THE HIGH COURT

[2022] IEHC 698

[Record No. 2022/5854P]

BETWEEN

PAUL FARRELL

PLAINTIFF

AND

EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY, KEN TYRELL, KIERAN CONNOLLY, ROSEMARIE CONNOLLY AND THE PROPERTY REGISTRATION AUTHORITY

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on the 5th day of December 2022.

Introduction and relief sought

1. This is an application for interlocutory relief against the third and fourth defendants who have purchased the property comprised in Folio 125860L of the Registrar, County of Dublin, being the property known as Unit B1, Baldonnell Business Centre, Baldonnell in the County of Dublin ("the Property").

2. The Property was originally part of the property comprised in another Folio, 128255F and this was the number inadvertently repeated in the plenary summons, which was issued on 21 November 2022. At the commencement of the

application for interlocutory relief, which I heard on Friday 25 November 2022, the summons was amended to refer to the correct Folio.

3. The interlocutory relief is sought against the third and fourth defendants ("the Purchasers") and the fifth defendant ("the PRAI").

4. The Purchasers bid for the Property at a publicly advertised online auction and are the transferees thereof on foot of a Transfer executed by the first defendant ("Everyday", who is not a party to this application) and which is awaiting registration.

5. The relief sought against the Purchasers is set out in the notice of motion which issued on 21 November 2022, and is in the form of orders restraining them from: -

(1) Taking possession of the Property, marketing it for sale or selling it, or otherwise seeking to deal with it;

(2) Trespassing or entering upon or otherwise interfering with the plaintiff's quiet enjoyment of same;

(3) Holding themselves out as having any estate or interest in title to, or rights in respect of, the Property;

(4) Holding themselves out as having any entitlement to sell, rent, or otherwise grant any entitlement to possession of any portion of the Property;

(5) Making any contact with any current tenants of the Property without the prior written consent of the plaintiff.

6. In effect, therefore, the injunction seeks to restrain the Purchasers from exercising the rights which would normally be enjoyed as owners of the Property. The injunction against the PRAI is one seeking to restrain it from taking any steps in respect of the registration of the purported sale of the Property.

Factual background

7. By Deed of Mortgage and Charge made 24 November 2005 between the plaintiff as mortgagor and Allied Irish Banks plc ("AIB") as mortgagee ("the Charge"), the plaintiff created a charge over this and other properties owned by the plaintiff. The covenants contained in the deed of charge entitled AIB and its successors to appoint a receiver over the secured premises, including the Property, but did not provide for the powers of such a receiver or the formalities by which he or she was to be appointed. In due course, AIB transferred the Charge to Everyday, who became registered as owner of the Charge on 15 August 2019.

8. By deed of appointment made 22 July 2021, between Everyday and the second defendant ("the Receiver"), the Receiver was appointed as such over assets of the plaintiff including the Property. The occupants of the Property, which include the plaintiff, was informed of this appointment by letter of the same date. It is not clear when precisely the plaintiff himself became aware of the Receiver's appointment, as he does not disclose this, but it must have been within a relatively short period thereafter.

9. The plaintiff claims in his affidavits that the Receiver unlawfully entered into possession of the Premises in November 2021. Again, the plaintiff must have been aware of this within a relatively short timeframe.

10. Insofar as the plaintiff asserts that such entry into possession was unlawful given the Receiver's limited powers under the Charge, it seems that he may be wrong as in *Kavanagh v. Lynch* [2011] IEHC 348, where Laffoy J. implied such a power in the case of a rent receiver. Insofar as he asserts that such entry into possession was unlawful given that it may not have been effected peaceably, he may well be correct

(see *Charleton v. Hassett* [2021] IEHC 746). However, neither of those issues is material to this application against the Purchasers and the PRAI.

11. On 24 August 2022, the Receiver, acting as agent of the plaintiff pursuant to clause 8.01 of the Charge, purported to enter into a contract of sale with the third defendant (in trust). It was common case at the hearing of the interlocutory application that the Receiver had no power to do this, as he had no power of sale, and was a rent receiver only, enjoying the powers contained in the Conveyancing Act, 1881 ("the 1881 Act").

12. If the application for injunctive relief turned on the authority of the Receiver to sign that contract, then I think it is clear that a serious question to be tried would have been established.

13. However, the problem for the plaintiff is that, by the time he applied for the injunction, the sale had been completed. By deed of transfer made 27 September 2022 ("the Transfer"), Everyday, as transferor and registered owner of the Charge which is registered as a burden on the Folio, transferred the Property to the Purchasers. The Transfer expressly states that Everyday is acting *"in exercise of its power of sale"* and expressly acknowledges receipt of the entire purchase price of €300,000 as set out in the contract purportedly signed by the Receiver. The Transfer has been lodged with the PRAI for registration.

The hearing of the application

14. The plaintiff raises a number of points as to why the PRAI should be restrained from registering the Purchasers as full owners of the Property in place of the plaintiff, in reliance on the Transfer, and why the Purchasers should not be

allowed to enter into possession of the Property or to exercise any of the other rights that the person entitled to be registered as owner of registered land would normally enjoy. This includes receipt of the rents and profits, as well as a general power to manage the Property which is an investment property, albeit that one of the two sitting tenants is apparently the son of the plaintiff and the plaintiff himself is in occupation of a portion of the Property also.

15. The application for interlocutory relief canvassed a wide range of legal issues over the course of almost a full day's hearing on Friday 25 November 2022.

