THE HIGH COURT

H.P. 2024 No. 3751

[2025] IEHC 124

BETWEEN

THOMAS NAUGHTON

PLAINTIFF

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND, JAMES ANDERSON AND O'DONNELLAN JOYCE

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered 4 March, 2025.

Introduction

1. This is an application for costs in an interlocutory injunction which has now become moot. The plaintiff says it has become moot because the second defendant ("Mr. Anderson"), who was previously appointed as Receiver of the first defendant ("the Bank") over the plaintiff's properties, has since been appointed as agent of the Bank for the purpose of, *inter alia*, marketing the property for sale.

2. The plaintiff says that when the proceedings commenced and when this motion for interlocutory relief was first issued, Mr. Anderson was a mere rent receiver with no power of

sale. Accordingly, a notice of motion issued on 23 July 2024 – the same date as the plenary summons – in anticipation of an online auction to take place on the following day. I granted short service for 24 July 2024, and on that date, I granted an order restraining Mr Anderson from being named as vendor in a contract for sale of the plaintiff's properties as comprised in Folios 55332F and 55333F Co Galway. That order expired on 30 September, 2024. I do not know what happened on that date or thereafter.

3. In any event, on 20 November 2024, Mr Anderson was appointed as agent of the Bank to provide certain services which include services relating to the marketing and contracting to sell the property. Mr Anderson was appointed with effect from the effective date as defined in clause 1.1. The effective date was said to be the earlier of the date of execution of the deed or the date on which the services or any part of the services were commenced in accordance with the instructions of the Bank. That agreement is exhibited to the second affidavit of Mr Anderson which was sworn on 28 November 2024, and it appears that the plaintiff and his representatives did not have any copy of that agreement before that time.

4. The plaintiff now accepts that the application for interlocutory relief is moot as Mr Anderson clearly has authority pursuant to his appointment on foot of the Deed of 28 November, 2024, to market the property for sale and to enter into a contract as agent for the Bank. The plaintiff says that the proceedings have become moot by the unilateral action of the defendants in appointing Mr Anderson as agent some months after the proceedings commenced, thereby curing what the plaintiff says is a defect in his authority prior to that date. As a consequence, the plaintiff, in reliance on *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222, says he is entitled to the costs of the motion and the action which it appears he intends to discontinue.

5. The defendants say the plaintiff is not entitled to his costs as he could never have established a fair question to be tried, damages were at all times an adequate remedy, and the plaintiff deliberately delayed his application to the last possible day so as to frustrate the online auction.

6. The principal reason upon which the defendants appear to say the plaintiff could not have established a fair question to be tried is that they say Mr Anderson was agent of the Bank even prior to execution of the formal deed on 20 November 2024.

7. The grounding affidavit which was sworn on 23 July 2024 contains a very specific averment that the charges created over the plaintiff's properties do not confer a power of sale upon any receiver such as Mr Anderson. The terms of the Order which I granted on 24 July 2024 was merely to the effect that Mr Anderson could not be named as vendor in any contract for sale of the properties. No order was granted against the Bank and it is quite clear that the Bank had a power of sale under the relevant charges.

8. The essential substantive issue in the proceedings is whether the receiver had a power of sale on the date that the proceedings issued and the date on which the interim order was granted.

9. If the receiver only acquired a power of sale by virtue of being appointed agent of the Bank, and if he was not appointed until 20 November 2024, then it would seem to inevitably follow that the proceedings became moot due to the unilateral action of the defendants in procuring the appointment by the Bank of Mr. Anderson as its agent, and costs would follow.

10. If Mr Anderson was agent before that time, and in particular on 23 and 24 July 2024 then the proceedings could always have been defended and the defendants would be entitled to their costs on the basis that the proceedings were misconceived and would have failed.

