

**THE HIGH COURT**

**[2021 No. 849P.]**

**BETWEEN**

**PHILIP WARD**

**PLAINTIFF**

**AND**

**TOWER TRADE FINANCE (IRELAND) LIMITED AND AENGUS BURNS**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Allen delivered on the 12th day of March, 2021**

1. This is an application by the registered owner of lands for an interlocutory injunction restraining the sale of lands by the first defendant, to whom the lands have been charged by the plaintiff, or the second defendant, who is a receiver appointed by the first defendant in exercise of a power created by the deed of charge. The core underlying claim is for a declaration that the charge is invalid and an order for the rectification of the Register.
2. There is no real dispute as to the facts.
3. By an agreement in writing called a trading agreement dated 8th December, 2014 made between the first defendant, Tower Trade Finance (Ireland) Limited ("*Tower Trade*") and Michael Ward Engineering Limited ("*the Company*") Tower Trade agreed to make available to the Company a finance facility pursuant to which Tower Trade would pay the Company's suppliers and the Company would, in respect of each such payment, draw a bill of exchange for the amount of the payment, plus Tower Trade's commission and charges. The agreement was contained in a letter of 8th December, 2014 addressed by Tower Trade to the Company and signed on behalf of the Company on the same day by its two directors Mr. Michael Ward, the plaintiff's son, and Mr. Philip Ward, the plaintiff.
4. On the same day Mr. Michael Ward executed a guarantee and indemnity by which, in consideration of Tower Trade making available to the Company the facility described in the trading agreement, Mr. Michael Ward unconditionally and irrevocably covenanted and guaranteed to pay on demand all and every sum of money which then were or might at any time be due, owing, incurred or payable to Tower Trade by the Company.
5. The documents are fairly verbose and dense, but their purpose and effect were perfectly clear.
6. The Company availed of the facility and did not pay the money it was bound to pay.
7. By summary summons issued on 20th November, 2015 (2015 No. 2151S) Tower Trade commenced proceedings against Mr. Michael Ward on foot of his guarantee and indemnity. On 2nd December, 2015 an appearance was entered on behalf of Mr. Michael Ward by Wales & Co., solicitors, and on 23rd February, 2016 a motion for summary judgment was issued on behalf of Tower Trade. Over the remainder of 2016 there was an extensive exchange of affidavits and on 20th December, 2016 the motion for judgment was sent forward by the Master of the High Court to the non-jury list. The motion was

thereafter adjourned from time to time for a little over a year until 27th February, 2018 when it was adjourned generally.

8. Along the way there were settlement discussions in the course of which it was suggested that Tower Trade might accept less than it was owed (or at least less than it claimed) if it had security for payment and in the course of which it was suggested that Mr. Philip Ward might provide security for payment of such lesser sum by way of a charge over about 5 ha of lands which he owned at Gragarnagh, County Monaghan. By November, 2017 the discussions had reached the point that Tower Trade was prepared to settle its claim against Mr. Michael Ward upon terms that it would be paid €100,000 within twelve months. A draft settlement agreement was prepared, the bones of which was that Mr. Michael Ward might consent to judgment in the sum of €132,032.40 plus costs to be taxed in default of agreement, and Tower Trade might consent to a stay on entry and execution of that judgment for twelve months, which stay would become permanent if Mr. Michael Ward paid the sum of €100,000 within that time, provided that Mr. Philip Ward was prepared to provide a limited recourse guarantee for Mr. Michael Ward's obligations, supported by a charge over the lands in Folio 12329F, County Monaghan. Again the paperwork which was prepared was fairly verbose, but the substance of the proposed deal was straightforward.
9. On 28th November, 2017 Mr. Matthew Wales wrote to his client, Mr. Michael Ward, to set out the salient points of the proposed agreement which were correctly explained to be that he was asked to consent to judgment for €132,032.10 plus costs to be taxed; if he paid €100,000 to Tower Trade within twelve months his liability would be at an end; but if he failed to pay the €100,000 Tower Trade would look to enforce a charge over his father's land to obtain payment and this would be to the extent of €132,032.10 plus taxed costs.
10. On the same day, 28th November, 2017 (as he had written to Mr. Michael Ward that he would) Mr. Wales wrote to Mr. Philip Ward. It is no harm to set the letter out in full. He wrote:-

*"Re: Tower Trade Finance (Ireland) Limited.*

*I refer to the above-mentioned matter.*

*As you are aware, you have agreed to provide land owned by you under Folio 12329F County Monaghan to Tower Trade Finance (TTF) who wish to obtain a charge over your land to provide them with security for the debt owed by Michael to them.*

*What this means, is that should Michael fail to discharge the debt of €100,000 within twelve months from the date of the Settlement Agreement then TTF are at liberty to sell your land to attempt to realise funds in relation to Michael's indebtedness to them.*

