# THE HIGH COURT

**[2023] IEHC 167**

**2019 No. 3794P**

**BETWEEN**

**TOM O'BRIEN**

**PLAINTIFF**

**AND**

**FRANCIS MURPHY and By Order**

**MIKE MURPHY**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Eileen Roberts delivered on 31 March 2023**

## The parties and the reliefs sought

**1.** This is an application for injunctive relief by the plaintiff who is a receiver appointed by Promontoria (Oyster) Designated Activity Company ("**Promontoria**"), the entity which, since 9 March 2017, has been registered as the owner of the mortgage charge on folio 3606F Co Galway (the "**Property**").

**2.** The first named defendant is the mortgagor of a loan facility advanced to him by Ulster Bank Ireland Ltd (the "**Bank**") which facility and related security was transferred to Promontoria by Global Deed of Transfer dated 19 December 2016. The first named defendant is the registered owner of the Property, which was secured by the mortgage the subject of these proceedings.

**3.** The second named defendant is the son of the first named defendant and was joined as a co-defendant to these proceedings by order of the High Court dated 3 February 2020. The second named defendant is not party to the mortgage deed. He alleges that he is, and has been since 2008, in possession of the Property and that he occupies same as his family home.

**4.** The application in this case is an application for injunctive relief by the plaintiff against the defendants. Counsel for the plaintiff described it as a three-tier application in which he sought to argue: firstly, that the plaintiff was entitled to all relief sought as of right; secondly and alternatively, that the plaintiff satisfied the strong case test for mandatory relief; or, thirdly, that he satisfied the fair issue test for those prohibitory reliefs sought. The range of injunctive relief sought includes what are clearly mandatory reliefs requiring the defendants to vacate the Property, orders preventing the defendants from trespassing upon or entering the Property or impeding the plaintiff from taking possession of or securing the Property and ancillary orders including the provision of keys and alarm codes to the Property. There are also a range of reliefs sought some of which are arguably mandatory orders albeit framed as prohibitory orders. These include orders restraining the defendants from impeding and/or obstructing the plaintiff in his efforts to sell the Property. orders restraining the plaintiff from collecting any rents in respect of the Property, as well as orders requiring the defendants to provide details of arrangements for the occupation of the Property by anyone other than the first named defendant and orders to provide details of all payments received or receivable in respect of the Property and an order to transfer to the plaintiff any such payments received. The plaintiff also seeks: orders restraining the defendants from interfering with the plaintiff in carrying out his functions and duties as receiver of the Property; an order restraining the defendants from holding themselves out as having any entitlement to sell, rent or

otherwise grant any entitlement to possession of the Property; and an order restraining the defendants from making contact with any prospective purchasers of the Property without the prior written consent of the plaintiff.

**5.** The plaintiff acknowledges that there is a higher standard of proof required to secure mandatory orders at interlocutory stage with a need to establish a strong case likely to succeed as opposed to a fair case to be tried.

**6.** The current status quo in this matter is that the second named defendant is in possession of the Property.

**7.** The plaintiff was represented at the hearing by solicitors and counsel. The defendants are not legally represented. The first named defendant did not appear at the hearing of this interlocutory application. The second named defendant appeared in person. Issues arising from this matter are dealt with later in this judgment.

**8.** I propose firstly to outline the background to the dispute as evident from the papers provided to this court. There were, in the view of this court, some deficiencies in the information provided by way of affidavits on both sides.

**The background to this dispute as apparent from the proceedings and the affidavits filed**

<u>The Proceedings</u>

**9.** The plenary summons in this case was issued against the first named defendant on 14 May 2019. While it sets out the reliefs sought by the plaintiff (running to 20 separate reliefs) there is no information in the summons setting out the basis on which the plaintiff is entitled to seek any of these reliefs. An appearance was entered by the first named defendant in person on 7 October 2019.

**10.** On 18 November 2019 the second named defendant issued a motion seeking to be joined as a co-defendant to the proceedings. His stated reasons for same are set out in his affidavit sworn in support of that motion. The second defendant avers in that affidavit, at para 2 that

> "*I am entitled to defend this motion as subject of the motion has been my dwelling since 2008*".

He also states at para 3 of his affidavit that

> "*The plaintiff is seeing (sic) an order against me, which would affectively (sic) render me homeless. I have been maintaining and improving the property since that time including installation of a central heating system and fitted furniture*".

He alleges at para 4 that

> "*The matter has been dealt with and administered by me on my father's behalf (the current sole defendant) and as such it would be extremely difficult for him if not impossible to litigate the matter without my direct involvement*".

**11.** The second named defendant was joined as a defendant to the proceedings by order dated 3 February 2020. Thereafter on 10 March 2020 an amended plenary summons was served to reflect his joinder as a defendant.

