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*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **12/11/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

DONAL THOMAS O'KANE AND RONAN FRANCIS O'KANE

v

PAUL ROONEY

DEENY J

Application

[1] In these proceedings Donal Thomas O'Kane and Ronan Francis O'Kane seek relief by way of a Writ of Summons of 9 August 2013 against Paul Rooney and Stephen Cave. Mr Rooney and Mr Cave are accountants in the firm of PWC, Insolvency Practitioners, and they are the joint fixed charge receivers on behalf of the Irish Bank Resolution Corporation Limited. By virtue of steps taken in the Republic of Ireland that corporation, formerly Anglo Irish Bank Corporation Limited, now has special liquidators but that does not really touch on the issues before this court.

[2] Anglo Irish Bank Corporation PLC, as it was then known, had advanced substantial sums to the two Mr O'Kanes who are brothers resident in Belfast and when there was default in repayments they appointed Mr Rooney and Mr Cave. They did so by way of a Deed of Appointment of 4 July 2011 and the property in respect of which they did that was set out in the schedule and it refers to folios AN160554 and AN160556L and is described as "ALL THAT AND THOSE the hereditaments and premises situated at and known as Cemax House, Upper Dunmurry Lane, Belfast, being the lands and premises comprised in the Deed of Conveyance and Assignment dated 8 June 2007 and made between (1) Ready Mix Concrete (Ulster) Limited and (2) the Borrower (being Donal Thomas O'Kane and Ronan Francis O'Kane)". With hindsight it can be seen that the two Mr O'Kanes were buying at what was either the absolute peak of the market or very close to it.

The Plaintiffs today seek an interlocutory injunction restraining the sale of that property by the receivers.

[3] The Deed of Appointment of Messrs Rooney and Cave is not challenged. It is perhaps relevant to observe that among the clauses of agreement in the Deed of Appointment is paragraph 2:

> "Receivers to be agents of the security provider.
>
> It is declared that the receiver shall be the agent of the Security Provider for all purposes and that the Security Provider shall be solely responsible for his acts and defaults."

I observe that that might strengthen the argument in law as to the nature of the duties of the two receivers to the two O'Kanes, if I may so refer to them.

[4] The court here has had the benefit of helpful oral and written submissions from Mr Mark Orr QC leading Mr Richard Shields for the plaintiffs and Mr David Dunlop for the defendants. I record my appreciation in particular for Mr Dunlop's submissions without the benefit of senior counsel on behalf of the defendant. It is fair to say that he faced some formidable difficulties.

[5] I need not go on, I think, at length about the duties of the receivers here. There is no real argument between counsel about it but I think out of caution I should say something on the topic. Mr Charles O'Neill in his valuable textbook, Mortgages in Northern Ireland, 1st Edition 2008, says as follows:

> "The duty of care imposed on a lender selling as a mortgagee in possession is one that arises in equity rather than contract or tort."

He cites Downsview Nominees Ltd. V First City Corporation Ltd.1993 A. C. 295 H.L. in support of that.

> "The same duty is owed to subsequent lenders and guarantors of the mortgage debt as is due to the borrower. In the case law in this area two main propositions have evolved:
>
> (i) that a lender must act in good faith;
>
> (ii) that a lender owes a duty to the borrower to obtain the best price reasonably obtainable."

[6] Counsel for the plaintiffs helpfully refer to some other authorities in regard to that and I might refer to those. They relied on Silven Properties Limited and another v Royal Bank of Scotland plc [2004] 4 All ER 484; [2003] EWCA Civ 149. For convenience I set out the head note in full.

> "The appellant mortgagors secured their indebtedness to a bank by mortgaging various properties to it. After demanding repayment, the bank appointed the respondents, pursuant to the mortgages, as receivers of the mortgaged properties. As was common form, the mortgages provided that the receivers were to be agents of the mortgagors. When they began their receivership, the receivers investigated the possibility of adding value to some of the mortgaged properties by obtaining planning permission, and they subsequently instructed consultants to make planning applications. However, the receivers eventually decided not to proceed with those applications or to await the completion of negotiations for the grant of a lease in respect of a vacant mortgaged property. Instead, they decided to proceed immediately with sales of the mortgaged properties as they were. The properties were duly sold. In subsequent proceedings against the receivers for allegedly selling the properties at an undervalue, the mortgagors alleged, inter alia, that, in order to obtain the best price obtainable, the receivers had been under a duty before selling to pursue the planning applications and proceed with the grant of the lease, and to defer a sale until those goals had been achieved. That contention was rejected by the judge who dismissed all of the mortgagors' claims. The mortgagors appealed.
>
> Held - Having regard to the fact that the primary duty of a receiver was to bring about a situation where the secured debt was repaid, the receiver had to be entitled as a matter of principle to sell the property in the condition in which it was in the same way as a mortgagee could, and in particular without awaiting or effecting any increase in value or improvement in the property. That conclusion accorded with repeated statements in the authorities that the duties in respect of the exercise of the power of sale by mortgagees and receivers were the same, and with a series of first

