] 1 I.L.R.M. 1 emphasised that, in assessing the balance of justice, an order or measure which is at least *prima facie* valid should command respect such that appropriate weight needs to be given to its immediate and regular implementation. This is so even if arguable grounds are put forward for suggesting that the order or measure might be invalid. All due weight needs to be accorded to allowing the systems and processes, by which lawful power is to be exercised, to operate in an orderly fashion.

6. As discussed presently, this factor has a particular importance in the circumstances of the present case having regard to the conclusiveness of the register under the Registration of Title Act 1964. See paragraphs 42 to 44 below.
7. Finally, the threshold to be met by the moving party will be more exacting in circumstances where *mandatory* relief is being sought by way of an interlocutory injunction. Rather than simply demonstrate a serious issue to be tried, it will be necessary for the moving party to establish a strong case that they are likely to succeed at the hearing of the action (*Lingam v. Health Service Executive* [2005] IESC 89).
8. Just how this distinction between mandatory and prohibitory relief operates in the context of the receivership of mortgaged property has been the subject of some debate. The Supreme Court in *Charleton v. Scriven* [2019] IESC 28 suggested that an application by a receiver seeking to restrain a party from interfering with the collection of rent was essentially prohibitory in nature.
9. The Court of Appeal in *Everyday Finance DAC v. Gleeson* [2022] IECA 130 held that an application for interlocutory relief which sought vacant possession of rental properties should be characterised as mandatory in nature. The

judgment observed that had the moving party confined themselves merely to diverting the rents to the receivers or requiring that the rents be paid into an escrow account, then the “*fair issue to be tried*” test might have been the appropriate standard.

10. It is not necessary for the purpose of resolving the present case to determine whether the reliefs sought by the plaintiff company are mandatory or prohibitory in nature. This is because—as explained below at paragraphs 34 to 39—the plaintiff company has established a very strong case. It is only where a moving party has been unable to surmount the higher threshold of a “*strong case*” that it becomes necessary to decide which threshold applies. Here, the plaintiff company has made out grounds for an interlocutory injunction irrespective of which threshold applies.

#### **PROCEDURAL HISTORY**

11. These proceedings have their genesis in a dispute between the plaintiff company and the defendant as to which one of them is the true owner of an apartment in Gortoorlan, Ballyconnell, Co. Cavan (“*the property*”). The property is held under a long lease of 500 years (“*the leasehold interest*”). It is the ownership of this leasehold interest which is in controversy in these proceedings.
12. As it happens, the property has been subject to a series of short-term residential tenancies, and to avoid confusion between the long lease and these short-term lettings, I propose to describe the person holding the leasehold interest as the “*owner*” of the property. All references in this judgment to the “*ownership*” of the property should, therefore, be understood as references to ownership of the leasehold interest.

13. The title of the lands is registered with the Land Registry under the Registration of Title Act 1964. The plaintiff company, Macray Properties Ltd, has been registered as full owner of the leasehold interest in the property since 24 March 2021. The defendant had previously been the registered owner of the leasehold interest in the property and he contends that the subsequent registration of the plaintiff company as owner is fraudulent. In particular, it is alleged that an earlier link in the chain of title is defective in that it involved a (purported) transfer by a charge holder of ownership of the property without a court order.
14. The plaintiff company complains that the defendant has frustrated it in collecting the rent from the property. It is averred on affidavit that the defendant had initially directed the then sitting tenant to continue to pay rent to him; and that the defendant has since installed other tenants in the property and is seemingly collecting rent from these supposed tenants.
15. The plaintiff company instituted the within proceedings before the Circuit Court on 25 November 2021. On 7 December 2021, the plaintiff company issued a notice of motion seeking an interlocutory injunction restraining the defendant from, *inter alia*, impeding or obstructing it in the collection of rents. Further orders were sought restraining the defendant from entering or occupying the property, and requiring him to deliver up keys to the property.
16. The plaintiff company relies on the conclusiveness of the statutory register under the Registration of Title Act 1964 in support of its application for an interlocutory injunction. Counsel cited, in particular, *Tanager DAC v. Kane* [2018] IECA 352; [2019] 1 I.R. 385 and *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26. It is said that, as registered owner, the plaintiff company

alone is entitled to grant tenancies in respect of the property and to collect rents from those tenants.

