

THE HIGH COURT

[2021] IEHC 216
[2019/433 COS]

BETWEEN

IN THE MATTER OF TOURVIEW LIMITED (IN RECEIVERSHIP)

AND

THE COMPANIES ACTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 26th day of March, 2021.

1. Number 3, Cluain Aedin, Sutton, County Dublin ('the House') is a detached home standing on half an acre with views of Dublin Bay. It has an open market value of about €1,500,000. The applicant ('the Receiver') wishes to sell the property; she is receiver and manager appointed to lands at Sutton which include the House, on foot of a debenture granted by Tourview Limited ('Tourview') on the 15th of July 2016 to Irish Residential Loan Investments 2015 DAC ('IRLI'). Tourview is the company which part developed the estate which includes the House.

2. The problem facing the Receiver in selling the House is the fact that there is already a contract to sell the House. This contract is between Tourview and the respondent ('Mr. Thompson'). Mr. Thompson entered into the agreement to buy the site in unusual circumstances, which I will describe. He then proceeded to register the contract as a deed in the Registry of Deeds. Any attempt to sell the House at anything like its true value is likely to founder when any potential purchaser discovers the claims of Mr. Thompson in respect of the property. The Receiver therefore brings these proceedings in order to clear this obstacle. She seeks the following reliefs:-

"1, Directions in the receivership of Tourview Limited (in receivership)('Tourview') in the following terms:

- a. A declaration that a purported contract for sale of House No. 3, Cluain Aedin, Sutton, County Dublin ('House No. 3') dated 21 July 2017 and entered into as between Tourview and the Respondent, Mr. Kevin Thompson, is not binding on Anne O'Dwyer as Receiver and Manager over the Mortgaged Properties secured by way of Debenture dated 15 July 2016 ('the Debenture') entered into as between Tourview and Irish Residential Loan Investments 2015 (DAC) ('IRLI'), which for the avoidance of doubt, include House No. 3.
- b. A declaration that the said purported contract is puisne to the Debenture and (to the extent that it has any validity as between the parties to it) is overreached on a sale of House No. 3 (whether alone or with other of the Mortgaged Property) by IRLI in exercise of its power of sale under the Debenture.
- c. If necessary, and subject to such evidence as may be adduced, a declaration that the said purported contract for sale is void and/or voidable as constituting a fraudulent conveyance within the meaning of section 74 of the Land and Conveyancing Law Reform Act 2009 and/or a fraudulent disposition within the meaning of section 608 and 567 of the Companies Act 2014.

2. A consequential direction that the Respondent, Mr. Kevin Thompson arranges for the removal of the registration of the purported contract for sale of 21 July 2017 from the Registry of Deeds and/or that the Property Registration Authority cancels the said registration, within such time following the making of the said direction as this Honourable Court shall allow.”

A. The Facts

3. Mr. Thompson and another gentleman, a Mr. Brian Wallace, owned Tourview since 1992. Its only asset was the land at Carrickbrack Road, on which Cluain Aedin was ultimately built. In 2015, Mr. Thompson and Mr. Wallace agreed to sell the entire shareholding in Tourview to Copia Capital Ltd. ('Copia') for €2,700,000. Mr. Thompson was to stay with the development as a consultant for a fee of €300,000.
4. Because of the withdrawal of one of the investors on the Copia side, there was a shortfall in the funds available to pay Mr. Thompson and Mr. Wallace for their shares. Mr. Thompson agreed to a late payment to him of €200,000; Mr. Wallace seems to have made no such concession to Copia. In order to secure this payment to him, Mr. Thompson obtained (among other assurances) the following:-
 - (i) An undertaking from Abacus Legal (Copia's solicitors) to Elizabeth McGuinness & Co. (the solicitors acting for Mr. Thompson) "to pay to the benefit of [Mr. Thompson] such sums as may be received by [Copia] from the construction finance [...] and to remit same [...] as soon as practicable thereafter".
 - (ii) A similar undertaking to Mr. Thompson personally directly from Copia.
 - (iii) A 10% shareholding in Copia held in trust by Damien Fitzsimons (a principal in Copia) for Mr. Thompson; this repeated the undertaking to pay Mr. Thompson "from the development finance drawn down [...]" in respect of two sites, including Sutton.
 - (iv) Joint and several guarantees given by the directors of Copia.
 - (v) An option agreement, which I will describe in a short while.
5. The securities described at 1, 2 and 3 appear entirely improper inasmuch as they involve the procuring of finance to be used for the development of sites at Sutton and at Ashford, but the diversion of enough of these monies to pay the debt to Mr. Thompson. If the financial institution funding the development of either of these sites wanted to lend money to Copia in order to pay Mr. Thompson, it could have done so. However, this is not what was contemplated by Mr. Thompson and Mr. Fitzsimons. Instead, the three securities involved siphoning off construction finance so that Mr. Thompson would be paid money due to him for his shares in Tourview. Counsel for the Receiver accepted that this issue is not one that will determine the questions I am asked to decide on this application. It could be relevant if the Originating Notice of Motion is to be decided at a plenary hearing, which would be required if I ultimately have to consider the Receiver's claim that