**12.** With the intervention of Covid-19 the proceedings were adjourned generally in March 2020. The plaintiff issued a notice of intention to re-enter the proceedings on 1 February 2022. The second named defendant had not entered an appearance to the proceedings by the time this matter came on for hearing on 16 March 2023. This court accepted an undertaking from him at the hearing of this action that he would file same later that day.

The Affidavits

**13.** The plaintiff's grounding affidavit sworn 15 May 2019 confirms that the relevant loan facility letter at issue in these proceedings is dated 6 January 2010 on foot of which the Bank advanced a sum of €265,060 to the first named defendant. The loan offer was accepted by the first named defendant on 2 February 2010 and the monies were advanced thereafter. The loan facility letter is exhibited. There are in fact two borrowers identified in it namely the first named defendant and a Mr Brian Murphy. The facility letter is deemed to be subject not only to its terms but also subject to the Bank's "*Standard Terms & Conditions Governing Business Lending to Partnerships-Business Banking*," A copy of these conditions is said to be attached to the facility letter but was not exhibited to the plaintiff's grounding affidavit.

***14.*** The loan facility is stated to be a "*Demand Loan Facility*". Its stated purpose was the

> "*Continuation of capital and interest moratorium until 1 March 2010 on existing facility of €258,690 Euro which was sanctioned in June 2009 (please see our facility letter of 24.6.09) plus additional €6,370 to cover interest charged to date since our last facility letter.*
>
> *Original purpose of loan was as follows;-*
>
> *€150,000 to take over Loan Facility granted in March 2006 (please see our facility letter 20.3.06) to assist with house construction on site at Creggmulgrany, Craughwell, Co. Galway, plus*
>
> *Additional €70,000 to assist with completion of above build (please see our facility letter of 26.2.07).*"

**15.** The facility was "*repayable on demand by the Bank*". Without prejudice to the demand nature of the facility however a moratorium on the repayment of principal and interest

under the facility "*shall apply for a period of two months to 1 March 2010*". Interest was to be capitalised quarterly during that period and added to the principal outstanding. The repayment provisions provide that "*Facility to be cleared in full on receipt of house sale proceeds on or before the end of the principal and interest moratorium*".

**16.** The security for the loan, which is stated at that point to be "*Held*" was a "*legal charge over .76 acre site with dwelling house constructed thereon*" and it was noted that a solicitors undertaking dated 9 October 2008 was also held in that regard.

**17.** The stated conditions precedent to the extension of the principal and interest moratorium were stated to be as follows:

"*1. Up date on sale of property and current asking price,*

*2. Up to date details of both your income/expenditure which should also include farm enterprise.*

*3. Up to date Bank of Ireland statements*

*4. Completion of this facility letter*".

**18.** The Bank was permitted to adjust the percentage rate per annum payable above the applicable interest rate in the event of a material adverse change in the Borrower's circumstances. Both Francis Murphy and Brian Murphy, who were collectively defined as "*the Borrower*", signed the facility letter. There is no express reference to joint and several liability in the facility letter. The proceedings have been advanced solely against Francis Murphy.

**19.** Para 4 of the plaintiff's affidavit confirms that the first named defendant provided security for the loan facility in the form of a mortgage over the Property. The mortgage was in fact executed by the first named defendant on 10 December 2008. No new

security was put in place following the facility letter in 2010. This is said by the plaintiff's counsel to be on the basis that the 2008 mortgage was an 'all sums due' mortgage which captured future advances by way of loan.

**20.** The deed of mortgage is exhibited. Of importance to these proceedings are the following points:

1. The mortgagors listed in the schedule are both Francis Murphy and Brian Murphy. However, it appears that only the first named defendant, Francis Murphy, signed the mortgage document. The first named defendant's signature is witnessed by his solicitor.
2. The covenant to pay arises "*on demand*" (clause 1).
3. The charge created is "*continuing security for the payment and discharge of the mortgagor obligations…*". (clause 2.1)
4. The mortgagor "*hereby consents to the registration of all or any of the foregoing security as a burden on the property thereby affected*". (clause 2.2). On 30 March 2009 the mortgage was registered as a charge on the Property in favour of the Bank.
5. The mortgagor was not without the Bank's prior written consent to

   "*grant or agree to grant any lease, tenancy, licence or right of occupation (whether shared or otherwise) affecting any part of the mortgaged property or surrender or terminate or agree to a surrender, assignment or other alienation of any such lease, tenancy licence or right of occupation…*" (clause 5.1.2).
6. The powers of the Bank are specified in clause 11 and come into effect if the mortgagor fails to discharge any of his obligations when they ought to be discharged or if there is an event of default prior to the date on which monies

would otherwise be due to be paid or discharged. Clause 11.4 provides that "*the Bank may at any time after this security has become enforceable under the hand of any official or manager or by deed appoint or remove a Receiver or Receivers…*".