17. The defendant has filed a detailed affidavit in response to the application for an interlocutory injunction. The defendant accepts that, as a matter of fact, the plaintiff company has been registered as the owner of the property by the Land Registry, but submits that the company had no lawful right to purchase the property nor to be registered as the owner of same. It is said that the mere registration of ownership alone cannot create a defeasance of the defendant's estate.
18. The defendant acknowledges on affidavit that he had consented to the creation of a charge over his interest in the property. This charge was created pursuant to section 62 of the Registration of Title Act 1964. (As explained below, the charge had initially been in favour of First Active plc, but ownership of the charge was subsequently transferred to Ulster Bank Ireland Ltd). The defendant denies, however, that he consented to the subsequent transfer of that charge to Promontoria Scariff DAC. It is further submitted that, even if the charge had been validly transferred, it would not have conferred a right upon Promontoria Scariff to sell the property without first obtaining a court order. It is said that a registered charge, unlike a mortgage of unregistered land prior to the Land and Conveyancing Law Reform Act 2009, does not operate to transfer an estate or interest in the land to the charge holder.
19. The application for an interlocutory injunction came on for hearing before the Circuit Court (His Honour Judge Aylmer) on 3 March 2022. The Circuit Court granted injunctive relief broadly along the lines sought in the notice of motion. Relevantly, an additional order was made directing that all rents for the property

are to be remitted to the solicitors acting for the plaintiff company. The solicitors have undertaken to retain these funds in a separate client ledger until the hearing of the action.

20. The defendant filed a notice of appeal against the order of the Circuit Court on 14 March 2022. The appeal ultimately came on for hearing before me on 4 July 2022.
21. In the interim, the defendant had delivered a defence to the proceedings on 14 April 2022. A notice of trial has since been served. It is anticipated that the action will come on for hearing before the Circuit Court in December 2022.

#### **LAND REGISTRY FOLIO**

22. The Land Registry folio in respect of the property (Folio 663L, Co. Cavan) has been exhibited as part of the application for an interlocutory injunction. It appears from the folio that the defendant had been the registered owner of the property until 24 March 2021.
23. It is also apparent from the folio that the defendant had created a charge over the property in favour of First Active plc. This charge was registered as a burden on the folio on 5 December 2007. The banking business of First Active plc was subsequently transferred to Ulster Bank Ireland Ltd on 15 February 2010 in accordance with an approved transfer scheme pursuant to Part III of the Central Bank Act 1971 (as amended). See Central Bank Act 1971 (Approval of Scheme of First Active Plc and Ulster Bank Ireland Limited) Order 2009 (S.I. No. 481 of 2009).
24. The folio also contains an entry dated 5 February 2019 noting that Promontoria Scariff DAC is now the owner of the charge. This entry was subsequently

cancelled on 24 March 2021. This is the same date upon which the ownership of the property is recorded as having been transferred to Tyra Properties Ltd, and then transferred onward to the current registered owner, Macray Properties Ltd.

25. A director of the plaintiff company has filed an affidavit explaining the devolution of the title of the property. In brief, it is said that Promontoria Scariff DAC, as registered owner of the charge formerly held by Ulster Bank, had transferred the property to Tyra Properties Ltd on 22 February 2021 pursuant to its power of sale. It would appear that Tyra Properties Ltd had purchased the property on trust for the plaintiff company. On the same date, Tyra Properties Ltd transferred the property to the plaintiff company. Both transfers were subsequently entered on the folio on 24 March 2021. On the same date, the entry recording the defendant as owner of the property was cancelled.