16. I indicated at the conclusion of arguments that I would refuse all relief. Insofar as the PRAI were concerned, I indicated that I was refusing relief because it was not necessary to grant injunctive relief against the PRAI as they had not yet processed the application for registration which had been lodged by the Purchasers. If and when that is done, and if the PRAI proceeds to register the Purchasers as full owners of the Property, the plaintiff may appeal that registration to the Circuit Court pursuant to s.19 of the Registration of Title Act, 1964, as amended. Accordingly, no injunction against the PRAI was necessary, and I expressed a doubt as to why the PRAI had been joined at all.

17. Insofar as the Purchasers were concerned, I indicated that I was satisfied to refuse the application for injunctive relief on the grounds of delay alone, but that I would give my written reasons in early course in deference to the submissions that had been made by counsel for all parties on the effect of the contract for sale and the Transfer, and of course so as to permit the plaintiff, should he wish to appeal my decision, to know the full reasons for it.

18. Before proceeding to give those reasons, it is convenient to set out the legal position of the parties, as this is a matter of settled law.

The legal position of the Purchasers

19. So far as the Purchasers are concerned, they are the full beneficial owners of the Property (see *Coffey v. Brunel Construction* [1983] I.R. 36). No legal title vests in them until registration of the Transfer is effected by reason of s. 51(2) of the Registration of Title Act, 1964, as amended ("the 1964 Act") but in the interim, the plaintiff is a bare legal trustee for them. It is interesting to note that in *Brunel*, the principles applicable to a transferee who had paid the full purchase monies and was awaiting registration were described by Griffin J. (at p. 43) as *"quite clear and have been followed for more than one hundred years"*. It is therefore appropriate to take that settled position into account in considering an application for interlocutory relief.

The position of the Plaintiff and Everyday pursuant to the Charge

20. Clause 8.01 of the Charge provides that AIB and its successors, which of course includes Everyday, who is now registered as owner of the Charge, shall have the statutory powers conferred on mortgagees by the Conveyancing Acts (which is defined in clause 1.01 (b) to include the 1881 Act) subject to the variations and extensions provided for in the Charge. Those variations and extensions, insofar as material to the power of sale enjoyed by Everyday, are:

(a) The secured monies (whether demanded or not) shall be deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of the Charge.

(b) The power of sale shall be exercisable without the restrictions on its exercise imposed by s. 20 of the 1881 Act.

21. The net result of clause 8.01, therefore, is that Everyday, as a matter of law, enjoyed the power of sale provided for in s. 19(1)(i) of the 1881 Act which is:

> *"a power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence or title, or other matter, as he (the mortgagee) thinks fit…."*

22. As the monies fell due on the date of execution of the Charge, this power of sale was in existence, that is, it arose, on 24 November 2005. Of course, the plaintiff could redeem the mortgage at any time prior to the conclusion of a binding contract for sale or, in this case as the Receiver had no power to sign the contract, up to the date of Transfer. This could have been done by paying all the monies secured by the Charge, but it is clear that it has not been done.

23. As the Property is registered land, it is important to recall that the power of sale arises not from the conveyance or demise of an estate or interest in unregistered land. It operates as a charge only and does not transfer an interest in land. However, s. 62 (6) of the 1964 Act, in the terms in which it applies to this pre-2009 Charge, provides:

> *"On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as [a mortgage by deed within the meaning of the Conveyancing Acts], and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee [under a mortgage by deed] including the power to sell the estate or interest which is subject to the charge."*

(The words in brackets were restored, in the case of charges created prior to 1 December 2009, by s. 1(3) of the Land and Conveyancing Law Reform (Amendment) Act, 2013, hereinafter "the 2013 Act".)

24. The result is that Everyday, as registered owner of the Charge, had the power to sell the Property and that power arose on the execution of the Charge. It seems that the conditions imposed by s. 20 of the 1881 Act were disapplied by clause 8.01 (b) of the Charge. However, it was accepted by the Purchasers at hearing that a demand was necessary for the exercise of the power of sale and I therefore propose to deal with the application on the basis that a lawful demand was required for the exercise of the power of sale, albeit whether the Purchasers were obliged to enquire into that issue is a different matter which is discussed further below.

25. It is against that background that I now proceed to consider the issues raised by the Plaintiff as a basis for establishing the necessary *"serious question to be tried"* which of course is the first hurdle he must clear in order to obtain the orders he seeks.

(1) *The fact that the receiver had no power of sale*

26. As I said, it was common case that the Receiver had no authority to sign the contract of the 24 August 2022. He purported to do so as agent of the plaintiff and therefore in pursuance of his powers as Receiver. As he had no power of sale, he had no authority to sign the contract. The plaintiff asserted that this affected the effectiveness and validity of the Transfer. He pointed to special conditions 5.3 and 5.4 of the contract which required the Purchasers to accept the validity of the Receiver's appointment and his authority to enter into the contract.

27. However, I am satisfied that those special conditions merely regulated the contractual rights of Everyday as vendor and the Purchasers as such, and they have no other effect. They do not bind the plaintiff or indeed this Court, but more importantly, they do not affect the validity of the subsequent Transfer.

28. If I understood the plaintiff's argument correctly, it was to the effect that there is no clear authority for the proposition that a subsequent transfer or conveyance is invalidated by the absence of any power on the part of the vendor named in a contract to enter into a contract for sale. However, I am satisfied that it is clear, as a matter first principle that, provided Everyday had itself the power to execute the Transfer, there is no reason why that Transfer would be in any way invalidated or impugned by the absence of any power or authority on the part of the Receiver to enter into the contract. It is routine in conveyancing practice, if a necessary party is identified after a contract is signed, to ensure that that party executes the deed so as to make good title. Indeed, under Special Condition 5.5 of this contract, it is specifically provided that Everyday will execute the Transfer. In my view, there is no legal basis for saying that the contract invalidates the subsequent Transfer. The power of Everyday to execute the Transfer is determined by the terms of the Charge.