*TTF require you to sign a Guarantee, copy attached. The effect of this Guarantee is effectively set out at clause 2.6 of the Guarantee. This provides that your liability to TTF is limited to the land and that TTF will have no recourse to any other asset, property or revenue of yours other than the assets secured by the charge.*

*If, for example, the land is sold and only realises €50,000, your liability is only limited to that figure. You would not be responsible for any shortfall in the amount owed to TTF, in other words the other €50,000 of the sum due by Michael or such other sum that might be due at that stage.*

*Please note that if Michael or indeed you were made bankrupt, the land provided by you would still be a continuing security and, consequently, even if Michael were or indeed you were made bankrupt, your land could still be sold by TTF.*

*You should be fully aware that there is a real risk that if Michael fails to pay the €100,000 in terms of the Settlement Agreement which is provided for at clause 3.2, then the land could very well be sold and, obviously, as you will realise, the land would no longer be owned by you.*

*Consequently, entering into this agreement is a very serious matter and we would recommend that you seek independent legal advice from a local solicitor in relation to this matter and that you make an appointment to see that solicitor and bring the documents which I have forwarded to you.*

*Whilst I am fully aware that you wish to assist Michael in this matter and you do so willingly and without any duress, I am concerned that your interests might conflict and that there may be a conflict of interest in me advising both you and Michael in relation to this matter.*

*In that regard, I do feel that it is imperative that you take in the documents, together with a copy of this letter, to a local firm of solicitors to seek their advice and then to provide me with a letter from that solicitor informing me that they have advised you in relation to the agreement and what your decision is in relation to signing same.*

*I look forward to hearing from you as a matter of urgency."*

11. As advised by Mr. Wales, Mr. Philip Ward took independent legal advice from Ms. Anne Skinnader of McEntee & O'Doherty, solicitors. On a date which is unclear save that it was shortly before Mr. Philip Ward signed the settlement agreement Ms. Skinnader prepared and signed a note which recorded that:-

*"I hereby confirm that Philip Ward sought independent legal advice from me Anne Skinnader, as the legal owner of the unencumbered lands over which the first legal charge referred to herein is to be registered and as a signatory of the within agreement. I confirm that, prior to my giving him advice, Philip Ward satisfied me (i) as to his identity; (ii) that he is the father of the Defendant named herein; and*

*(iii) that he is the ownership (sic.) of the lands comprised in Folio 12329F County of Monaghan. I say that I read and explained each provision of this agreement, and of the documentation annexed hereto, to Philip Ward paying particular attention to those provisions that directly impact upon him and the lands comprised in Folio 12329F. I confirm that Philip Ward understands the nature of the within agreement and the legal effect of his signing same. I say that Philip Ward confirmed to me that he enters into the within agreement freely and voluntarily and in the full knowledge and understanding of the nature and effect of the terms and conditions of same and of his signing/completing the documentation annexed hereto."*

12. The text of Ms. Skinnader's memorandum conveys that it was intended to be attached to the settlement agreement and the copy settlement agreement exhibited by Mr. Ward marked "P.W.2" suggests that it was so attached. An annex immediately behind the memorandum lists The Guarantee, The Family Home Declaration, The Deed of Charge, Requisitions on Title, and Agreed Mortgage Conditions. Mr. Ward's execution of the settlement agreement was witnessed by Ms. Skinnader.
13. The document referred to in the body of Mr. Ward's affidavit as a copy of the mortgage charge and marked "P.W.5" is a draft of his guarantee and indemnity for the liabilities of his son but there is no dispute that he executed both the charge and the guarantee and indemnity. The settlement agreement signed by Mr. Ward is undated, but he deposes that he signed it on 16th March, 2018. I suspect that he may very well have signed it a little earlier, specifically before summary proceedings were adjourned generally on 27th February, 2018 but signed it was and nothing turns on precisely when it was signed. I have not seen a copy of the charge, but nothing turns on the terms of that document. It is common case that Mr. Ward executed it and on 12th April, 2018 it was duly registered as a burden on Folio 12329F, County Monaghan.
14. The settlement agreement is said by Mr. Ward to give a good account of events under the heading "Background". It recites the trading agreement between Tower Trade and the Company, Mr. Michael Ward's guarantee of the liabilities of the Company to Tower Trade, the payments made by Tower Trade on foot of the facility, the Company's default, a resolution of the Company on 16th October, 2015 to wind up, a demand on Mr. Michael Ward for €132,032.40, the commencement of the summary summons proceedings, and the agreement of the parties of terms for the full and final settlement of the action. Mr. Ward in his grounding affidavit highlights clause 2(iii) which set out his agreement to provide a first legal charge over the lands.
15. This action was commenced by plenary summons issued on 11th February, 2021. The general endorsement of claim includes claims for damages under a number of headings but for present purposes the relevant claims are for:-
  1. A declaration that Tower Trade through misrepresentation and breach of contract procured Mr. Ward's consent to charge his lands described in Folio 12329F, County Monaghan and that the said charge registered by Tower Trade was registered in contravention of section 31 of the Registration of Title Act 1964.