## **DISCUSSION**

26. The first issue to be addressed is whether the plaintiff company has established a serious issue to be tried. The essence of the plaintiff company's case is that it is the registered owner of the relevant property, and that the actions of the defendant in purporting to collect rent represent an interference with its rights as owner. For the reasons which follow, I am satisfied that not only has the plaintiff company made out a serious issue to be tried, it has actually established a very strong case for saying that it would be entitled to a permanent injunction against the defendant following the trial of the action.
27. The evidence before the court confirms that the plaintiff company has been registered under the Registration of Title Act 1964 as the full owner of the leasehold interest in the property since 24 March 2021. Indeed, the defendant



does not dispute the fact of registration, but instead questions the validity of that registration.

28. Section 31(1) of the Registration of Title Act 1964 provides as follows:

“The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just.”

29. The legal consequence of these provisions has been summarised as follows by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26 (at paragraph 51):

“The Register reflects the ownership of land and burdens affecting the interest of the registered owner. The Register may contain errors and provision is made for rectification on the grounds of actual fraud or mistake: s. 31(1); or where an administrative error is made in registration of an instrument: s. 32. Some interests affect without registration: e.g. under s. 72. A challenge to the correctness of the Register is brought by an action for amendment or rectification in which *inter alia* the Property Registration Authority would be a defendant or notice party, and such proceedings would almost invariably include other defendants or notice parties such as prior registered owners or other persons asserting an interest. If such proceedings are in being then that might amount to a ground to adjourn the action for possession, or indeed to list it to run after the rectification or amendment proceedings have been concluded (see the judgment in *Tanager DAC v. Kane* at para. 86), but no such proceedings have been commenced or threatened in the present case. Section 31 means that in possession proceedings the proof on foot of which a plaintiff claims an entitlement to possession takes as its conclusive starting point the registration on a folio of a charge of which that plaintiff is shown to be legal owner on account of entry on the register.”

30. No challenge to the correctness of the register has been brought in respect of the property the subject-matter of these proceedings.
31. The plaintiff company, as the registered owner of the property, would appear to have an almost unanswerable case against the defendant. The actions of the defendant, in purporting to install tenants in the property and to collect rent from them, involve a direct interference with the rights of the registered owner.
32. The defendant has indicated, in his replying affidavit and in his delivered defence, that he proposes to resist the claim against him by disputing the plaintiff company's title to the property. In particular, the defendant proposes to argue that an earlier link in the chain of transfers leading to the devolution of title is defective. It is contended that the transfer from Promontoria Scariff DAC to Tyra Properties Ltd is ineffective in circumstances where no prior application was made to court for an order for possession. It is further contended that a court order is a prerequisite to a valid transfer, by a charge holder, of the ownership of the charged lands to a purchaser. This is said to follow because the creation of a registered charge does not operate to confer upon the charge holder an interest or an estate in the relevant lands. The defendant insists that a charge holder cannot properly transfer legal ownership of the charged lands when they themselves do not have possession of same.
33. It will ultimately be a matter for the trial judge in the Circuit Court to determine the correctness or otherwise of these arguments. As noted, the action is to be heard this coming December. For the purpose of the application for an interlocutory injunction, this court need go no further than considering, first, whether the plaintiff company, as the moving party, has established a serious issue to be tried; and, secondly, whether the strength of the case is something

which might legitimately be taken into consideration in assessing the balance of justice.