7. Clause 11.8 provides that "*At any time after the security hereby constituted has become enforceable, the Bank may without further notice or demand enter into possession of the Charged Assets*".

*8.* Clause 12 deals with the receivers. Clause 12.1 states that

   "*Any Receiver appointed by the Bank shall (in addition to all powers conferred on him by law) have the following powers which, in the case of Joint Receivers may be exercised jointly or severally:*

   *12.1.1 To take possession of and generally manage the Charged Assets and any business carried on at the Mortgaged Property…[…].*

   *12.1.4 To sell, lease, surrender or accept surrenders of leases, charge or otherwise deal with and dispose of the Charged Assets without restriction including (without limitation) power to dispose of any fixtures separately from the Mortgaged Property. […]*

   *12.1.5 To carry into effect and complete any transaction by executing deeds or documents in the name of or on behalf of the Mortgagor."*

9. Clause 13 provides a power of attorney to the Bank and any receiver to be attorney of the mortgagor to include signing or executing any documents for vesting any of the Charged Assets in any purchaser.

10. Clause 18.1 confirms that any notice or demand by the Bank may be sent by post or fax or delivered to the mortgagor's last known address. The address specified in the schedule to the mortgage for the first named defendant is

Ballyshea, Craughwell, Co Galway. Clause 18.3 provides that "*A notice or demand by the Bank by post shall be deemed served on the day after posting*". Clause 20.4 confirms that "*The Mortgagor consents to service by delivery or post at the Mortgagor's address last known to the Bank*".

11. Clause 19 entitles the Bank to dispose of the whole or any part of the benefit of the mortgage deed and the Bank's rights and obligations thereunder and to provide any information concerning the mortgagor and the deed to any actual or proposed assignee or successor.
12. Clause 21.6 applies where "*Mortgagor*" consists of two or more persons (as in the present case). In those circumstances clause 21.6.2 provides that

> "*The expression "Mortgagor's Obligations" shall be construed so as to include and this deed shall be security for all monies, obligations and liabilities due, owing or incurred by any of such persons to the Bank whether solely or jointly or jointly and severally with any other(s) of them or with any other person(s).*"

**21.** Paras 6 and 7 of the plaintiff's first affidavit confirm that on 19 December 2016 the Bank transferred its interest in the first named defendant's loan facility and mortgage to Promontoria. A redacted copy of the Global Deed of Transfer is exhibited as exhibit T0B4. On 9 March 2017, Promontoria was registered as the owner of the mortgage charge on the Property.

**22.** Para 8 of the plaintiff's first affidavit confirms that the first named defendant defaulted under the loan facility. The date of first default is not specified nor does the plaintiff confirm in this affidavit what demand was made of the first named defendant under the loan. The plaintiff confirms that he was appointed as receiver over the Property by deed of appointment dated 11 September 2017 and he refers to correspondence after that date

with the first named defendant – both of which items are exhibited. The deed of appointment is executed by Promontoria. It refers to a Mortgage Sale Deed dated 8 October 2016, a Deed of Novation dated 25 November 2016 and a Global Deed of Transfer dated 19 December 2016 pursuant to which Promontoria acquired the Bank's interest in the loan and Property. The deed appoints the plaintiff to be receiver over the Property "*and to enter upon and take possession of same in the manner specified in the Security Document*". The deed does not refer on its face to any previous appointment of receivers. The plaintiff corresponded on 12 September 2017 both with the first named defendant and with "*the occupier*" of the Property. This correspondence does not reference the appointment of any previous receivers.

***23.*** The plaintiff's affidavit then moves forward to 5 March 2019, a period of almost 18 months later. There is no explanation as to what occurred in that interim period. On 5 March 2019 the solicitors for the plaintiff demanded vacant possession of the Property confirming that "*our client is making arrangements to take possession and sell the property*". Confirmation was required in writing by 18 March 2019 that certain undertakings requested would be provided failing which an application for injunctive relief was to issue. It would appear that no undertakings were received. A similar letter was sent to the occupant of the property on 8 April 2019 and to the first named defendant on 12 April 2019 at a different address, being the address specified in the mortgage deed.

***24.*** On 15 April 2019 the plaintiff's solicitors received a letter enclosing a letter dated "*16/01/18*" alleged to have been sent to their client's agent in January 2018 from "*the Tenant*" of the Property in the following terms:

> "*Please be advised this property was placed in a private irrevocable contract trust.*

*The property is occupied and the occupants have a legally binding lease with the private contract trust.*

*Any queries should be directed to the trust in this regard*."