the purported contract for sale is void and/or voidable as constituting a fraudulent conveyance.

6. The option agreement is an unusual one. As the deferred consideration for Mr. Thompson's shares is owed by Copia, the option agreement has Mr. Thompson and Copia as the counter parties. However, the contract for the sale of the House appended to the option agreement is between Tourview and Mr. Thompson, even though Tourview owes nothing for the sale of the shares in it. The option agreement requires Copia to pay Mr. Thompson four sums of €50,000; the last of these was to be paid 22 weeks after the 19th of October 2015. If any payment were missed, the House was to be put up for sale, market value achieved, and Mr. Thompson would take out of the proceeds of sale the amounts due to him along with interest at an annual rate of 15%. The balance of the proceeds of sale would be remitted to Copia.
7. While initially stress was placed by Mr. Thompson on the fact that the option agreement provided that Copia would not encumber the relevant properties (including the House) without his consent, ultimately this was not pressed as the basis of any argument on behalf of the respondent. Notably, the option agreement also provides:-

"The parties hereto acknowledge rights, entitlement and privileges furnished to Emerald Sky Finance DAC on the Sutton Development and Bright Sky Finance BV in respect of the Ashford Development on foot of the existing first legal charge on each development. As soon as practicable the Debtor shall procure the discharge of all mortgages, loans, charges liens affecting the Option Properties."
8. Mr. Thompson was therefore fully aware of the fact that there were already encumbrances on the Sutton property (including the House) at the time of these transactions in October 2015, and both he and Copia acknowledged the precedence of these "rights, entitlements and privileges"; if they did not, there would have been no need to provide for the discharge of "all mortgages, loans, charges or liens affecting" the relevant property. The debts of Tourview acknowledged in the option agreement were subject to refinancing by IRLI in July 2016.
9. When IRLI refinanced the Tourview debt in July 2016, it was provided with certain documents relating to the acquisition by Copia of the shares in Tourview. None of the documentation referred to the option agreement, or in any way disclosed any right on the part of Mr. Thompson to any interest in the House. On the contrary, the share purchase agreement was provided to IRLI, as were the minutes of the meeting of the Board of Tourview which approved the share transfers but nowhere mentioned the other suite of securities provided to Mr. Thompson. These minutes are signed by both Mr. Wallace and Mr. Thompson. Importantly, as part of the share acquisition Mr. Wallace made a statutory declaration on the 19th of October 2015 in connection with the entire Sutton property which included:-

"The property is not subject to any trust, licence, tenancy or propriety interest in favour of any person or body corporate arising by virtue of any arrangement,

agreement or contract entered into by [Tourview], or by virtue of any direct or indirect financial or other contribution to the purchase therefore, or by operation of law, or otherwise, and the property is held free from encumbrances.”