34. Without in any way trespassing upon the role of the trial judge, it can reasonably be observed that there are two obvious difficulties with the proposed defence. The first difficulty is that the defendant has never sought to rectify the register. The defendant has not instituted parallel proceedings against the Property Registration Authority seeking to rectify what he alleges is the fraudulent registration of the plaintiff company as owner of the property.
35. Nor does the defendant purport to seek relief by way of rectification in the within proceedings. No such relief has been sought as part of the defence delivered on 14 April 2022: the defendant has not brought a counterclaim seeking rectification. Indeed, it is doubtful whether rectification could properly be sought in these proceedings in the absence of the Property Registration Authority as party. As explained by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* (above), the Property Registration Authority would have to be a party to any application for the rectification of the register.
36. In the absence of any application to have the register rectified, there would not appear to be any basis upon which the defendant can purport to look behind the register in these proceedings.
37. The second difficulty with the proposed defence is this. Even if the defendant had instituted separate proceedings seeking to rectify the register, he has failed to identify any cogent grounds for saying that the register is incorrect, still less that the registration of ownership was fraudulent. It seems that the principal argument which the defendant intends to advance at trial is that the absence of a court order is fatal to the transfer from Promontoria Scariff DAC to Tyra

Properties Ltd, and, by implication, also fatal to the subsequent transfer to Macray Properties Ltd.

38. This argument would appear to be based on a misunderstanding of the nature of a registered charge. Whereas it is correct to say that the creation of a charge does not operate to transfer an interest or estate in land to the charge holder, it is incorrect to say that a charge holder does not have a power of sale over the charged lands. Here, the charge created in favour of First Active / Ulster Bank—and subsequently transferred to Promontoria Scariff—conferred a power of sale. As appears from the copy of the deed of mortgage dated 26 June 2006, which has been exhibited on behalf of the plaintiff company, the charge holder had a power of sale exercisable in accordance with the Conveyancing Acts 1881 to 1911. The exercise of this power of sale is not contingent on the charge holder having first obtained a court order for possession. In this regard, it should be emphasised that the property the subject-matter of these proceedings is not the principal residence of the defendant nor was it purchased by way of a housing loan mortgage as defined for the purposes of the Land and Conveyancing Law Reform Act 2009.
39. Having regard to these two obvious difficulties with the proposed defence, I have no hesitation in finding that the plaintiff company's case meets the threshold of a serious issue to be tried. Indeed, the case also satisfies the higher threshold prescribed for mandatory interlocutory relief, i.e. a strong case that the moving party is likely to succeed at the hearing of the action.
40. It is necessary next to consider the balance of justice. In many cases, the question of the adequacy of damages will have a central role to play in the assessment of the balance of justice. Here, the Circuit Court order of 3 March 2022 has put in

place a mechanism whereby any monies collected on behalf of the plaintiff company by way of rent are to be held in escrow until the hearing of the action. This ensures that, in the event the defendant were to succeed at trial, any rental income received by the plaintiff company in the interim will have been ring-fenced and thus available to be paid out by way of damages to the defendant.

41. By contrast, a cross-undertaking as to damages would not appear to be an adequate remedy for the plaintiff company. It is apparent from the folio that a number of judgment mortgages have been entered against the defendant and this suggests that he may not be a mark for damages.
42. As flagged at paragraphs 5 and 6 above, one of the matters which might be relevant to the consideration of the balance of justice is whether the grant of an interlocutory injunction would have the effect of suspending the orderly operation of a statutory scheme. As explained by the Supreme Court in *Okunade v. Minister for Justice*, it is legitimate, in deciding whether or not to grant an interlocutory injunction, to have regard to the public interest in the continued operation of public administration. An order or measure which is at least *prima facie* valid (even if arguable grounds are put forward for suggesting invalidity) should command some respect in assessing the balance of justice. This principle was stated in the specific context of an application for judicial review involving a direct challenge to an administrative decision: on the facts, an immigration decision made by the Minister for Justice. The principle has, however, been applied more broadly in the subsequent judgment of the Supreme Court in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd.* There, some weight was attached to the fact that one of the parties had the benefit of a certificate of patent protection which had been granted pursuant to an

authorisation process provided for by law and which was valid and effective until declared invalid by a court of competent jurisdiction.