**25.** The plaintiff confirms at para 10 of his affidavit that no consent was given by the Bank or Promontoria to the first named defendant to part with possession of the Property. Accordingly, he states that "*any arrangements providing for occupation of the Property by the unidentified "Tenant" were created in contravention of the Deed of Mortgage and are void and of no legal effect as against Promontoria and me, as Receiver*".

**26.** An occupancy report obtained by the plaintiff in May 2018 confirmed that the Property was occupied by the second named defendant and this position is also confirmed by the second named defendant in his affidavits.

**27.** At para 13 of his affidavit, the plaintiff confirms that he seeks the interlocutory injunctive orders "*so that the Property can be secured and disposed of for the best price that can be reasonably achieved*".

**28.** The plaintiff avers at para 13 of his affidavit that the first named defendant's liability under the loan facility stood at €451,019.89 as at 9 May 2019. However, no breakdown of that figure is provided.

**29.** Para 14 of the plaintiff's affidavit states his belief that the first named defendant will be unable to pay any amount of damages and as a result the plaintiff argues that damages would not be an adequate remedy for the receiver. The receiver also argues that the balance of convenience lies in his favour as it would be in the first named defendant's interests to have the Property disposed of for the best price achievable to reduce the debt. It is argued that the first named defendant "*has deliberately sought to thwart the*

*receivership process by purporting to grant a lease or right to occupy the property to his son in clear contravention and breach of clause 5 of the Mortgage*".

**30.** An affidavit was sworn on 30 September 2019 by the first named defendant in response to the plaintiff's affidavit. At para 2 of this affidavit the first named defendant states that "*this matter is already before the High Court*" and refers to the High Court proceedings under record number 2016/1019P. It appears that these are High Court proceedings taken by the first named defendant against a previous receiver appointed in respect of the Property. Those proceedings have not been advanced but remain in place.

**31.** The first named defendant states that he had written to the plaintiff's representatives on 7 March 2019 confirming that he had no difficulty in giving the undertakings sought but he had not received official notification of the receiver's appointment and asked that it be sent to him. He exhibits a letter addressed to the receiver's solicitors.

**32.** There are then some confusing and legally incorrect averments in the first named defendant's affidavits regarding the fact that as the receiver contracts without personal liability he has no basis to claim damages at all or to suggest the damages would not be an adequate remedy.

**33.** The first named defendant argues at para 5 of his affidavit that he sees "*no evidence of any event of default*" or no "*evidence of a debt*". He pleads at para 6 of his affidavit that "*to date I have not received a formal letter of demand. Without a final letter of demand the appointment of a receiver is invalid…*".

**34.** A second affidavit was sworn by the plaintiff in response over 4 months later on 7 February 2020. This affidavit deals with five specific issues:

**35.** (i) – First, the plaintiff provided particulars of the demands issued to the first named defendant, which had not been itemised in the plaintiff's grounding affidavit. It appears

that two demands were sent by the Bank. The first demand was addressed to the first named defendant and Mr Brian Murphy and is dated 11 October 2010. The letter is stated to constitute a "*formal demand for payment of your debt*" and the amount claimed was €276,835.62. Proposals for repayment were sought within 14 days failing which the Bank advised that "*the account will be placed in the hands of the Banks debt recovery department*". The letter also confirmed that "*This may lead to legal action being instigated against you and the realisation of any security held by the Bank*". The letter referenced the legal charge over the Property and a solicitor's undertaking and life policy also held as security. The second demand is dated 5 January 2011 and is addressed to the first named defendant only. The letter is in similar terms to the previous demand save that the balance demanded at that point had increased to €278,627.77. Both letters of demand are addressed to the address which appears on the mortgage document.

**36.** (ii) – The second issue concerns the previous receivership, which had not previously been addressed by the plaintiff. The plaintiff avers at para 4 of his affidavit that, following demands, the Bank appointed Mr Peter Stapleton as receiver by deed of appointment dated 11 June 2012. The proceedings referred to by the first named defendant in his affidavit were issued by the first named defendant against Mr Stapleton on 4 February 2016. The plaintiff avers that following the transfer of the loan and related security to Promontoria on 19 December 2016 that

> "*the receivership of the mortgaged property was rationalised and I was appointed. In particular, Mr Peter Stapleton was subsequently discharged as receiver and by deed of appointment dated 11 September 2017 I was appointed as receiver over the mortgaged property*".

The deed of appointment of Mr Stapleton is exhibited. That document shows that the Bank appointed Mr Stapleton as receiver and manager over all the assets charged by the deed of charge dated 10 December 2008. The plaintiff's affidavit contains no explanation as to when or how Mr Stapleton was discharged as receiver and manager.

**37.** (iii) – The third issue relates to pre-action correspondence and the receiver avers that his solicitors never received the letter from the first named defendant dated 7 March 2019, exhibited by the first named defendant.