Review of the evidence

11. So far as the evidence prior to the issue of proceedings is concerned it is not in dispute that the charges did not confer a power of sale on to the receiver and that he was a rent receiver only. The plaintiff had available to him a copy of the deed of appointment of Mr Anderson as receiver. That deed is dated 28 September 2023. He also had available to him the legal pack issued in connection with the online auction that included a draft contract for sale which was in terms of the Law Society Conditions of Sale, 2023 edition. This named Mr Anderson as vendor. In the Documents Schedule, certified copies of the folios were listed along with certified copies of the charges. The fifth and last document was a certified copy of the deed of appointment of Mr Anderson as receiver. This is consistent with Mr. Anderson purporting to sell the properties in his capacity as receiver.

12. The special conditions are 23 a number and run to five and a half pages. Special condition 4 relates to title. Under the heading *"Receiver appointment"*, it is said that Mr Anderson was appointed as receiver by deed dated 28 September 2023 and that the purchaser must accept appointment as valid. The purchaser is also required to accept that the Bank has a power of sale under the relevant charges, and the purchaser is informed that the sale would be by the Bank as mortgagee in possession. There is no reference anywhere in the special conditions to Mr Anderson acting as agent of the Bank, nor is there any reference to any intended or proposed appointment in writing by way of a formal deed as eventually occurred on 20 November 2024.

13. The draft contract for sale, therefore, supports the plaintiff's position that, as of 23 and 24 July 2024, Mr Anderson was appointed as receiver only and not as agent of the Bank.

14. Secondly there is a letter from the receiver to the plaintiff dated 2 October 2023. This contains the following statement:

> *"I wish to advise that by way of deed of appointment dated 28 September 2023, I was appointed receiver over : Folios 55332F and 55333F Co Galway*
>
> *Please note that your interest in the property ceased as at the date of my appointment and I am now entitled to possession of the property so that the property can be marketed and sold in order to pay down your indebtedness in this matter to the fullest extent possible."*

It is quite clear from that letter to Mr Anderson is informing the plaintiff that he has been appointed receiver and that it is in that capacity that he is demanding possession and purporting to market and sell plaintiff's properties. He also asserts an unqualified right to possession and makes the puzzling and somewhat overblown statement that the plaintiff, as registered owner, no longer has any interest therein. These statements were repeated in a further letter dated 5 October 2023.

15. He was of course quite wrong about that. A receiver has a power of possession incidental to the exercise of his powers or is otherwise explicitly granted in the charge. In this case there is no explicit power of possession and therefore his right of possession is confined to a right which is necessary and incidental to his powers as rent receiver. It is abundantly clear from the evidence that not only did the receiver never act as rent receiver, but he never intended to so act. By contrast, the plaintiff as registered owner of the lands remained as such unless and until the Bank, as registered owner of the charges, exercised its power of sale pursuant to s. 62 of the Registration of Title Act, 1964, sub-ss. (6) and (9). Furthermore, the plaintiff had a right of possession unless dispossessed by the Bank as mortgagee in possession or by a receiver going into possession for the purpose of carrying out his powers and duties as receiver (which did not occur here and was never intended).

16. Nevertheless, the receiver purported to enter into possession on 13 October 2023. He was dispossessed a few days later - certainly no later than 17 October 2023 - by the plaintiff.

It is difficult to read the averments relating to these events in Mr. Anderson's principal replying affidavit as anything other than a complaint about this. However, it may now be something of a relief because it now appears that the entry into possession by the Receiver was a trespass, but was of very limited duration and therefore most likely could give rise to no claim greater than one for nominal – or at least limited - damages.

17. Issue was taken by the plaintiff's then solicitors in correspondence with the Receiver's agent's attendance on the property and their actions in changing the locks and occupation thereof. In response, by letter dated 9 November, 2023, the receiver stated: –

> *"The receiver is satisfied that his appointment is valid. The receiver is also satisfied that all steps taken by on behalf of the receiver are squarely within the scope of the receiver's authority."*

There is no mention whatsoever of a dual role for the receiver as agent of the Bank. On the contrary, he asserted his rights on the basis of his status as receiver.