29. A defect in a contract might affect the rights of the parties thereunder, on the assumption that they intended those rights would survive the execution of the transfer, which is of course not always the case. Normally if the contract is intended to survive the ultimate transfer, specific provision is made for that in the contract for sale. It was not argued in this instance that there was a term which survived the execution of the Transfer, or that any term which so survived was material.

30. I think it is clear that it is a matter of first principle, therefore, that the only issue is whether Everyday had a power of sale, and it is not disputed that they did. *Nihill v. Everyday* [2022] IEHC 484, on which the plaintiff relies, is therefore entirely distinguishable as, in that case, matters had not proceeded beyond a proposal to offer secure lands for sale in terms of a draft contract to be signed by a receiver purporting to exercise a power of sale which he did not have, and there was no conveyance or transfer in existence. The issue of the effect of a subsequent conveyance or transfer on the rights of a purchaser did not arise and the judgment is inapplicable to this case.

31. Accordingly, there is no serious question to be tried on this point.

(2) *Alleged defects in the appointment of the Receiver*

32. The plaintiff also claims that the Receiver was not validly appointed. As the Charge did not make any provision for the formalities for such appointment, the matter is governed by s.24(1) of the Conveyancing Act, 1881, which provides that a Receiver can be appointed *"under [the] hand"* of the mortgagee.

33. However, the plaintiff claims that, notwithstanding that provision, the Receiver must be appointed by deed. For this proposition he relies, first, on the combined effect of ss.52 (1) and 62 (1) of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act"). As I understand it, the argument was that because, pursuant to s.52(1) of the 2009 Act, the entire beneficial interest in land passes on the signing of a contract for sale, and because s. 62(1) requires that interests in land be transferred by deed, that means that the Receiver must be appointed by deed.

34. In addition, counsel for the plaintiff referred to Picarda, *The Law Relating to Receivers, Managers and Administrators*, 4th ed. (Tottel Publishing, 2006) at p. 89 where it states:

> *"A deed is required not only where the appointment provision expressly states that the appointment shall be by deed, but also where the receiver and manager is given the power to execute deeds in the name of the debenture holders."*

35. I am satisfied that this statement is not applicable on the facts of this case and that the plaintiff has not identified a serious question to be tried as to the alleged invalidity of the appointment of the Receiver, or indeed the materiality of any such invalidity if it did arise.

36. As regards the formalities required to appoint this particular receiver, s. 24(1) clearly provides that, unless the deed of charge provides otherwise (which it is conceded it does not), the Receiver can be appointed in writing, without the necessity for a deed (see *Re The Beholn Ltd.: The Merrow Ltd. v. Bank of Scotland plc* [2013] IEHC 130).

37. The arguments based on ss. 52 (1) and 62 (1) of the 2009 Act and based on the extract from Picarda are, in my view, misconceived. This Receiver did not in fact execute a deed: the Transfer was executed by Everyday and not by the Receiver. The Receiver signed the contract for sale but that is simply irrelevant to the Purchasers' position, as they rely on the Deed of Transfer. I am satisfied for the purposes of this interlocutory application that the Receiver had no power to execute that contract and that the Purchasers could not rely on it as evidence of their beneficial ownership.

38. But even if the Receiver had power to execute the contract – and it must be recalled that the plaintiff argues (in my view correctly) that he did not – and if the

beneficial interest in the Property thereby passed to the Purchasers, only *legal* estates or interests in land are required by s. 62 (1) of the 2009 Act to be transferred by deed. There is nothing to prevent a contract, even though it will generally transfer the entire beneficial interest to the purchaser, from being concluded on the basis of a written document which is not under seal (as occurred here) or indeed orally (subject to the requirements of s. 51 of evidence of an oral agreement should either party seek to enforce it).

39. As correctly argued by the plaintiff, the powers of the Receiver were actually quite limited. In particular, he had no power of sale and could not execute a Transfer. The quotation from Picarda is therefore not relevant to this case.

40. Other than the argument that the Receiver should have been appointed by deed, there was no challenge to the execution of the instrument of appointment or the authority of Everyday's attorney to execute it.

41. The plaintiff has therefore raised no serious issue to be tried under this heading.

(3) *Whether the sale was an abuse of process*

42. In order to understand this point, it is important first to recall that there are a variety of proceedings already in being, which the plaintiff claims are material to this application. Essentially, he says that it is an abuse of process for Everyday to proceed to sell the Property before those proceedings are determined.

43. First, AIB sought to enter judgment against the plaintiff for a sum in excess of €500,000 in proceedings bearing High Court Record No. 2017/458S ("the 2017 Summary Proceedings"). In my view, the only relevance of these proceedings to this

application is that they suggest that the plaintiff cannot give a meaningful undertaking in damages so as to secure the injunction he now seeks, and I return to that issue below.

44. Secondly, AIB brought an application for possession and, if necessary, an Order for sale, pursuant to s. 62 (7) of the 1964 Act, as applied to the Charge by s. 1(2) of the 2013 Act, in proceedings bearing High Court Record No. 2018/24SP ("the 2018 Possession Proceedings").