**38.** (iv) – The fourth issue is confirmation that there is only one mortgage registered against the Property and that is the deed of mortgage dated 10 December 2008. The plaintiff notes the registration on 9 March 2017 of Promontoria as the registered owner of that mortgage on the Property and refers to the conclusive nature of the register as provided by section 31 of the Registration of Title Act 1964.

**39.** (v) – The fifth and final issue raised by the plaintiff in his second affidavit relates to the amount of debt due by the first named defendant to Promontoria which as at 31 January 2020 is stated to be €426,384.89. A "statement of account" is exhibited but contains little detail other than the movement on this account from 8 March 2019 to 13 December 2019. It is a significantly higher figure than had been demanded in 2011. The interest rate is specified at 4.5%. This interest appears to be accruing at a rate between €4000 and €5000 per quarter.

**40.** The next affidavit in the sequence is an affidavit from the second defendant sworn on 2 March 2020 after he had been joined as a defendant.

**41.** He avers at paragraph 3 that "*…we have not received any formal demand by Ulster bank on any of the dates which Mr O'Brien claims demands have been sent*". He complains of the poor quality copies exhibited, that they are unsigned and that "*there is*

*no evidence to state that they were ever sent*". He avers "*I can definitively state that we did not receive any letter of demand from Ulster bank at any time since 11th of October 2010 or 5th of January 2011. Therefore the formalities for receivers have not been met Mr O'Brien's appointment stands as invalid".*

**42.** The second named defendant does not purport to make his affidavit on behalf of the first named defendant. It was never suggested by the plaintiff that the second named defendant received any demand letter nor would the Bank have had a reason to send one to him as he was not a party to the mortgage.

**43.** The second named defendant outlines how a data access request was forwarded to Promontoria in 2017 following their acquisition of the mortgage. He complains that there are "*numerous missing documents from the received pack*". He outlines the need "*to request sight of the original documentation*". However, no specific arguments are advanced to challenge the transfer of the mortgage (save an argument about original documentation which is not relevant) nor is there any engagement by the second named defendant with regard to the conclusiveness of Promontoria's registration as owner of the charge.

**44.** The second named defendant notes that there is no evidence provided of the discharge of Peter Stapleton as receiver. That is a valid point for the second named defendant to have raised. It was only answered by a third affidavit sworn by the plaintiff (some four months later) on 14 July 2020. The plaintiff avers that Mr Stapleton was discharged as receiver on 9 February 2018 and the relevant deed of discharge is exhibited. It is clear that this deed post-dates the appointment of the plaintiff as receiver (on 11 September 2017). The deed of discharge is made between Promontoria and Mr Stapleton. The recitals incorrectly refer to the earlier appointment as having been made by Promontoria when it was in fact made by the Bank. There is no reference in the deed of

discharge, or indeed evidence before the court, as to how Promontoria stepped into the original deed of appointment of Mr Stapleton. It is not evident to this court therefore on what basis Promontoria discharged him.

**45.** Finally, the second named defendant avers at paragraph 9 that

> "*I myself have never made the claim that I was a "tenant" I have simply stated that I have lived in the house since 2008. I can confirm that the property is in a private contract trust and that copies of all correspondence received are forwarded via email. I am a stranger to the claim that a letter was sent to Beauchamp's solicitors claiming a tenancy therefore I cannot comment on it in any way".*

Given the vague nature of this averment, this was a matter on which the second named defendant was questioned by the court at the hearing of this application.

**46.** That is the extent of the evidence and arguments provided by the parties on affidavit and in the proceedings. It is worth now considering how matters were advanced orally at the hearing of the application.

**The hearing of this application**

**47.** At the hearing of this application the plaintiff was legally represented. There was no appearance on behalf of the first named defendant. The second named defendant appeared in person. Objection was rightly taken by counsel for the plaintiff to any attempt by the second named defendant to represent the first named defendant. It was explained to the second named defendant that, while he was entitled to appear on his own behalf, he was not entitled to represent the interests of any other party before the court. The second named defendant stated that he had assisted many parties in similar situations but conceded that this was outside court rather than in court. The first named defendant needs to be very clear that the second named defendant will not be able to

represent him in court and if he wishes to be represented at any future hearing he should either instruct solicitors or counsel or attend in person. While there may be rare and exceptional circumstances in which third-party lay representation could be permitted, there was no evidence before the court that this was such a rare and exceptional case. The hearing therefore proceeded on the basis that the first named defendant was unrepresented at the hearing but had delivered an affidavit which was considered by the court.

**48.** The plaintiff sought to introduce a new affidavit at the hearing. This was refused by the court on the basis that the defendants had not had an opportunity to respond to it. While I have seen that affidavit, I do not propose to rely on it in this judgment. It does not address any legal or factual matters that are relevant to the appointment of the plaintiff as receiver.

