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The standard of proof for service of demand letters – Ruling in *'Declan McDonald v Thomas Michael Hill'* [2014] IEHC 629 (Judgment delivered 25 November 2014)

This case related to an application by the Plaintiff, a receiver appointed by Danske Bank A/S trading as Danske Bank (the "**Bank**"), for interlocutory relief in which the Plaintiff sought an order restraining the defendant from attempting to frustrate the activities of the Plaintiff receiver appointed over lands which were charged by the defendant in favour of the Bank. The Bank claimed that it issued a letter of demand to the defendant on 22 November 2013. The defendant denied ever receiving this letter as grounding a basis for refusing to deliver up vacant possession to the Plaintiff.

The central issue in this case is the standard of proof that the Bank must demonstrate to prove that a letter of demand had been sent prior to the appointment of a receiver.

By way of background, the Bank advanced facilities to the defendant for the purpose of purchasing a public house. Security was provided by the defendant. At some stage following the drawn down of the loan, the defendant began to fall into arrears with his repayments.
The mortgage in favour of the Bank contained the following clause:

> *"The monies owing upon this security shall be deemed to have become due within the meaning of s.19 of the Conveyancine and Law of Property Act 1881, and s.4 of the Conveyancing and Law of Property Act 1911, immediately on demand for payment*

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being made by the Bank … and that such demand may be effectually made by notice in writing either left at or sent by post to the mortgagor either at the mortgagor's usual or last known place of abode or business in Ireland or left for the mortgagor on any part of the mortgage property.."

The Bank claimed that it issued a letter of demand to the Defendant on 22 November 2013 which was a prerequisite to the entitlement to appointment of a receiver. The Plaintiff was appointed on 14 April 2014.

The Defendant denied ever receiving the letter of demand. He also claimed that the letter could not have been sent as he maintained that he was careful about the management of his correspondence.

To support the contention that the letter had been sent, the Plaintiff procured a number of affidavits from members of staff of the Bank which attested to the following:

- The demand had been checked, printed, signed and placed in the internal bank postage process (for subsequent external positing to the Defendant via the Head Office of the Bank);
- The demand was then scanned into the customer folder;
- A comment had been issued to the customer portal in the Bank's internal computer system dated 22 November 2013 noting that the demand had issued; and
- An internal email had been received confirming that the above letter had been sent.

Binchy J, however, held that there was no evidence available to the court to prove as a matter of certainty that the demand letter was sent by the Bank. He went on to note that such evidence could be in the form of a certificate of posting from the postal authorities or in the form of a certificate or affidavit from the person who actually posted the letter.

He also noted that there does not appear to be any authority dealing specifically with the standard of proof required to demonstrate that a letter of demand has been sent. However, a number of authorities exist that stress strict adherence to the terms of the debenture.

After applying the seminal criteria to be met in an application for interlocutory injunction as laid down by the Supreme Court in Campus Oil v. Minister for Industry and Energy (No.2) [1983] I.R. 88, the Court held that there was a serious issue to be tried at a full hearing of the proceedings in defence of the Plaintiff's application. Therefore, the interlocutory relief sought by the Plaintiff was refused.

This case highlights the importance of being in a position to prove that a demand letter has been sent before the enforcement is commenced. It should also be noted that this decision is only at interlocutory stage, so the Court only had to determine whether there was a serious issue to be tried as opposed to a final determination of the issue.

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