> instance decisions which had held that receivers were not obliged before sale to spend money on repairs, make the property more attractive before marketing it or work an estate by refurbishing it. In the instant case, the receivers, by accepting office as receivers of the mortgagors' properties, assumed a fiduciary duty of care to the bank, the mortgagors and all (if any) others interested in the equity of redemption. Having regard to the special character of a receiver's agency, the receivers' appointment as agents of the mortgagors did not affect the scope or content of the fiduciary duty. The scope or content of the duty had to depend on, and reflect, the special nature of the relationship between the bank, the mortgagors and the receivers arising under the terms of the mortgages and the appointments of the receivers, and in particular the role of the receivers in securing repayment of the secured debt and the primacy of their obligations in that regard to the bank. Those circumstances precluded the assumption by, or imposition on, the receivers of the obligation to take the pre-marketing steps for which the mortgagors contended. Further, no such obligation could arise in their case (any more than in the case of the bank) from the steps which they took to investigate and (for a period) to proceed with applications for planning permission. The receivers were at all times free (as was the bank) to halt those steps and exercise their right to proceed with an immediate sale of the mortgaged properties as they were. Accordingly, the appeal would be dismissed (see [28]-[30], below)."

What is clear from that and the other authorities is that a receiver is effectively in the same position as a mortgagee. Though it seems to me that I should not reach an absolute concluded view on that but certainly, if anything, the receiver has a greater duty than a mortgagee but he certainly does not have a lesser duty. The Court of Appeal said the following in Silven at [29].

> "In summary, by accepting office as receivers of the claimant's properties the receivers assumed a fiduciary duty of care to the Bank, the claimants and all (if any) others interested in the equity of redemption."

I respectfully follow and accept that view that there is a fiduciary duty of care to the mortgagors and all others interested in the equity of redemption.

[7] The plaintiffs also rely on Cuckmere Brick Company Ltd and another v Mutual Finance Ltd [1971] 2 All ER 633, again a decision of the Court of Appeal in England. I think it is sufficient for these purposes to quote paragraph 1 of the decision of the court as summarised in the headnote:

> "A mortgagee was not a trustee of the power of sale for the mortgagor and, where there was a conflict of interests, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale; in exercising the power of sale, however the mortgagee was not merely acting under a duty to act in good faith, i.e. honestly and without reckless disregard to the mortgagor's interest but also to take reasonable care to obtain whatever was the true market value of the mortgage property at the moment he chose to sell it."

[8] So it is taken as read and is clear law that a mortgagee and therefore a receiver must be under a duty to act in good faith and honestly as well as having a duty to obtain the true market value of the property. Here we have, I must say, on the facts a most unhappy position. The plaintiffs, through the affidavits of Mr Donal O'Kane, have quoted what was criticised as a good deal of hearsay evidence but it was hearsay evidence from, in most cases, named persons who contended that they were discouraged from bidding for the property which I have described which was being sold by the receivers to recover at least part of the monies owed to IBRC. I have to say that I found Mr O'Kane's averments as to what he had been told persuasive. It is obvious that, as he had named his sources, that the defendants and their solicitors could have gone to those persons and ascertained if he, Mr O'Kane, was in any way misrepresenting what had been said to him. But that was not the case. This was important because the plaintiffs are before the court today seeking an interlocutory injunction to restrain the sale of the property. They thought they were restraining the sale of the property to a company called ABCO Marine, but in effect it proved to be slightly more complex than that, but that is what they are seeking to do. They show worrying conduct by the agents for the receivers in the second half of 2012 with various persons whom they encouraged to contact the agents being provided with inaccurate information which discouraged them from buying and including the allegation that the ultimate highest bidder at the present moment, ABCO Marine, was advised by the selling agents not to bid more than £550,000 during the open bidding process because they would get it for that.