18. All of the contemporaneous documentary evidence therefore is consistent with the appointment of Mr Anderson solely as receiver and not as agent.

19. The only evidence for the contention that Mr Anderson was at all times also the agent of the mortgagee are the averments in his principal replying affidavit of 2 October 2024, sworn shortly after the expiry of the interim order. He states: –

> *"4. Firstly, and from the outset, I acknowledge that I do not enjoy a power of sale in my role as receiver of the Property.*
>
> *5. The [Bank], on the other hand, does enjoy a power of sale. <u>In my role as receiver to the property</u>, and in conjunction with the [Bank], I made arrangements for the marketing of the property for sale. In that role, I take steps to ready the property for sale, arrange for it to be marketed and ultimately seek to achieve the best price for the property. I would also seek to maintain the Property while a sale is awaited.*

6. Although no written agency agreement has been executed, the [Bank] and I are in the process of finalising same to formalise the agency agreement once a suitable buyer is identified. The said agreement confirms the arrangement which was in fact in place – where I was appointed as an agent to carry out the work set out above and this also delegates the [Bank's] power of sale to me, as agent." [Emphasis added.]

19. Those averments are somewhat confusing in that they state explicitly that the steps undertaken by Mr. Anderson in relation to the sale of the properties were made and done in his capacity as receiver, while also saying that he was appointed as agent to carry out the work already referred to. They are, in my view, contradictory.

20. Furthermore, Mr. Anderson has not put in evidence of any correspondence to the plaintiff before or after the issue of the proceedings and the grant of the interim order in which he refers to his role as agent. Given the contents of his letters of 2 and 5 October, 2023, the plaintiff and his advisers could not have had any suspicion that Mr. Anderson was asserting authority beyond that enjoyed as receiver, which was of course determined by the terms of the relevant charges.

21. Furthermore, if one looks at the contract for sale, there is no reference whatsoever to any role for Mr. Anderson other than as receiver. There is, for example, no provision in the special conditions requiring the purchaser to accept Mr Anderson's authority as agent for the Bank to sign the contract for sale. While this would be a matter for the purchaser – as a purchaser would be concerned to ensure that it had an enforceable contract for sale when placing a deposit on lands – it is also highly material evidence as to what Mr Anderson thought his authority was at the time he instructed the issue of the draft contracts and indeed the holding of the auction on 24 July 2024. The inescapable inference from the draft contract for sale is that Mr Anderson was purporting to sell as receiver, that is, he was purporting to enter into the

contract for sale as receiver, on the basis that the Bank would ultimately sign the relevant deeds of transfer.

22. The letters of 2 and 5 October 2023 are also quite plain in stating that Mr Anderson is acting as receiver. Unfortunately, they overstate Mr Anderson's powers as such. No explanation as to how these letters came to be written, or why they were never corrected, has been given. No detail is given of this purported verbal arrangement between Mr Anderson and the Bank. It is not stated when it commenced, what the terms of this purported arrangement were – for example what fees Mr Anderson was to be paid, which surely would have been a matter of concern to him – or who concluded this suggested verbal arrangement on behalf of Mr Anderson and the Bank, respectively. Without those details the court is left with the very uncomfortable feeling that the averment at paragraph 6 of Mr Anderson's replying affidavit is unreliable and incorrect.

23. These types of applications are quite commonplace in the chancery list. I myself have refused at least one on the basis that a bald assertion in an affidavit by the neighbour of a borrower that he had been in sole and exclusive occupation of a mortgaged property for in excess of 12 years was lacking in credibility given his complete inability to put forward any corroborative evidence, such as the payments of outgoings on the property. Bare assertions of this kind, particularly as to the ultimate issue to be decided by a court, are in my view inadmissible in evidence and should not be contained in affidavits.