**49.** Counsel for the plaintiff argued that his application was uncontested against the first named defendant. He said that there were only two points raised by the first named defendant on affidavit, namely that he had not received demand letters and that he was generally challenging the validity of the appointment of the receiver (or at least had challenged the appointment of a previous receiver). Counsel for the plaintiff said that the failure of the first named defendant to engage with the specific demand letters which had been exhibited in the plaintiff's second affidavit meant that there was merely a bald denial of receipt of demand and that this should not prevent the court holding that the sums due had been validly demanded. Equally, the first named defendant did not raise any specific challenge to the transfer of his loan to Promontoria but had merely sought to inspect further original documentation.

**50.** Counsel for the plaintiff argued that the demands which had been served prior to the appointment of the first receiver could equally be relied upon by a second receiver.

**51.** Counsel for the plaintiff said there were a number of important issues which the first named defendant had failed to address or contradict at all. These included that he had entered into the loan agreement, that he had received the loan monies and that he had not made any repayments in respect of the loan, which caused it to go into default. The first named defendant had also failed to address the allegation that he had, in breach of covenant, parted with possession of the Property and had allowed the second named defendant to occupy it. There was no evidence from the first named defendant as to any entitlement of the second named defendant to lawfully occupy the Property.

**52.** In relation to the query raised by the court regarding the fact that two sets of receivers had been in place for a period of time and how Promontoria could discharge the first appointed receivers, counsel for the plaintiff submitted that the mortgage entitled the Bank (and by extension Promontoria) to appoint a receiver or receivers. He argued that there was no prohibition on more than one receiver being in place. Counsel further argued that as the first named defendant had challenged the validity of the appointment of the first receiver, he could not now use that appointment to undermine the later appointment of the plaintiff as receiver.

**53.** The second named defendant argued that two unsigned copy letters provided no proof that the loan had been properly demanded. He complained that there was a lot of information missing and that he had not been provided with information he had sought over the years. He complained that he had no idea how the indebtedness was calculated and that he had never been provided with a proper statement of account. Of course, this latter document could only have been properly requested by the first named defendant.

**54.** The second named defendant said that he believed strongly the plaintiff had not been properly appointed. He argued that the deed of discharge was invalid and that the

confusion regarding sequential receivers ought to persuade this court to refuse injunctive relief.

**55.** The second named defendant stated that he had been in possession of the Property since March 2008 following a row between his father and the builder which had resulted in litigation. He said he had finished off the Property and had moved into it using his own money to complete the roof. There are no such details however contained in the affidavit he filed although it does refer to other works he claims to have carried out. He said he was never given the opportunity to buy the Property or to take over the loan and that he believed he should be able to do this. He argued that there were issues with the demands, issues with the provision of documents and with the discharge of the previous receiver. He also argued that the loan facility was clear that the loan was to be repaid out of the proceeds of sale of the Property (which had not been sold). He said that Promontoria was being "unjustly enriched" because they were now looking for full payment having bought the loans at a discount. He said that the Property was his family home and that he should not be made to vacate it. He said that if the Property is sold by the receiver that will be the end of the matter.

**56.** When questioned by the court regarding the basis on which the second named defendant believed he had an entitlement to remain in the Property, the second named defendant was inconsistent and evasive. He denied sending the letter from "the tenant", although he could not offer any suggestion as to who else might have sent it. That letter refers to the "*private trust*" arrangement which is also referred to in the second named defendant's affidavit. He explained that this was the "Charlie Allen trust" which he now realised was not legally sound and he said that he regretted stating this in his affidavit. He said there was no private trust, contrary to what he had averred on oath. He was not a tenant and had never paid any rent. He said he had no formal agreement in

relation to his occupation and that in fact, having fallen out with his father, he had taken possession of the Property without his father's knowledge or consent. He said he was in adverse possession and that as he had been there since 2008, he had acquired title to the Property. None of this was stated in his affidavit. This version of events also does not sit easily with the previous averments of the second named defendant that he was administering this matter on his father's behalf and needed to be "*directly involved*" in it (see para 10 of this judgment).

**Analysis of the facts and relevant caselaw.**

**57.** The plaintiff claims an entitlement to the interlocutory injunctions he seeks as a matter of right on the basis that he has good title to the lands as a validly appointed receiver and that the second named defendant's status as a trespasser on the Property is indisputable. This position requires that there be no issue raised as to the validity of the plaintiff's appointment (and therefore his title) and that there is no issue raised regarding the second named defendant's status as a trespasser. If the entitlement to an interlocutory injunction as of right is not made out, I was urged by counsel for the plaintiff to instead consider whether the plaintiff would be entitled to the relief it seeks under the *Campus Oil* principles, following the approach suggested by the Supreme Court in *Merck Sharp & Dohme Corp v Clonmel Healthcare Ltd* [2019] IESC 65.