[9] This was very curious behaviour indeed. It is clearly a breach of duty of the servants and agents of the receiver to try and get the best price and it is in bad faith. The court dealing with an interlocutory injunction acts on the evidence before it at this stage in accordance with the decision of the House of Lords in American Cyanamid 1975 A.C. 396 H.L. But in this case owing to the conscientiousness of

those advising the defendants the evidence is very strong, because following the hearing yesterday and a query from the court, Mr Dunlop of counsel made enquiries and properly put before the court today a letter from Messrs Hewitt and Gilpin, Solicitors, of 20 February 2013 to BTW Shiels, that is to the agent, not to Messrs Tughans who were the defendants' solicitors. I think it is a sufficiently remarkable letter and as the facts of the case are somewhat unusual it is my duty to quote it at least in part. They say as follows:

> "We refer to the above matter, in particular letter of 30 January 2013 from Tughan Solicitors in relation to the waiting process. In accordance with the contents thereof we enclose our client's offer to purchase together with a letter from Danske Bank in relation to funding capabilities.
>
> We are today arranging to transfer a sum equal to 10 per cent of the proposed purchase price to Tughan's Solicitors' bank account, details of which were set out in their letter of 30 January 2013.
>
> Our clients have asked us to place on record that they are somewhat concerned and puzzled by the process to date. In particular they have been seeking to place bids on this property for many months prior to the commencement of the latest tendering process, but were discouraged by representatives of your office from doing so. Indeed, on one occasion a formal bid of £550,000 was lodged in relation to the property, followed by a subsequent offer to increase that figure, but our clients were told not to do so as they would be able to secure the property at that price.
>
> In addition our client's ability to investigate the property and the income generated by same has been hampered by a lack of information furnished to date. In particular they have not received full details of the rent, licence fees and service charges being collected from the property. The information which has been provided is out of date and inaccurate. You will appreciate this places our clients in a disadvantageous position."

[10] So the case of bad faith made by the plaintiffs is singularly corroborated by that document. There were, in addition, several quite remarkable things such as the rent figure being quoted at £25,000 when in fact it was closer in gross terms to £100,000 although the representative of BTW Shiels did correct himself in that

regard. I do not think it is necessary for me in the circumstances to go through all of them but I am satisfied, certainly to a sufficient degree for this interlocutory hearing, that there is good evidence of bad faith here and good evidence of a breach of duty to proceed with the sale to get the best advantage. Mr Dunlop in his submissions faced with this very substantial difficulty while accepting that fault on the part of the agents to the mortgagee was relevant, and indeed one might in that regard quote Lord Justice Salmon in Cuckmere, sought to defend his client's position in this way.

[11] First of all he said that there was no arguable case to attack the sealed bid process. The receivers here were appointed in 2011 and for some considerable period of time this property was being or was allegedly or putatively being marketed by way of private treaty. That was shelved for reasons which I myself thought quite inadequate and I say that of the affidavit of Mr Cave as well as others. It did not seem to me that the reasons stacked up or were persuasive but in any event they then resorted to the sealed bid process even though the O'Kanes had warned them that this would effectively disadvantage or maybe prohibit them completely from the bidding. This was because the O'Kanes themselves are, on Mr Dunlop's case, hopelessly insolvent; they owe more than £6 million pounds to the IBRC or its now special liquidator. However, they are very keen to bid for the property and they are keen to bid for it because they are still managing it at the present and clearly believe that they can derive a living from the management of it and may be able to manage it more effectively than others. They are not in the position, the unhappy position, of some other borrowers whose lives have really ended with the foreclosure on their properties. They are managing properties for their receivers in respect, presumably, of other properties of which they were once the beneficial owners. They have a substantial gross income of some £20,000 per month in regard to that management role which extends to this property. How can they hold on to that? The answer is that they have said through their solicitors, do say on averment and affidavit and through their counsel that a number of close family members and query friends but near relatives, I think, largely, are prepared to transfer funds from their pension funds into a self-invested pension fund which would then buy the property formally owned by Ready-mix; that is their mechanism. Going by way of sealed bid process damages them.

[12] Mr Dunlop says that is all very well but they bid in the sealed process and so whatever happened before is water under the bridge and does not assist them in an arguable case. In regard to that I accept the submissions of Mr Orr QC that I should find otherwise. First of all, now that we have this strong prima facie evidence of some bad faith for some reason not yet known to the court on the part of the agents of the defendants the whole decision to proceed to a sealed bid is tainted by that bad faith. What was the mechanism? Was the agent seeking to favour ABCO? Were they seeking to favour somebody else? What was going on? It seems to me Mr Orr is right in that the sealed bid process is tainted. In any event as I raised myself since Mr Orr submitted thus, how can the court be satisfied, particularly at this interlocutory stage, that the sealed bid process was properly conducted given that it was conducted by the same persons in the same leading firm of agents as were

behaving very oddly only a few weeks or months before hand. So it seems to me for those reasons that the plaintiffs have an arguable case that the sale process should be set aside. There is an arguable case that this is not the market value of the property. As it happens that would not assist the plaintiffs in their own bid but that is not the court's principal concern. It may well be a larger sum is now offered for this property if the sale is properly conducted to the benefit of creditor and debtor alike.