45. The plaintiff, then acting as a litigant in person, also instituted proceedings bearing High Court Record No. 2019/ 5608P ("the Plaintiff's 2019 Proceedings") against AIB, Everyday and various other parties including the receiver previously appointed by AIB but not the Receiver appointed by Everyday. He also registered a *lis pendens* as burden on the Folio on 16 July 2019. I have not seen the pleadings in that case, but I assume that they include the point now relied upon (and discussed in more detail below) for the proposition that AIB were guilty of fraudulent conduct such that the power of sale could not be exercised.

46. However, it transpired in an earlier application to this Court (Dignam J.) made on 1 November 2022, that the summons had never been served and had therefore expired. No application to renew it has ever been made. Accordingly, those proceedings are, in effect, non-existent and cannot give rise to any right to an injunction.

47. No argument was made on the basis of the *lis pendens* in this injunction and, in any event, it is registered as a burden subsequent to the Charge. That does not affect the Purchasers' *prima facie* right to be registered as full owners of the Property. Furthermore, the plaintiff has not even served the summons. Even if it were capable of somehow taking priority over rights derived from the Charge, there has been no

adjudication in those proceedings in favour of the Plaintiff and, given his failure to progress the proceedings, there may never be. The mere issue of the summons has no effect on the rights of the Purchasers and could not provide a basis for the injunctive relief sought here.

48. The 2017 Summary Proceedings and the 2018 Possession Proceedings remain in existence but are, apparently, in abeyance. The 2017 Summary Proceedings can have no relevance to these proceedings as those were instituted for the purpose of the recovery of monies due and owing to AIB by the plaintiff. That is a matter for AIB, who are not a party to these proceedings. They are not material to the title to the Property, albeit that one of the factual issues which would presumably be material to those proceedings is also material to the question of whether Everyday's power of sale was exercisable on the date of the Transfer i.e., whether the plaintiff owed monies to Everyday and whether Everyday or its predecessor had made a lawful demand for payment. However, the legal issues are separate, as the 2017 Proceedings were issued so as to give AIB liberty to enter judgment against the plaintiff in a particular sum. They are therefore irrelevant to this injunction.

49. The 2018 Possession Proceedings similarly would have raised the same factual issue i.e., whether the plaintiff owed monies to AIB and whether a lawful demand had been made for payment. Again, however, even though the factual issue is the same, the legal issues are distinct.

50. The contract for sale explicitly provided at Special Condition 4.6 that vacant possession was not being provided and General Condition 17 was amended to reflect that. It should be noted that, while the Receiver took possession in November 2021, it appears that possession was retaken either by the plaintiff or by the tenants in occupation of the Property, one of these tenants being the plaintiff's son. It seems

fairly clear that the Receiver then decided to sell on the basis that any purchaser would have to obtain vacant possession themselves.

51. Incidentally, it should be noted that I am not asked to grant possession against the Plaintiff: I am only being asked to restrain the Purchasers from taking possession. They will have to take the appropriate practical and legal steps for themselves so as to take possession in accordance with law. That is a matter for another day.

52. I do not see how the mere fact that AIB originally sought to recover possession on a summary basis and did not proceed could prevent Everyday, AIB's successor, from selling without vacant possession. I am in agreement with the judgment of Sanfey J. in *Crowley v. Promontoria (Oyster) DAC* [2020] IEHC 309, that it is not an abuse of process to abandon proceedings and pursue an alternative method of enforcement, where that is legally available. These are, in general, commercial decisions for mortgagees as to how to enforce their securities. They are free to pursue alternative remedies.

53. It may have an effect on the purchase price which can be achieved, and I return to this below in the context of the complaint that the Property has been sold at an undervalue and whether, if this is true, this affects the application of the principles relevant to the grant of an interlocutory injunction. However, in itself, the continued adjournment of possession proceedings brought by its predecessor-in-title does not prevent Everyday from selling without vacant possession and the sale was not an abuse of process.

(4) Whether the Purchasers are on constructive notice of the plaintiff's claim?

54. The plaintiff in effect seeks to set aside the Transfer on the basis that AIB fraudulently attached his signature (and that of his ex-partner, who was co-owner of the one of the properties offered as security for the loans) to two Loan Facility Letters dated 23 December 2011. He claims that these Letters were never accepted and, as the demand for payment contained in letters dated 29 June 2012 explicitly referred to them, the power of sale was not exercisable and the sale was therefore invalid and should be set aside.

55. The plaintiff says, in essence, that there is a serious question to be tried as to whether the Purchasers were on notice of the alleged infirmity in the demand letters, such that the sale should be set aside.

56. In support of the proposition that the Purchasers were put on enquiry in relation to this alleged infirmity, which is in substance an argument that the power of sale had not arisen, the plaintiff refers to: a letter written by him on 3 May 2022; a similar email on 8 May 2022; and to his draft replying affidavit in the 2018 Possession Proceedings. In his written submissions, the plaintiff argues that, by reason of the contents of that affidavit, the Purchasers were put on enquiry of his claim that AIB had perpetrated a fraud on him in that the Bank was purporting to rely on Facility Letters which he had never signed, and on which his signature had been placed by the Bank by fraudulent means.

57. The plaintiff relies on s. 3 of the Conveyancing Act, 1882, for the proposition that, by reason of sight of those documents, the third and fourth defendants are fixed with constructive notice of that fraud and that the Transfer is invalid and ought not to be registered or that his rights are binding on the Purchasers.