24. In *Brennan v. Lockyer* [1932] IR 100, which concerned an application to set aside leave granted under the former order 11, and where it had been necessary to show at *ex parte* stage where the relevant contract was made for the purpose of considering whether it was appropriate to grant leave to serve proceedings out of the jurisdiction, Kennedy C.J. stated (at p. 107):-

> *"It is necessary in my opinion that the affidavit should set out the facts which will enable the court to determine for itself where the contract was made and not to accept what is*

merely that deponent's opinion or conclusion upon undisclosed facts, without regard to the material upon which the interested parties conclusion is based."

A similar situation pertains here where Mr Anderson has purported to depose to a conclusion on the principal issue of fact between the parties, which is whether he was already the agent of the Bank – as opposed to merely the receiver – at the relevant time, but has not disclosed any evidence material to that issue so as to permit the court to conclude for itself that Mr Anderson had authority as agent to enter into a contract for sale, and indeed to market properties. It is very doubtful that such an averment could be accepted.

25. However, I prefer to rest my decision that there is no reliable evidence of even an informal appointment as agent prior to 20 November, 2024, on the fact that the relevant averments are in any event contradictory on the material issue of the authority upon which Mr. Anderson was acting.

26. Indeed, I have no doubt that were corroborative evidence available – such as emails predating the formal appointment of Mr Anderson as agent of the Bank, and which showed that he had commenced acting as agent on the basis that his authority would later be ratified- those would have been put before the court.

27. On the evidence before me, therefore, I am satisfied on the balance of probabilities that Mr Anderson was not the agent of the Bank prior to 20 November, 2024. It is, of course, at least as relevant to point out that, even if Mr. Anderson had been authorised to act as agent of the Bank prior to that date, the plaintiff was not made aware of any such agency prior to service on them of the replying affidavit of 28 November 2024.

28. That was shortly before the setting down for hearing of the interlocutory motion which I am told occurred in December, 2024. The plaintiff's counsel drafted written submissions in January, 2025, which were drafted on the basis that the application was now moot. These were served only on 19 February, 2025, due to the inexplicable failure of his solicitor to send them

to the correct email address, but they were nevertheless served prior to the hearing of the application for costs. It is not acknowledged in the defendants' submissions that any change occurred since the date of issue of the proceedings and it is clear from the defendants' submissions that the costs applications was to be fully defended. In those circumstances, the hearing date would have been required in any event to determine the costs to date, the proceedings now having become moot, and therefore the costs of the hearing on 27 February, 2025, were necessarily incurred.

29. Having regard to the evidence made available to me, I am satisfied on the balance of probabilities that the proceedings – which were launched on the basis that Mr. Anderson did not have authority *qua* receiver to place the properties on the market or sign a contract for sale - became moot due to the unilateral action of the defendants in the appointment by the Bank of the second defendant as agent from 20 November, 2024 from which point he undoubtedly did have that authority. As a result it is my view that the plaintiff is entitled to the costs of the application for interlocutory relief.

Application for costs of the action

30. An application was also made for the costs of the action which it appears will be discontinued. If a notice of discontinuance is served, then the plaintiff will have to pay the costs of the action. I note that in the plenary summons the claim was made for damages for trespass. On the evidence before me, it is difficult to avoid the conclusion that Mr Anderson trespassed on the property for a number of days in October, 2023. He asserted a right to possession which he did not enjoy and which his counsel (correctly) did not attempt to stand over at the costs hearing on 27 February 2025.

31. The action as a whole is not moot because it is within the jurisdiction of the court to give damages for a historic trespass. However it appears that the plaintiff is not going to prosecute the proceedings. Insofar as I am able to do so at the moment, and on the basis that the proceedings and are never going to go to trial, it seems to me that the plaintiff would be entitled also to the costs associated with the action, as there is, on the affidavits at present, evidence of trespass by the receiver on the plaintiff's property. His right of possession was an implicit one for the purposes of discharging his functions as rent receiver. However, he never intended to act as rent receiver.