[13] The further aspect of the matter relied on by Mr Dunlop, understandably, was that this is neither here nor there because these men, the plaintiffs, owed such relatively huge sums of money to the lender but it seems to me that I should not accept his submissions in that regard. It seems to me that it is at least arguable that the collateral benefit to the mortgagors from a successful friendly bid may be a relevant consideration for the court to take into account. Mr Orr pointed out the duty here, as Mr O'Neill in his textbook has cited, the duty is not in negligence but the duty is in equity. It is a duty of care, it is a duty of good faith on the part of the receivers, their servants and agents and as it is in equity it must be at least arguable that the personal circumstances of the O'Kanes are relevant. Whether that is akin to the special value cases regarding property is something I need not decide today. In any event there is clearly a duty on the receivers to, as I quoted earlier, to address those who would hope to benefit some day from the equity of redemption. If the O'Kanes are still up and working, whether it is through Ready-mix and particularly through their relatives obtaining the ownership of Ready-mix, then they may be able to reduce the amount owing to them and they may at some further date achieve a compromise with whoever is then mopping up the complex affairs of IBRC for these debts. It may be very marginal but it seems to me again at this interlocutory stage that I could not dismiss them out of hand.

[14] The third argument put by Mr Dunlop, unfortunately put, was that the plaintiffs are not coming here with clean hands and if we are talking about equitable remedies of course they should come with clean hands. He refers to the fact that after ABCO were found to be the highest bidder with a bid initially of £700,000 against the friends of the O'Kanes at £590,000, the O'Kanes then resorted to claiming that an entity called South Birch had a lease of the property for some 15 years which would obviously alter the value of the property to a purchaser and they persisted with this and he says that that was not done with clean hands because after two months of this in May their solicitors then withdrew the allegation that there was a binding lease. It seems to me that are two answers to that from the plaintiffs' point of view. First of all, that would involve me reaching a final conclusion on their good faith which I could not do at this stage. Mr O'Kane says it was in good faith but they took legal advice and accepted that their lease with South Birch was not enforceable and I do not know at the moment what the truth of that is so I do not think I can safely conclude that they acted in bad faith. Secondly, it really does not lie in the mouth of the defendants here to complain of a possible bad faith on the part of the plaintiffs given the very strange conduct of one or more persons acting for the defendants here, apparently very strange conduct. Mr Orr pointed out in his helpful and illuminating submissions yesterday that not everybody on the other side had

given affidavits. That would often be the way but it is right to say that not everybody on the defendants' side did swear affidavits but again I think that is a matter for another day.

[15] That leaves us with the balance of convenience. That follows the decision of the House of Lords in American Cyanamid which I attempted to analyse for my own assistance, at least, in McLaughlin and Harvey Ltd v Department of Finance and Personnel No. 1 [2008] NIQB 122. I pointed out that the judgment of Lord Diplock is of such magisterial quality that it is perhaps unwise and presumptuous to try and gloss it or recast it or summarise it and I set it out in extenso. I do so at paragraph 5 and 6 of that judgment. I quote Lord Diplock's rejection of the purported rule that a plaintiff had to have a more than 50 per cent change of success as he said at page 47(g):

> "The court no doubt must be satisfied that the claim is not frivolous of vexatious; in order words, that there is a serious question to be tried."

[16] That is the first of what seems to be seven tests that have to be applied by the court in a situation like this. I conclude a serious issue is to be tried here. If it has, has it been shown that damages would not be an adequate remedy for the plaintiffs and would be an adequate remedy for the defendant if an injunction were granted and ultimately succeeded? Well as to the first we are dealing with an unusual factual situation and we are dealing with a duty in equity and I am not at this stage confident that a subsequent action, if an injunction was refused, for damages by Mr O'Kane could adequately compensate him. That is partly because of the difficulty of calculating it, partly because Mr O'Kane would have to be in the position to bring such an action which he may not be if this injunction is refused.