2. An order pursuant to s. 31 of the Act of 1964 for the removal of the charge on the grounds of fraud or mistake.
  3. A declaration that the Deed of Appointment [presumably the appointment of the receiver] grounded on the mortgage is null and void and of no effect due to misrepresentation as made by Tower Trade.
  4. A permanent injunction restraining Tower Trade and the receiver from offering for sale or trespassing on the property in Folio 12329F, County Monaghan.
16. I pause here to observe that while the jurisdiction of the court invoked by the general indorsement of claim, is that to order rectification of the register based on the ground of fraud or mistake, the plaintiff does not make any case of fraud and the indorsement of claim ought not to have referred to fraud.
17. What immediately prompted the issue of the proceedings and the interlocutory application now before the court was that the property had been advertised for sale by public online auction which was to have taken place on 25th February, 2021. The application was grounded on an affidavit of Mr. Ward sworn on 10th February, 2021. The grounding affidavit did not disclose that the land had previously been offered for sale by public online auction on 17th December, 2020 or that Mr. Ward, with the assistance of a man described as a family friend, had tried to stop that auction by writing to Tower Trade, the receiver, the auctioneers, and Tower Trade's solicitors and by circulating a form of draft plenary summons on which all of them were named as defendants. That auction appears to have gone ahead but to have failed for lack of interest in the land at the then disclosed reserve of €72,000. The advertised reserve for the auction on 25th February, 2021 was €50,000.
18. The fact of the previous auction and Mr. Ward's attempt to prevent it were disclosed in a supplemental affidavit of Mr. Ward sworn on 22nd February, 2021, which was three days after an *ex parte* application had been made to Reynolds J. for short service. An affidavit of the plaintiff's solicitor, Mr. Geoffrey Nwadike, sworn on 26th February, 2021 shows that his office was first consulted on 14th December, 2020 and that he was aware of the previous correspondence. Apart from the merits, the defendants argued that there had been delay on the part of the plaintiff but did not complain of a failure to make full disclosure. In the circumstances I will say no more than that the previous auction and the plaintiff's attempt to stop it ought to have been disclosed and that it makes no difference that the plaintiff's solicitor did not agree to act until 9th February, 2021.
19. Mr. Ward accepts that he guaranteed his son's liabilities to Tower Trade and charged his lands as security for that guarantee. His case is that he would not have given the security which he gave if he had not believed that otherwise his son would be decreed. The case he now makes is that the summary summons proceedings against Mr. Michael Ward were invalid on the grounds that the High Court had no jurisdiction to entertain Tower Trade's claim and that if he had known then what he knows now he would never have given the charge. He does not say that there was ever any issue raised by Mr.

Michael Ward, who was the defendant in those proceedings, as to the jurisdiction of the court to deal with them.

20. The foundation of this argument is clause 24 of the trading agreement between Tower Trade and the Company. This provided:-

24. *The terms and conditions of this agreement shall be construed in accordance with the laws of South Africa. The supplier and the buyer submit to the non-exclusive jurisdiction of the High Court of South Africa, South Gauteng Local Division.*

21. The plaintiff's case is that this non-exclusive jurisdiction clause in the trading agreement confers exclusive jurisdiction on the High Court of South Africa to deal with any claim by Tower Trade against Mr. Michael Ward on foot of his guarantee and indemnity dated 8th December, 2014 which by its express terms was to be governed by and construed in accordance with Irish law and by which Mr. Michael Ward irrevocably submitted to the jurisdiction of the Irish courts.
22. It is unstateable.
23. The effect of clause 24 of the trading agreement is that any dispute between the parties to that agreement as to the construction of that agreement was to be determined in accordance with the laws of South Africa. It is not suggested that there ever was such a dispute. A choice of law clause is not the same as a choice of jurisdiction clause. A choice of law will not carry with it the exclusive jurisdiction of the courts for the place of the law chosen.
24. Ms. Sallar, for the plaintiff, argues that the trading agreement and Mr. Michael Ward's guarantee are so inextricably linked that they must be taken to be one and the same instrument. Mr. Donnelly argues that the guarantee supersedes the trading agreement. Neither is quite right. A choice of jurisdiction by the parties to the trading agreement could not bind the guarantor: *a fortiori* where the parties to the guarantee had agreed a different jurisdiction. Although the guarantee is governed by Irish law, any dispute as to the liability of the Company as principal debtor arising out of the construction of the trading agreement would fall to be determined in accordance with South African law.
25. The fundamental point, however, is that the choice of jurisdiction was non-exclusive, so the argument does not get out of the blocks. In argument, reference was made to *Analog Devices v. Zurich Insurance Company* [2005] 1 I.R. 274, in the sense that the name of the case was mentioned, but it is of no assistance in the plaintiff's attempt to transform a non-exclusive choice of jurisdiction into an exclusive choice of jurisdiction, or to use a choice of jurisdiction in one document to oust the jurisdiction chose in another, by different parties.
26. Mr. Ward complains that he did not have "the benefit of disclosure from Tower" and that "candour was entirely absent when [his] 'consent' was obtained under bogus circumstances." He complains that Wales & Company solicitors did not alert him to