Whether the Purchasers were aware prior to closing of the plaintiff's claim

The plaintiff exhibited draft replying affidavits which it appears he intends to file in the 2017 Summary Proceedings and the 2018 Possession proceedings. In those affidavits, he alleges that the 2011 Facility Letters dated 23 December 2011, relied upon by AIB to issue a demand for repayment, were not in fact signed by him and his then partner, and he claims that AIB used software or other means to fraudulently affix their signatures to the facility letters.

58. As both proceedings have been adjourned for some time, there has been no adjudication of this issue. As a result, the assertion of fraud on the part of the plaintiff has not been proven in any court of competent jurisdiction. Indeed, the exhibited affidavits are unsworn drafts, prepared in April 2022, and not, as described in the grounding affidavit of the plaintiff, affidavits filed in those proceedings.

59. However, even if they were sworn and filed, there is no evidence that the Purchasers knew anything about those affidavits or their contents when they entered into the contract to purchase the Property or when the Transfer was executed. They are not included in the Documents Schedule to the contract for sale and, indeed, there is no evidence that they were ever sworn or served on the Receiver or Everyday. As a result, they could not have been put on enquiry by these draft affidavits.

60. The contract, which has been exhibited by the Purchasers, discloses that certain documents were notified to the Purchasers and there is no evidence that they were aware of anything beyond the contents of those documents (and the existence of the *lis pendens* referred to above).

61. At Special Condition 4.8, the Purchasers were told of the 2017 Summary Proceedings, but no documents were furnished. The Purchasers were also told of the 2018 Possession Proceedings but only a copy of the Special Summons was furnished. This contains a claim for possession pursuant to s. 62(7) and, if necessary, an order

for sale. Furthermore, it contains nothing which would cast any doubt on the entitlement of the mortgagee to execute the Transfer. The summons also asserts that the 2011 Facility Letters, which related to sums of €23,000 and €396,803 respectively, were both signed and accepted by the plaintiff and his ex-partner on 14 March 2012.

62. Also at Special Condition 4.8, the Purchasers were furnished with the letters and emails which had been sent by the plaintiff and were dated 3 December 2021, 3 May 2022 and 8 May 2022. In addition, pursuant to Special Condition 5.2, the Purchasers were obliged to conclusively assume and accept that the statutory power of sale had become exercisable and that they were not entitled to raise any requisitions or seek any documentation in relation to same.

63. The letter of 3 December 2021 is a letter from the plaintiff to the Receiver's solicitors complaining about his entry into possession and complaining it was illegal. It does not contend that there would be any difficulty with the power of sale enjoyed by Everyday. This letter therefore cannot ground any relief.

64. The e-mail of 3 May 2022 was sent to the first company retained to organise an online auction. This claims that the Property is unlawfully for sale, that Everyday do not have a power of sale, and points to the *lis pendens* and to the 2017 Summary Proceedings and the 2018 Possession Proceedings. None of these three matters amount to an allegation that Everyday is purporting to exercise its power of sale on the basis of a fraud and the only reference that could be of any relevance is a statement that: *"the Bank rely on fraudulent paperwork"*. However, the paperwork in question is not identified in any way, there was obviously a charge in place, and a previous claim by AIB in the 2018 Possession Proceedings that monies were due and owing on foot of the 2011 Facility Letters which had been signed and accepted by the

plaintiff. It is difficult to see how the Purchasers were on notice of the claim being made, or why they should have thought there was any doubt about the existence or exercise of the power of sale by Everyday.

65. The letter of 8 May is an email to the same company. It does not suggest there is any difficulty with the existence or exercise by Everyday of their power of sale.

66. The plaintiff also claimed at hearing, based on the draft affidavits already referred to, that he had never drawn down funds on foot of the 2011 Facility Letters. However, only one of those letters is on affidavit and it appears to relate to the restructuring of an existing debt. The Charge itself was granted in 2005, around the time of the grant of the Lease to the plaintiff, that is, around the time he purchased the Property and presumably on the basis, at least in part, of monies drawn down from AIB. There is nothing on affidavit to the effect that those monies were ever paid off and the 2011 Facility Letter exhibited suggests that the plaintiff needed to restructure existing loans at that time. In those circumstances, it does not seem surprising that no monies were drawn down in 2011.

67. In any event, none of the documentation furnished to the Purchasers on foot of the contract made any mention of this and the only reference to it in the evidence is in the affidavits drafted in 2022 which, on their face, have not been sworn and therefore have not been served.

68. The result of the documentation disclosed to the Purchasers, therefore, is that the only indication given to them of the claim now made by the plaintiff is the bald assertion made in the email of 3 May 2022, to the effect that the Bank was relying on *"fraudulent paperwork"*.

69. It is against that factual background that the question of whether there is a serious question to be tried as to why the Purchasers should not be registered as full

owners of the Property, and in the interim enjoy the rights they *prima facie* enjoy as full beneficial owners thereof, falls to be considered.

Whether the Purchasers were obliged to inquire further

70. In essence, the plaintiff says that s. 3 of the Conveyancing Acts, 1982, means that the Purchasers could be fixed with constructive notice of what he says is a fraud. He says he never signed the 2011 Facility Letters and that he never drew down money on foot of them.

71. It should first be noted that the doctrine of notice does not apply to registered land: see for example, Deeney, *Registration of Deeds and Title in Ireland*, (Bloomsbury Professional), para. 6.1. This flows from various provisions of the 1964 Act. Section 31(1) is a key provision which provides, subject to limited exceptions, that the register is conclusive and is in the following terms:

> *"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."* [Emphasis added.]