[17] Furthermore, I have to consider an adequate remedy for the defendant if the injunction were granted but it ultimately succeeded and I will return to that in a moment. I consider the balance of convenience here, there are difficulties but happily counsel with their customary good sense are agreed that if the court is granting an injunction the property should be remarketed and sold in a proper way. The balance of convenience therefore seems to me to favour the plaintiffs slightly because the defendants get on with their sale. If I refused the injunction there is the risk of an appeal and either the defendants or ABCO might be unwilling to complete until such a course had been exhausted whereas if I grant the injunction there will be a sale and either ABCO buy it or the plaintiffs buy it, or of course, some third party buys it but there is no harm in that because that will reduce the debt of the original lender. In that regard I can be said to be preserving the status quo i.e. at the moment the property is not sold and significantly the defendants are not in contract. The relative strength of one party's case might be said to be stronger in favour of the plaintiffs. There are special factors to which I have briefly alluded. I have the statutory power and duty under Section 91 of the Judicature (Northern Ireland) Act

1978 to grant an injunction "where it appears to the court to be just and convenient to do so for the purposes of any proceedings before it".

[18] I am persuaded of that here. The defendants may well be right that the plaintiffs bid to secure these premises may be unrealistic but they are still earning, it seems to me and I have not been corrected on this, that they are funding this litigation and the difference between them and ABCO is a relatively modest one. That is because ABCO succeeded in obtaining a reduction in their initial offer of £700,000 to one of £650,000. So that is only £60,000 more than the friends of the O'Kanes were offering. Now given that the rent role of the property is somewhere between £25,000 and £80,000 a year these are not large sums and it seems to me given that millions of pounds was lent on the property some years ago that Messrs O'Kane may well be able to make a realistic bid. What if they do not? What if the property now sold and ABCO bid a lower amount and the friends of Mr O'Kane do not come up to scratch with their undoubtedly rather complex proposal but a more than arguable proposal, a proposal that may well succeed or if they do not find somebody else to lend them money to re-purchase the property and in effect through some friends or relative of theirs or what if no third party comes in, well then the defendants could say well we had an offer of £650,000 and owing to the O'Kanes intervention we now only have £600,000. Well that is possible. Mr Orr argues, I think rightly, that it does not necessarily mean that they would be liable for that amount but I think something needs to be put in place in that regard and I think some protection has to be put in place for the receiver without making a final ruling.

[19] This is not a case where the undertaking in damages of itself can be of any value because of the very large debts of the two plaintiffs but the injunction which I do propose to grant here would be subject to the payment into court of £30,000. I will hear Mr Orr in a moment as to the timescale for that but I am thinking of 21 days. The injunction will restrain the defendants from proceeding to accept and enter into contract with ABCO Marine (Ireland) Ltd or its directors Messrs Osborne, Osborne and Magill for the sale of property on foot of their earlier offers in this case.

[20] It is out of place to mention this but I will mention it now. Needless to say I have not set out everything in this extempore ruling which has been dealt with on the papers or in argument but I have taken all the factors into account but this factor does bear one express reference. Throughout the papers, including the affidavits of Mr Stephen Cave, Insolvency Practitioner, there was reference to a sale to ABCO but as the documents disclosed belatedly by the defendant show the Memorandum of Sale does not mention ABCO, - it names these three gentlemen, John Vincent Osborne, Brendan Osborne and Niall Magill. Those gentlemen are perfectly welcome to bid for the property and I say absolutely nothing against them. It is right to say that in the additional special conditions there is provision for the vendor transferring the property to the purchaser or to any nominee of the purchaser which could well be this ABCO. I do find it unsatisfactory at least that the deponents for the defendants at no stage disclosed to the court what the correct position was. That

should have happened and it is a factor that falls to support the decision of the court in favour of the plaintiffs here.

[21] The defendants are at liberty to resell the property. I will now say a word about that but I would then ask counsel for the plaintiffs to draft an order and seek the agreement of Mr Dunlop as to the precise wording of that and that could be put for my approval. The sale should be by way of private treaty not auction or sealed process. There had better be a fresh advertisement of the property as the defendants are advised. I do not direct the defendants to leave their present agents nor to retain their present agents but I do direct that the persons named, one a deponent, one not a deponent, named in the papers in this regard have no involvement with the sale. BTW Shiels are obviously a large firm and I can see no reason why some other member or members of that firm should not conduct the sale. So if the defendants choose to stay with BTW Shiels some other members of the firm must conduct the sale. All bids are to be recorded in a bidding book which is to be produced to the court in due course. I will accept Mr Dunlop's suggestion that this court approves, that I approve of the sale but that will be done on summons and affidavit and exhibiting the bank book. I expressly contemplate that it would be proper for the defendants to give the O'Kanes a period of time, which I think Mr Dunlop is probably right in saying may be a couple of months rather than weeks or perhaps three months to put all their processes in place. The defendants are not obliged to do that unless the O'Kanes are the highest bidders by, I suggest and rule, subject to counsel's submissions, by a five figure sum. If they are five figures clear of the next bidder, well then I think it is appropriate for the defendants to give them some time and if not, not.