10. This statutory declaration, provided to IRLI on the refinancing of Tourview’s debt, did not include any reference to the option on the House provided to Mr. Thompson. It may well have been that Mr. Wallace was unaware of this arrangement; for the purpose of this decision, it is enough to record that the documents provided by Tourview to IRLI at the time of the 2016 refinancing gave no indication of the rights now asserted by Mr. Thompson.
11. In the context of the refinancing, IRLI unusually raised requisitions on Tourview’s title to the property which was to secure the loans. The replies to these requisitions, prepared by Abacus Legal, make no mention of the option granted to Mr. Thompson. Even more clearly, Abacus Legal certified (in a letter of the 25th of July 2016) that:-

“The property is not subject to any trust, licence, tenancy or proprietary interest in favour of any person or body corporate arising by virtue of any arrangement, agreement or contract entered into by the Company, or by virtue of any direct or indirect financial or other contribution to the purchase thereof, or by operation of law or otherwise, and the property is held free from encumbrances.”
12. This certification does not sit easily with the terms of the option agreement; that agreement is witnessed by a solicitor from Abacus Legal, the original draft of the option agreement was prepared by the same solicitor in Abacus Legal, and the terms of the option agreement was negotiated by that solicitor.
13. The funds advanced by IRLI in July 2016 were secured by a debenture executed by Tourview in favour of IRLI. It is accepted by the Receiver that this debenture did not achieve its objective of creating a legal mortgage of the relevant property. It is submitted on behalf of the Receiver, and not heavily disputed by counsel for Mr. Thompson, that the agreement to create a legal mortgage itself creates an equitable security in favour of IRLI.
14. Meanwhile, Mr. Thompson had not been paid any of the deferred consideration due to him by Copia. On the 22nd of September 2016 Ms. McGuinness (Mr. Thompson’s solicitor) wrote to Abacus Legal expressing displeasure that the Sutton lands had been remortgaged; Mr. Thompson knew this as his solicitors had reviewed the CRO website and seen the debenture which was lodged in the CRO on the 15th of July 2016. Ms. McGuinness sought a range of documents:-

“1. We note that Martin Moloney has signed the CRO documentation in relation to the Form C1s. Please furnish us with details of all and any discussion between you and your client in relation to the re-mortgaging and the inability to re-mortgage without obtaining the prior consent of our client;

2. Copy of the Loan Offers for both the Ashford and Sutton sites confirming the security which the Lender holds.
3. Copies of the security documents/Mortgages including maps in relation to the Ashford and Sutton sites.
4. Confirmation of the amount of monies which have been drawn down to date in relation to the re-mortgage and provide a Statement of Account showing how the monies have been disbursed.
5. Confirmation when the next draw down is occurring and the quantum of the draw down.
6. Confirmation (evidenced in writing from the Lenders) as to when capital/interest payments are required and how your clients intend to service the said payments going forward.
7. Confirm how your client has structured their debt repayments on both the Ashford and Sutton sites i.e. how much is required to be paid per each house closing.
8. Confirmation evidenced in writing that your clients have sought their VAT refund from Revenue and when they expect payment.
9. Provide details of a clear pathway as to how your client intends bringing their agreement with our client back within its terms and in compliance with the undertaking/agreements which they have provided to our client supported by your firm's undertaking that the sums received from the construction finance to be drawn down in respect of Carrickbrack Road, Sutton and/or Ashford, Co. Wicklow would be remitted to your firm for onward payment of such sums due to our client.
10. Confirmation that any monies drawn down to date and any subsequent monies from the re-mortgage have and will continue to be paid directly to your firm's client account. It is a matter of great concern that you have not provided confirmation in writing to date as to whether or not you are in receipt of the funds from your client during the term of our client's agreement with your client."
15. Mr. Thompson has not described the response of Abacus Legal to this letter; however, it is clear that on the 7th of July 2017 Ms. McGuinness triggered the option agreement and demanded the payments due to Mr. Thompson, specifying that failure to pay these amounts would entitle him to "counter execute the contract [for sale of the House to him for a nominal €10 euro] and building agreement [...]".
16. The monies remained unpaid. Mr. Thompson executed the contract with Tourview. However, he then did nothing apart from register the contract in the Registry of Deeds. He did not sue on the contract. Indeed, apart from exercise the option to the extent that I have described, Mr. Thompson has never sued the persons behind Copia on foot of their guarantees.

17. Mr. Thompson executed the contract on the 21st of July 2017, and registered it in September 2017.
18. The flaw in the debenture was to be corrected by a Deed of Rectification and Confirmation between Tourview and IRLI; this was executed on the 16th of October 2017 and was then registered in the Registry of Deeds.
19. Despite correspondence from the Receiver, Mr. Thompson has refused to vacate the contract's registration.