72. Similarly, s. 37 provides that registration of a freehold interest with absolute title is subject to burdens registered under s. 69 and taking effect without registration pursuant to s. 72, but *"shall be free from all other rights"*. Section 44, which deals with the registration of a leasehold interest with absolute title, is to similar effect, though of course providing for the enforceability of the covenants and conditions in the lease, and is applicable in this case.

73. However, the plaintiff also relies in his written submissions on s. 72 (1)(j) which protects the rights of those in *"actual occupation of the land or in receipt of the rents and profits thereof, save where, on enquiry made of such person, the rights are not disclosed."* At least for the purposes of this interlocutory application, I think the plaintiff is correct in relying on this provision, which has proven to have a wide reach. For example, in *Boyle v. Connaughton* [2000] IEHC 28, Laffoy J. held that a right to rectification enjoyed by occupants of registered land was protected by s. 72.

74. The question then is what are the plaintiff's rights which override the Purchasers beneficial ownership of the Property? For this, the plaintiff relies on s. 3 of the 1882 Act, which obliges purchasers to have made reasonable enquiries, and which I understand to be relied on for the proposition that the plaintiff is entitled to set aside the sale by Everyday on the basis of alleged fraud.

75. In response, counsel for the Purchasers relied on s.21(2) of the 1881 Act which provides as follows: -

> *"Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised, or improper, or*

irregular exercise of the power should have his remedy in damages against the person exercising the power."

76. In *Bailey v Barnes* [1894] 1 Ch. 25, the Court of Appeal considered the relationship between s.21(2) of the Conveyancing Act, 1881, and s.3 of the Conveyancing Act, 1882, which provides that purchasers will be fixed with notice of matters they *"ought reasonably"* to have enquired into. It was held that s. 21(2) of the 1881 Act defined the extent of the reasonable enquiries required by s. 3 of the 1882 Act in the case of purchasers from mortgagees purporting to sell under powers of sale, by relieving such purchasers of the necessity of enquiring into the propriety or irregularity of the exercise of the power (see pp. 35- 36).

77. However, there was a *caveat* in the judgment in that where there is actual notice of impropriety or irregularity, a purchaser will not be protected:see the commentary in *Wolstenholme's Conveyancing and Settled Land Acts* 10th ed., (London, 1913) at p.85.

78. Wylie, *Irish Land* Law, 6th ed., (Bloomsbury Professional, 2020) at para. 14.61 summarises the position as follows:

"These provisions are designed to simplify conveyancing by reducing the enquiries which the purchaser is expected to make. He is only obliged to satisfy himself that the power of sale has arisen. However, under the Land and Conveyancing Law Reform Act 2009, he no longer has to, as under the 1881 Act, satisfy himself that the legal date for redemption has passed, which in most cases could be done very easily by reading the terms of the mortgage deed. The 2009 Act vests the power of sale as soon as the mortgage is created. <u>He is not obliged to make enquiries, which could become extremely complex, into the detailed relations between the mortgagor and the mortgagee</u>

> *during the currency of the mortgage. In particular, he does not have to look at the accounts, if any, kept by the mortgagor and mortgagee as to payments made and received in respect of the mortgage. However, as is their practice with such a statutory provision, the courts will not allow it to be used as an instrument of fraud and it has been stated that a purchaser with knowledge of any impropriety or irregularity about the exercise of the power will not obtain a good title. This does not require of a purchaser from a mortgagee the standard of care in conveyancing matters imposed by the doctrine of notice, but it has been said that he must not shut his eyes to suspicious circumstances."* [Emphasis added.]

79. It should be noted that Wylie cites *Bailey v. Barnes* as authority for the last sentence. In that case, the purchaser had been told of the existence of earlier mortgages and of the deeds by which the mortgagee's power of sale had purportedly been exercised, but his solicitors had raised no requisitions or made no searches in relation to them. It was held that the purchaser was not bound by the irregularity in the exercise by the mortgagee of his power of sale, even though it was argued that the purchaser was on notice of the fact that the sale had been at an undervalue which should have triggered further inquiries.

80. The general legal position therefore appears to be settled: in the absence of knowledge of facts which suggest irregularity or impropriety in the exercise of the power of sale, a purchaser is not bound to make any inquiries into whether the conditions for exercise had been satisfied. Insofar, therefore, as the plaintiff relies on the doctrine of notice and s. 3 of the 1882 Act, it is my view that he has not raised a serious question to be tried.

81. He is not without a remedy, however, if he can substantiate his claims. Section 21(2) of the 1881 Act quite explicitly provides that any defect in the exercise of the power is one which sounds in damages against the person exercising it, and not against the purchaser.

82. In my view, it is therefore quite clear, as a matter of law, that a purchaser from a mortgagee is under no duty to enquire into the exercise by the mortgagee of his power and that the plaintiff's remedy, if it is indeed the case that the power of sale was improperly exercised, is against Everyday.

83. That leaves the *caveat* recognised in *Bailey v Barnes*, and restated in the passage from Wylie, above, that s. 21(2) of the 1881 Act cannot not be used as an instrument of fraud. This appears to mean that, if the Purchasers can be said to have actual knowledge of the alleged fraud by AIB then the court can act to set aside a transfer or conveyance of lands

84. The question then is whether there is a serious question to be tried as to whether the Purchasers had actual notice of fraud or whether they closed their eyes to suspicious circumstances.