**58.** In summary, the defendants have advanced the following general propositions by way of defence to the plaintiff's application for interlocutory relief. My analysis and conclusion in respect of each proposition is set out under each point:

1. *that repayment of the loan was never demanded and accordingly the plaintiff was not validly appointed as receiver*. I find in that regard that the receiver has provided evidence of two demand letters dated 11 October 2010 and 5 January

2011 respectively. The first named defendant has asserted on affidavit that he received no demands. The second named defendant is not in a position to give any evidence regarding the receipt of demands as there is no suggestion any demands were sent to him (nor would there have been any requirement to do so). I accept that there is no evidence currently before the court regarding actual service of the demands but the fact that copies have been provided makes the plaintiff's position stronger on this point that the bald denial of the first named defendant. The demands predate by some years the appointment of the plaintiff as receiver. The plaintiff asserts that demands served by the Bank can be relied on by him. While there is some issue raised on the receipt of the demands, I do not find that there is a real or substantial issue on it. The first named defendant has baldly denied receipt but has failed to engage on the specific demand letters the Bank say that they sent.

2. *that the defendants have not received the requested original documentation regarding the transfer of the mortgage to Promontoria*. On this point I do not believe the defendants have raised a fair issue. There are no actual grounds advanced to challenge the transfer. Nor have the defendants engaged in any way with the conclusiveness of the Register which reflects that Promontoria is the registered owner of the charge. The loan has not disappeared because it was transferred to Promontoria. Neither has the agreed repayment obligation of the first named defendant been extinguished by that transfer. The mortgage deed permitted the Bank to transfer or assign the mortgage. The second named defendant has provided no legal basis as to how he can challenge that as a non-party to the mortgage. Nor has he provided any legal basis on which he should

be entitled to step into the mortgage or renegotiate it to reflect the terms on which it was acquired by Promontoria.

3. *that the defendants have never been provided with a statement of account*. On this issue I believe that the first named defendant is entitled to receive a detailed statement of account breaking down the amounts due by reference to principal and interest. The second named defendant has no rights under the mortgage or entitlement to demand a statement of account in relation to it. The plaintiff has stated the sums due. Even if the figure provided is incorrect, the defendants have not raised a fair issue on this point in circumstances where no repayments have ever been made in respect of the loan, and there are clearly substantial monies due to Promontoria.
4. *that Promontoria had no right to appoint the plaintiff as receiver when there was already a receiver in place*. On this point I believe that at trial, Promontoria will need to deal with the discharge of the earlier receiver. Without determining the issue, I believe that there is an evidential issue raised in relation to it, which in my view prevents the plaintiff securing the injunctive relief it seeks as of right.
5. *that, as the second named defendant states, the second named defendant has acquired rights to remain in the Property and cannot be evicted*. I do not believe that the second named defendant has raised a fair issue on this point. The second named defendant has provided no credible or even consistent evidence as to the basis of his entitlement to occupy the Property.

**59.** Counsel for the plaintiff relied upon the decision of the High Court in *Tyrrell v Wright* [2017] IEHC 92 which was a case where the plaintiff receiver sought vacant possession of three properties with a view to selling the properties. At para 58 of her judgment Ms

Justice Costello stated "…*prima facie the plaintiff is entitled to an injunction to restrain a trespass on an interlocutory basis unless the defendant puts in evidence to establish that he has a right to do what would otherwise be a trespass*". One of the parties in that case asserted that she was entitled to an interest in the secured properties on the basis of her contributions to the fitting out and completion of them. The court found that this individual could not have contributed towards the acquisition of an interest in the property prior to the grant of the mortgage. The first named defendant in that case could not later as a matter of law confer, assign or convey any interest in those properties to a third party without the prior written consent of the mortgagee.

**60.** Similarly, in this case the first named defendant could not part with possession of the Property to the second named defendant without breaching the negative pledge clause in the mortgage. I believe it is for this reason that the second named defendant appeared at the hearing of this application to change his previous position and to introduce the idea that he was occupying the Property without the knowledge or consent of the first named defendant. While this court at interlocutory stage is not determining finally any issues of fact or law, I nevertheless found the second named defendant to be unconvincing as to the basis of his occupation of the Property and any beneficial or other interest he claims he has acquired in it. In circumstances where the first named defendant appears to live in immediate proximity to the Property, it appears highly unlikely that he was unaware of the second named defendant's occupation of it. Furthermore, it is clear that in 2010 when further monies were being advanced to the first named defendant, both he and the Bank had in mind the imminent sale of the Property to enable the loan to be repaid. There is no suggestion that for a period of two years prior to that date the second named defendant had been in occupation of it. These will of course be matters for the trial of the action. The relevance however for present

purposes is to enable this court to determine whether a sufficiently strong argument has been advanced by the defendants on this point to prevent this court granting interlocutory relief sought by the plaintiff. On this point I am not convinced that the second named defendant has demonstrated a legal entitlement to occupy the Property. Even if he were to be in adverse possession of same, the evidence is that the plaintiff demanded vacant possession from him within the relevant statutory period..