B. *The Submissions*

20. The Receiver has, at the hearing of this Motion, refined significantly the arguments contained in her written submissions. She contends that the intention was to create a security over the Sutton property when the refinancing occurred in 2016, that this gives rise to an equitable mortgage, that Mr. Thompson had notice of this security when he exercised his option and signed the contract with Tourview in 2017, and that this equitable mortgage has priority over any rights created in favour of Mr. Thompson.
21. I agree that the facility agreement and the debenture created an equitable mortgage over the Sutton lands. I will set out the relevant parts of these documents:-

The Facility Agreement provided:-

- “(A) The Borrower has requested that the Lender make available to the Borrower the Facilities (as defined below) to fund the Borrower's development of the Property and the Additional Collateral;
- (B) The Lender has agreed to make the Facilities, repayable on demand, available to the Borrower subject to and in accordance with the terms set out herein; and
- (C) The Borrower has created certain security interests over the Property and the Additional Collateral and other assets in favour of the Lender pursuant to the Mortgage Debenture in respect of the Secured Liabilities [...]"

“Mortgage Debenture” is defined as “the mortgage debenture dated on or about hereof between the Borrower and the Lender pursuant to which the Borrower creates certain first ranking security interests over the Property and the Additional Collateral and its other assets in favour of the Lender as security for the Secured Liabilities.”

“Property and Additional Collateral” means the freehold Property and the Additional Collateral known as 11.4 acre site at Ballybeg, Rathnew, Co. Wicklow.”

The Mortgage provided:-

- “(B) The Lender has agreed to provide financing to the Company for the purposes of developing the Scheduled Property;

(C) As a condition of the credit provided to the Company under the Facility Agreement, the Company has agreed to provide the security constituted by this Debenture as security for proper discharge and payment of the Secured Liabilities”

“ ‘Mortgaged Property’ means the Scheduled Property and all other assets purported to be charged or assigned in favour of the Lender hereunder;”

“The Scheduled Property is defined as “ALL THAT AND THOSE the lands known at Carrickbrack Road, Sutton in the City of Dublin as more particularly delineated in a deed of conveyance dated the 22nd June 1992 and made between the Howth Estate Company Limited of the one part and the Borrower of the second part.”

22. On the basis of these and other provisions, counsel for the Receiver relies on paragraph 12.43 of Wylie’s Land Law:-

“As part of its general policy of giving effect to contracts for the creation of legal estates, equity will enforce a contract to create a legal mortgage by its usual remedy of a decree of specific performance. Because of this special approach equity goes further and says that, until the legal mortgage is actually created by the appropriate method, the intended mortgagee has an equitable mortgage on the land. Thus in *Eyre v. McDowell*, it was held that a covenant by a debtor to the effect that, if the debt was not paid by a certain date, the creditor could, by entry, foreclosure, sale or mortgage, levy the amount from the lands of the debtor, was held to create such an equitable mortgage. The same principle has been applied in the very common situation where, in return for a loan advanced to the client, his solicitor gives an undertaking to hold the client’s title documents on trust for or to the order of the lender. Indeed, even without such an undertaking, that fact that the lender and borrower have agreed upon a loan to be secured, which is then acted upon the loan being advanced and accepted, is sufficient to create an equitable mortgage.”

23. He also relies on a passage from the judgment of Carroll J. in *ICC v. M&J Gleeson Company Ltd.* (18th February 1992) where it was held (at page 11):-

“In my opinion the payment of the loan monies pursuant to the loan agreement create an equitable charge which predated the registration of judgment mortgages. The execution of the instrument of charge did not affect the existence of their equitable charge.

When the judgment mortgages were registered they took subject to that equitable interest as it would be contrary to Section 71(4) [of the Registration of Title Act] if they were to have priority.”

24. Counsel also relies on the fact that the description of the debenture as registered in the CRO is:-

“A mortgage debenture overall assets of Tourview limited and a fixed charge over all that and those the lands known at Carrickbrack Road, Sutton in the City of Dublin as more particularly described in a deed of conveyance dated 22nd June 1992 and made between the Howth Estate Company Limited and Tourview Limited of the other part.”