43. Applying these principles to the circumstances of the present case, the refusal of an interlocutory injunction would entail a temporary suspension of the conclusiveness of the register maintained under the Registration of Title Act 1964 insofar as it relates to this specific property. The register expressly identifies the plaintiff company as the registered owner of the property. As such, the plaintiff company has a *prima facie* entitlement to exercise ownership rights, including relevantly the right to collect rent from tenants of the property. The evidence establishes that, until restrained from so doing by the Circuit Court, the defendant had been acting in breach of the registered owner's rights by purporting to install tenants in the property and collecting rent from those supposed tenants himself.
44. Were this court to decline to grant an interlocutory injunction in similar terms to that granted by the Circuit Court, it would mean that a *prima facie* breach of the registered owner's property rights would go unremedied. This would occur against a legislative backdrop where the register is stated to be conclusive evidence of title. Of course, the register is not infallible and is amenable to rectification. Nevertheless, significant weight must be attached to the integrity of the register in the context of an application for an interlocutory injunction. A court would have to be satisfied that there was at least an arguable case for rectification before it would consider making—or refraining from making—orders which would have the practical effect of suspending temporarily the rights of the registered owner. For the reasons already explained, the defendant in the

present case has failed to identify any cogent grounds for saying that the register is incorrect, and has failed to apply for rectification.

### **CONCLUSION AND PROPOSED FORM OF ORDER**

45. The moving party, Macray Properties Ltd, has met the threshold of establishing a serious issue to be tried. Indeed, it has also surmounted the higher threshold of establishing a strong case that it is likely to succeed at the hearing of the action.
46. The balance of justice favours the grant of an interlocutory injunction for the following two reasons. The first is the strength of the underlying merits of the moving party's claim. The nature of the dispute between the parties in the present case turns almost exclusively on legal issues: there does not appear to be any material factual dispute between the parties. Accordingly, this court, even though it is only hearing the application for an interlocutory injunction, is well placed to make some assessment of the legal issues. As discussed under the previous heading above, there are two fundamental difficulties with the proposed defence of the proceedings. The moving party has demonstrated very strong grounds for the grant of a permanent injunction at the trial of the action.
47. The second reason that the balance of justice favours the grant of an interlocutory injunction relates to the public interest in the orderly operation of the statutory scheme under the Registration of Title Act 1964. Section 31 of the Act expressly provides that the register is to be conclusive evidence of the title of the owner. The *refusal* of an interlocutory injunction would, in effect, suspend temporarily the operation of the register insofar as it relates to this specific property. A *prima facie* breach of the registered owner's property rights would go unremedied.

This would occur in circumstances where the defendant has never applied to rectify the register. This would be an unsatisfactory outcome and the interests of justice are better served by the grant of an interlocutory injunction.

48. The position of the defendant will be protected in the period between now and the trial of the action in December by continuing the arrangement whereby any rent collected by the plaintiff company is to be held in escrow.
49. Accordingly, the appeal against the Circuit Court's order granting an interlocutory injunction is refused. The order of the Circuit Court is hereby affirmed. I will, however, hear from the parties as to whether the reliefs at paragraphs 2 and 4 of the order are still necessary. These reliefs require, *inter alia*, the defendant to deliver up keys to the property, and to furnish all records held by him relating to the letting of the property. As I understood the submissions at the hearing before me, these aspects of the order have already been complied with.
50. As to costs, my *provisional* view is that the plaintiff company, having been entirely successful in its application for an interlocutory injunction, is entitled to an award of costs in its favour in accordance with Order 99, rule 2 and rule 3 of the Rules of the Superior Courts.
51. These proceedings will be listed for argument on costs and as to the precise form of order on Monday, 25 July 2022 at 10.45 am. The hearing will take place remotely.

#### *Appearances*

Dean Regan for the plaintiff instructed by Sweeney McHugh Solicitors, Donegal  
The defendant represented himself

Approved  
S. M. S. M. S.