32. I will therefore award the costs of the action to the plaintiff. Given that the plaintiff has never delivered a Statement of Claim – and I have not been told whether the defendants requested one – the costs of the action are not likely to be substantial.

Adequacy of damages and delay

33. Very significant stress was placed at the hearing on the plaintiff's delay in seeking the interim relief. Delay is a discretionary bar to equitable relief and it is appropriate that the courts would exercise that discretion in cases where a late application is made so as to frustrate legitimate business activity. However, in this case I do not think it would be appropriate to exercise any discretion against the plaintiff. This is not least because – contrary to the submissions of counsel for the defendant that the court was left with no choice but to make the interim order given the lateness of the application – the interim order was tailored very precisely so as <u>not</u> to impede the Bank, who clearly had a power of sale over the properties, from exercising that power. The only restraint placed was that the receiver should not act as vendor. Despite the opportunity presented by the passage of a considerable period of time since the grant of the interim order, the defendants have not been in a position to demonstrate that

the order would not have been granted had they had more time to tender the necessary evidence as to Mr. Anderson's authority.

34. Furthermore, there is evidence before the court that attempts were made to sell this property in February 2024 and again on 20 June 2024. They failed due to lack of interest, combined with difficulties with access and proximity to the plaintiff's family home. On the specific facts of this application there is no evidence that the very specific and tailored relief granted on 24 July 2024 in fact impeded the Bank's efforts to sell the property at all.

35. Last but not least, I regret to say that the evidence in this case points to misunderstanding by the receiver of his powers and an unlawful entry onto the plaintiff's property. The plaintiff has applied for relief pursuant to the court's equitable jurisdiction and, while he certainly should have moved earlier to secure the injunctive relief, the inconvenience to the defendants in this case is, in my view, outweighed by the merits of the plaintiff's grounds for seeking the order which he did in fact obtain.

36. In this particular case, therefore, I'm not prepared to refuse costs on the basis of the undoubted delay on the part of the plaintiff. While delay on the part of plaintiffs which result in last minute applications to court are to be discouraged – and should such applications be made in circumstances where the challenge to the power to conduct the sale and the facts surrounding the authority to conduct it are unclear, they should in my view be refused for delay - this case is different in that it was I think clear at the stage of the initial application that Mr. Anderson was in fact purporting to exceed his powers. That remains the position.

Undertaking as to damages

37. Much was made about the relevance of the undertaking as to damages. It bears repeating that the Bank was never restrained from selling the property. The Bank appears to have voluntarily stayed its hand in light of the fact that a court order was granted, but the order was in very limited terms even insofar as Mr. Anderson was concerned, and no order was ever granted against the Bank. It is very unclear to me what damage could possibly have been suffered by either the Bank or the receiver in restraining the receiver from being named as vendor in circumstances where he had no authority to act as such in the first place.

The plaintiff's standing

38. The defendants' written submissions stress the plaintiff's alleged lack of standing to object to the contract. I agree that the special conditions are, in general, irrelevant to the plaintiff's position as he was not going to be a party to the contract and, to that extent, the terms regulating the contractual rights and duties of vendor and purchaser were nothing to do with him.

39. However, the advertisement of the properties for sale and the naming of the receiver as vendor are, in my view, material to the plaintiff who is the registered owner of the properties for sale. The torts of slander of title and of trespass protect the rights of the registered owner in such circumstances. The fact of the placing of the properties on the market and the naming of receiver as vendor in the draft contract are arguably relevant – directly to the tort of slander of title and circumstantially to any action for trespass. That is quite different to pointing out that the special conditions preventing the purchaser from raising requisitions on certain matters have nothing to do with the plaintiff.

Conclusion

40. In my view of the motion and the action for the reasons set out above, the plaintiff is entitled to the costs of the motion and the action.