**61.** The court in *Tyrrell* also had to consider, in assessing the balance of convenience, the position where one of the properties was occupied as a family home. As in the present case, the house in that case had not been built as a family home but rather as an investment property in respect of which commercial loan facilities were advanced which were repayable on demand. Costello J noted at para 110 of her judgment that "*[t]his differentiates his situation from the mortgagor who enters into an agreement to borrow monies for the purposes of acquiring a family home*". Costello J found that in those circumstances that damages would be an adequate remedy for the first named defendant.

**62.** Because there is at least an evidential issue regarding the appointment and discharge of an earlier receiver and in circumstances where there is no evidence before the court as to the entitlement of Promontoria to discharge the first appointed receiver, I do not believe that the plaintiff's title is so clear as to justify the granting of an order for possession in his favour as of right. Accordingly, I now move to consider the test for granting interlocutory relief on more usual *Campus Oil* principles.

**63.** In order to obtain the mandatory relief sought, the plaintiff would have to establish a strong case likely to succeed at trial. The issue regarding the previous receivers remains relevant in relation to that test. Another issue which was referenced briefly by the second named defendant, but not raised at all by the plaintiff, is the decision in

*Charleton v Scriven* [2019] IESC 28 where the Supreme Court recognised that, in the words of Clarke CJ at para 6.12 to his judgment "*there may very well be an important distinction to be made in receivership cases between situations where the receivers concerned simply intend to maintain the situation pending a trial and ones where the substance of the interlocutory order sought is one designed to, in practice, bring the proceedings to an end*". I believe in this case that if the orders for possession and sale of the Property were secured at this stage, it would effectively bring these proceedings to an end. I am reluctant to make such an order in circumstances where I have outstanding concerns regarding the appointment and discharge of earlier receivers.

**64.** I am satisfied however on the basis of the evidence before the court that the plaintiff has met the lower standard of proof of a fair issue to be tried and that the arguments advanced by the defendants are not sufficiently strong to displace that.

**65.** As part of the balance of convenience, I am required to consider the adequacy of damages. The plaintiff argues that there is no reason to believe the defendants could discharge any award of damages made against them. In circumstances where it appears that no loan repayments have ever been made and where there is now a significant indebtedness due by the first named defendant to Promontoria, I am satisfied that the ability of the defendants to discharge any award of damages must be questionable. Conversely, Promontoria should be a mark for any damages if it transpires at trial that the injunction should not have been granted.

**66.** As to the other aspects of the balance of convenience, if I had been minded to grant an order for possession and sale of the Property, the balance of convenience would have involved a different assessment in circumstances where the second named defendant is residing there, albeit it would appear free of charge and without any discernible legal entitlement. However, where I have determined that the interlocutory relief should at

this point be limited so as not to include taking possession of or selling the Property, the same issues do not arise.

**67.** I am satisfied that the plaintiff has been thwarted by the defendants in his efforts to enforce the security granted to the Bank (and assigned to Promontoria) by the first named defendant. The proceedings now need to progress with significantly greater speed so that the trial can be concluded and final orders made.

**68.** I propose to make an order in favour of the plaintiff as against both defendants in the terms of paragraphs 3, 8, 9, 10, 11,12 and 13 of the plaintiff's notice of motion dated 3 July 2019.

**Conclusion**

**69.** Because there is an evidential issue raised regarding the plaintiff's appointment arising from the appointment and discharge of a previous receiver and manager, I will not make an order on the basis that the plaintiff is entitled to all the interlocutory relief he seeks as a matter of right.

**70.** I have therefore instead considered this application by reference to the *Campus Oil* principles mindful that to secure mandatory injunctive relief, the plaintiff needs to establish a strong case that he is likely to succeed at the trial of the action. Given the evidential issue referred to above, I will not make orders at this stage entitling the plaintiff to mandatory relief in the form of possession of the Property.

**71.** I have determined however that the plaintiff has on the evidence before me, met the lower threshold of proof of a fair issue to be tried. In those circumstances I propose to make orders in favour of the plaintiff as against both defendants in the terms of paragraph 3, 8, 9, 10, 11, 12 and 13 of the plaintiff's notice of motion dated 3 July 2019.

**72.** I will list this matter for mention on 21 April 2023 for the purposes of hearing the parties in relation to legal costs and any other matters arising from this judgment. Given the delays which have occurred to date in these proceedings I will fix directions for the exchange of pleadings on that date unless the parties agree those directions in advance.