difficulties with the original contract between Tower Trade and the Company and he claims that the charge he executed was given under misrepresentation on the part of Tower Trade.

27. Apart altogether from the fact that the point relied on is a thoroughly bad one, the complaint of a lack of candour on the part of Tower Trade appears to be based on an assumption that Tower Trade had a duty to advise Mr. Michael Ward of the legal effect of the clause, which Ms. Sallar quite rightly accepts that it did not. Similarly, the thinly veiled criticism of Mr. Wales appears to be based on an assumption that he had a duty to advise Mr. Philip Ward when the plain fact is that Mr. Wales spelled out clearly that he was not in a position to do so and took great care to ensure that Mr. Philip Ward sought and obtained independent legal advice. In argument Ms. Sallar was inclined to speculate that Mr. Philip Ward might not have been fully or correctly advised by Ms. Skinnader but there was not a shred of evidence as to what that advice was. Nor was counsel able to explain how, in principle, any infirmity in the advice taken by one party to an agreement might undermine the validity of the agreement or the rights of the counterparty.
28. It was also suggested that the charge might somehow or other have been invalid because judgment had not been entered against Mr. Michael Ward. Mr. Ward has deposed that he signed the charge "*on the basis of summary judgment having been entered*" and "*in the belief of a summary judgment having been obtained.*" I am satisfied that this is mere assertion which is entirely at variance with the facts. The settlement agreement on its face records Mr. Michael Ward's consent to judgment. The online search to which Mr. Ward refers shows that the summary summons proceedings were adjourned generally on 27th February, 2018, which was before he says he signed the papers on 16th March, 2018. If, when he signed the papers, Mr. Ward believed that judgment had been entered against his son he does not say how he came to that belief or what difference any such mistaken belief might have made to the liability he assumed or the security which he gave.
29. It was common case that the threshold test to be met by the plaintiff on an application for a prohibitory injunction was whether he had established a fair issue to be tried as to his entitlement to a permanent injunction. In oral argument Ms. Sallar referred to *Maha Lingam v. Health Service Executive* [2015] IESC 89 and appeared to suggest that there was an onus on the defendants to establish that they had a strong case which was likely to succeed because if the injunction was refused and the land sold "*the defendants would have achieved mandatory relief.*" That is wrong. The onus is on the plaintiff to establish, in the first place, that there is a fair issue to be tried and, in this case, I am satisfied that he has failed to do so.
30. The plaintiff having failed to meet the threshold test, it is unnecessary that I should consider the adequacy of damages or the balance of convenience but if it had come to that I would have had little to go on. Mr. Ward, at para. 15 of his grounding affidavit describes the lands as "*long standing family lands.*" The copy folio which has been exhibited shows that the lands comprise 4.906 ha in the townland of Gragarnagh, Barony

of Cremore, County Monaghan and that they were registered in the name of Mr. Philip Ward on 31st January, 2000. A screenshot of the advertisement for sale calls for the attention of farmers and investors and describes the lands as good quality agricultural lands with development potential (subject to obtaining all necessary planning consents). There was no evidence as to who might have owned the lands before 2000, or whether they were used by Mr. Ward or let by him, or what his intentions were as to what might happen to the lands if they could be rescued. The plaintiff's written submissions quoted extensively from my judgment in *Sammon v. Tyrrell* [2021] IEHC 6 but there was no evidential basis for the argument that the lands in this case are in any way comparable to the lands in that case.

31. In circumstances in which the application fails *in limine* it is not necessary to address the defendants' argument that an injunction should be refused by reason of the delay of the plaintiff in seeking interlocutory relief.
32. The plaintiff's application having failed in its entirety, it seems to me that the costs must follow the event. If, as I have found, there is no substance to the argument that the court had no jurisdiction to deal with Tower Trade's claim against Mr. Michael Ward, I cannot see any good reason why execution of foot of the order for costs should be stayed. However, as this judgment is being delivered remotely, I will allow the plaintiff fourteen days within which to file and serve a written submission as to why the defendants ought not to have their costs, or as to why execution on foot of any costs order that might be made should be stayed. In the event of the plaintiff filing any such submission the defendants will have fourteen days within which to reply.