85. Special Condition 4.7 of the contract put the Purchasers on notice of the plaintiff's 2019 proceedings and of the *lis pendens*, which had been registered as a burden on foot thereof. However, this Special Condition also stated (as I think is accepted given that the summons has never been served) that there was no documentation available in relation to the 2019 proceedings. On foot of this Special Condition, the Purchasers accepted that the *lis pendens* wouldn't be released prior to completion but it was provided that if the plaintiff obtained an injunction pending completion, the sale would be rescinded.

86. No such injunction was applied for, let alone obtained. An attempt was made to make an application for an injunction on 1 November 2022, but apparently it failed as it transpired that the summons had never been served and has not been renewed. In the circumstances, the existence of the *lis pendens* can give no right to the injunctive relief sought here. The effect, if any, of the *lis pendens* must be determined in those proceedings.

87. The question, then, is whether the fact that the Purchasers were aware prior to closing of the bald assertion in the letter of 8 May 2022, that the Bank was relying on *"fraudulent documents"* was sufficient grounds for saying that the Transfer was an instrument of fraud, or that the Purchasers had knowledge of suspicious circumstances.

88. The threshold for establishing a *"serious question to be tried"* is a low one, but it must nevertheless be established on the basis of some credible evidence. It cannot be the law that once the barest of assertions is made that s. 21(2) is, in effect, disapplied and purchasers are put on enquiry of a matter which, generally speaking, the statute says is a matter between mortgagor and mortgagee. On the facts of this case, none of the claims now being made (that the signatures were fraudulently affixed to two Facility Letters, and that no monies were ever drawn down) are even referred to in the letter. In my view, the Purchasers were not aware even in outline terms of what was being claimed. This plainly does not meet the threshold of *"suspicious circumstances"* as referred to in the authorities.

89. I should add that no argument was made on the possibility of cancellation of a registration on the basis of fraud and therefore I have not considered s. 31 in that context.

90. In my view, therefore, the Purchasers were not, as a matter of law, bound to enquire, and they are not in fact on notice of any suspicious circumstances such that it could be said that Everyday were acting fraudulently.

(5) Sitting tenants

91. Miscellaneous issues in relation to the sitting tenants were raised in the grounding affidavits but I did not understand the plaintiff to pursue these at hearing. These are the rights of third parties which they must assert for themselves. In any event, without proving the prior written consent of the mortgagee for the time being, these tenancies are void as against Everyday or indeed anyone except the plaintiff himself.

(6) Re-entry of the Property

92. Similarly, complaint was made by the manner in which the Receiver and his agents re-entered the premises in November 2021. It was alleged that the Receiver used force, to the extent of cutting the locks, and that he was not authorised to do so. I think it is now established that this is impermissible and that receivers must re-enter peaceably or by court order. However, any unlawfulness in that action of re-entry is a matter between the plaintiff and the Receiver and has nothing to do with the Purchasers.

(7) Alleged sale at an undervalue

93. The issue of the price for which the Property was sold was also raised at hearing. A mortgagee has an obligation to get the best price reasonably obtainable (see *Holohan v. Friends Provident* [1966] I.R. 1) but it is also clear that the mortgagee is entitled to take a commercial decision and, if necessary, to proceed to a forced sale (see also *Farrar v Farrars Ltd* (1888) 40 Ch. D. 395).

94. The problem again for the plaintiff is that he cannot raise this issue as against the Purchasers, it can only be raised against Everyday. Section 21(2) of the 1881 Act is very clear on this point: if the property is sold, the plaintiff must pursue his remedy in damages against Everyday and it cannot ground an application for interlocutory relief against a purchaser.

95. Towards the conclusion of the hearing, the plaintiff sought to introduce valuation evidence as to the open market value of the Property, which he alleges is approximately €600,000. I did not permit the introduction of evidence at hearing without any notice to the Purchasers. However, any such evidence would, in my view, fail to take account of the fact that, on the plaintiff's case, no good marketable title is being offered. In fact, the Purchasers have bought a lawsuit. That inevitably depresses the price below its market value.

Conclusion: "serious question to be tried"

96. For all of those reasons, it is my view that the plaintiff has not established a serious question to be tried in this case.

Balance of justice

97. If I am wrong in that, it is my view that the balance of justice in any event favours a refusal of the relief.

98. If the plaintiff succeeds at hearing in setting aside the Transfer, he will have been deprived not only of his own place of business but of the rents from the two tenancies which remain in the Property.

99. However, the Purchasers have paid €300,000 for this Property at public auction. The plaintiff's counsel referred at hearing to the importance of the plaintiff's property rights. However, as it stands at present, it is the Purchasers who are full beneficial owners of the Property, whereas the plaintiff, in executing the Charge, voluntarily conferred on AIB and its successors the right to sell the Property outright.

100. Two factors, I think lean particularly heavily in favour of permitting the Purchasers to manage the Property pending determination of the plaintiff's claim. First, given that the plaintiff and his son are in occupation of parts of the property, and given the letters written by the plaintiff to date as to his attitude to the recovery of possession by any person purporting to act on foot of the Charge (albeit that there may be some merit to the plaintiff's complaints about the Receiver's actions), I think it is more likely that the Property could be successfully managed by the Purchasers rather than the plaintiff. In addition, it is clear from the correspondence between the Purchasers and the Receiver, written in relation to the apportionment of arrears of rates and service charges, that €76,854 has been paid by the Receiver out of the proceeds of sale in order to discharge those obligations. The Purchasers were also obliged to make up a shortfall of €10,179.47, in addition to paying the Purchase Price.

101. It therefore seems that the Purchasers are more likely to meet the obligations to the Management Company and the local authority.