25. In a considerable simplification of the Receiver’s written submissions, her counsel set out the core issue as being:-

- “(i) An equitable mortgage over the Sutton lands was created in favour of IRLI on foot of the July 2016 transactions.
- (ii) This equitable mortgage has priority over any subsequent interest created in favour of Mr. Thompson, including any interest created as a result of the entry into the contract between Mr. Thompson and Tourview in July 2017.
- (iii) Any enlargement in IRLI’s security created by the Deed of Rectification and Confirmation of October 2017 did not 'take away from that starting point that the property had been charged before this contract [with Mr. Thompson].”

I am therefore invited by the Receiver to decide this motion on the basis of this argument.

26. In response, counsel for Mr. Thompson made two submissions:-

- (a) “The argument in terms of an equitable mortgage certainly bites but calls then for an exercise of an accounting inquiry so that one can actually crystallise on the actual sum to which that equity attaches [...]. So as a matter of principle, I certainly accept that an advance in these circumstances creates an equitable interest and I have to take subject to that. But as to the outcome of that process is an entirely different thing from saying that Mr. Thompson has no value or no interest in the outcome of the sale of his property.”
- (b) “The other aspect which has been mentioned is a question of knowledge. And in relation to that, you’ve no direct evidence from IRLI in terms of what they knew or what they didn’t know.” Counsel specifically raises the possibility that IRLI or its agents on site “may have been told that Mr. Thompson and there was an outstanding issue with him [sic].”

27. The first point is in effect a concession that an equitable interest, as contended for by the Receiver, was in fact created and that this interest is in priority to any interest or security on the part of Mr. Thompson. However, counsel maintains that there is or may be a residual value in Mr. Thompson’s interest; logically, and in the light of counsel’s own

submission, this can only persist if there are funds left over after the Receiver has been paid the sums due under the equitable mortgage.

28. The second point made by counsel is really one about the quality of the evidence; counsel has carefully drawn back from asserting that I can or should speculate on what may have been said to IRLI.
29. Counsel for Mr. Thompson accepted that, on the documents surrounding the refinancing, there is no reason to believe that IRLI was made aware at that time of any interest in the House on the part of Mr. Thompson. Mr. Thompson himself never told IRLI about his entitlements under the option agreement. As for Copia, the position taken by its solicitors was that there "are no claims whatsoever", as counsel described it. Indeed, counsel went further. Referring to the events of 2016 (including the refinancing) counsel said of Abacus Legal:-

"And in terms of reconciling that correspondence [with IRLI's solicitors] with the contemporaneous correspondence that he is engaging with Ms. McGuinness at that stage, or in that period of time, it's very hard to reconcile both letters, because it's speaking from both sides of the mouth in different directions."
30. Counsel then went on to accept that prior to the creation of IRLI's equitable charge the Court has no reason to believe that IRLI either knew or suspected there was any option agreement in favour of Mr. Thompson.
31. The final position of Mr. Thompson, therefore, on this second question is that there is some prospect that IRLI acquired some knowledge of Mr. Thompson's option agreement, after the creation of the equitable mortgage; if this happened, "it may become relevant later on as further advances are made".
32. Counsel went on to submit that the carrying out of the development, after the refinancing, occurred with hands on involvement of IRLI. He also referred to the removal from the project of the original principals of Copia. If anything, this makes communication to IRLI of Mr. Thompson's interest even less likely. The two people who knew about it have been side-lined, and that makes some casual mention on site of the option agreement even more fanciful.
33. As counsel for the Receiver observed in reply, there is simply no authority for the proposition that the continuing advances by IRLI are somehow not secured if IRLI was told of Mr. Thompson's interest. I accept the submission that the equitable mortgage created in IRLI's favour is one catching "all present and future obligations and liabilities [...]"; this is the security that the parties intended to create, as is set out in the definition of "Secured Liabilities" to be found in the debenture.
34. Given the scope of the equitable mortgage, it cannot be set at naught in respect of future advances by the notification to IRLI of the option agreement. However, on the evidence before me there is simply no reason to believe that there was any such notification after

the refinancing. As I have noted, it is accepted that there was no notification to IRLI up to and including the time of the refinancing.

C. *Decision*

35. I find that IRLI obtained an equitable mortgage over Tourview's property in Sutton (including the House) as of the 15th of July 2016. This security ranks ahead of any entitlement claimed by Mr. Thompson. I will hear counsel on the precise form of order to be made, and on other matters such as costs, at 10:30am on the 14th of April 2021.