102. Secondly, I find it difficult to see how the plaintiff can give a meaningful undertaking in damages. He gave a very limited account of his borrowings, indebtedness and income. His complaint is actually limited to what appears to be the acceptance of a restructuring of existing debt and he does not assert that he can repay the monies owing. There is direct evidence of his failure to pay service charges and rates, as just referred to.

103. In those circumstances, it seems that the Purchasers are more likely to be able to compensate the plaintiff if it turns out the injunction should have been granted, than the plaintiff being able to compensate the Purchasers if it turns out that an injunction is wrongly granted.

104. A suggestion was made by the plaintiff's counsel that rents could be lodged to a solicitor's account pending determination of the proceedings. However, it appears that there are very few tenants currently in occupation. In any event, it also appears that the outgoings on the property will need to be discharged pending trial. The plaintiff does not have a good track record and, if the Purchasers are to do it, they are entitled to receive the rents in order to pay them.

105. As a result, the object of minimising injustice suggests that the injunction should be refused at this point.

106. Whilst the plaintiff and indeed the plaintiff's son are in occupation of part of the Property, it is nevertheless a commercial property. That is not to say that the plaintiff has not put a lot of time and effort into it over the years, but ultimately the Property is commercial in nature and the plaintiff will have a remedy and damages if he succeeds against the Purchasers in due course. I agree with counsel for the plaintiff that *Ryan v. Dengrove* [2021] IECA 38 had unusual facts, in that the plaintiff was arguing about the type of sale of the Property which should take place, rather than

arguing that he should have an opportunity to redeem the mortgage (though his position appears to have been slightly inconsistent on this issue). Nevertheless, Murray J. indicates at several points in the judgment that, in the case of a commercial property, an injunction will not typically be an appropriate remedy and a plaintiff may be confined to his remedy in damages.

Delay

107. Leaving aside all of the above, the delay in seeking the interlocutory relief is to my mind determinative of the application. The Receiver wrote to the occupants of the property by letter dated 22 July 2021, advising them that he had been appointed as Receiver. It is not clear precisely when the plaintiff became aware that a Receiver had been appointed but he must have become aware at the time of the taking of possession in November 2021, or a short time thereafter, that the Receiver had been appointed and was taking steps to enforce the security. This was not least because the plaintiff' and his son are both apparently in occupation of at least part of the premises.

108. The plaintiff relies on the fact that, early this year, he prevailed on the company first retained by the Receiver to give him assurances that they would not sell the Property. The plaintiff has not given any details of the nature of these assurances. The Receiver then approached another, similar company, who put the Property up for public auction in June 2022, with a reserve of €350,000, at which he failed to sell and at which the Purchasers say they did not bid, and again in August 2022, with a reserve of €300,000. The Purchasers bid the reserve and it was knocked down to them, resulting in the contract for sale.

109. Notwithstanding that, no application to court was made until late October 2022, when the plaintiff, acting for himself, got short service of a notice of motion

which was returnable for 1 November 2022. However, it was struck out on the court being informed that the summons in those proceedings, which were issued in 2019, had never been served. Thereafter, the plaintiff retained his current legal team who have worked extremely promptly to move the application and obtain a hearing date for it.

110. The essential position is that the plaintiff was objecting to the appointment of the Receiver, and the validity of his contract for sale from at least early 2022 when he objected to the first company running an online auction of the Property. However, he took no steps to seek injunctive relief, but confined his complaints to correspondence.

111. He did not seek an undertaking from Everyday or indeed the Receiver, and none was forthcoming. In fact, I have little doubt that if such an undertaking had been sought, it would have been refused. This left those parties free to take such steps as they were entitled to take. In the case of Everyday, this included exercise of its power of sale of the Property.

112. The delay which is material here is the delay in seeking to apply to court. At least a year, if not sixteen months, has passed from the first attempt to enforce the security to the first properly constituted application to court for interlocutory relief. The essential basis of the application is one of which the plaintiff has been complaining of for some time, possibly since the issue of the 2019 proceedings.

113. In the interim, the Purchasers have completed their purchase of the Property. They bought it at public auction and paid a significant sum of money for it.

114. There is an obligation on an applicant for interlocutory relief to move reasonably promptly to seek that relief and, in particular, before the circumstances changed materially and before third parties become involved. Unfortunately, the

plaintiff in this case has been guilty of delay in asserting impropriety in the exercise by Everyday of its power of sale.

115. At some point, the registered owner of a charge, and those dealing with him or acting in relation to the sale, must make a commercial decision as to whether they proceed given the repeated assertions of wrongdoing where no concrete steps are taken to back up those assertions.

116. The plaintiff is guilty of delay in seeking the interlocutory relief and I would therefore refuse the application on that ground.

Application against the PRAI

117. As indicated at the conclusion of the interlocutory hearing, I accepted the arguments of the PRAI that it was not necessary to grant any relief against it in circumstances where it had not commenced its examination of the application of the third and fourth defendants to be registered as full owners of the Property in place of the plaintiff. I accept the submission of counsel for the defendants that a public authority should not, in general, be restrained from exercising its statutory authority (see *Okunade v Minister for Justice* [2012] 3 IR 152 and *Campus Oil v Minister for Industry and Energy (No. 2)* [1983] I.R.). There is nothing to suggest that the PRAI will not exercise its functions lawfully. Furthermore, the PRAI will abide by any order that is made as between the plaintiff and any of the other defendants, including the third and fourth defendants, in these proceedings. It is accordingly not necessary to grant any injunctive relief against it.

118. The various applications are therefore refused.