THE COURT OF APPEAL
CIVIL

Neutral Citation Number [2020] IECA 167
Record No. 2019/281 CA

Costello J.
Power J.
Murray J.

BETWEEN:

ANTHONY SHEEDY

APPELLANT

- AND -

ALASTAIR JACKSON

RESPONDENT

JUDGMENT of Mr. Justice Murray delivered on the 22nd day of June 2020

Background

1. These proceedings concern a property known as Whitfield Manor, Whitfield Court, Kilmeadan, County Waterford together with adjoining lands of approximately 230 acres ('the property'). On 7 August 2015 the defendant (acting by his duly appointed receiver Mr. Peter Stapleton) entered into a contract for its sale to the plaintiff. The contract was in the form of the Law Society of Ireland General Conditions of Sale (2009 Edition), with special conditions. The contract price was €1,375,000. The closing date provided for in the contract was to be thirty days after the date thereof. Almost exactly two years after the closing date thus fixed,

the defendant served a notice purporting to enable the rescission of the contract. He thereafter acted on foot of this, confirming the rescission of the contract on 18 September 2017, and returning the deposit on 4 October 2017. In these proceedings the plaintiff seeks specific performance of that contract, thereby challenging the legal and factual basis for this rescission. By order of 17 May 2019 Quinn J. dismissed the plaintiff's claim, the reasons for that determination being delivered in a reserved judgment of 12 April 2019 ([2019] IEHC 313).

2. The sale arose in a context where the defendant had, in March 2005, mortgaged the property to Irish Nationwide Building Society ('INBS'), the underlying loan and security being thereafter acquired by National Asset Loan Management Limited ('NALM'). On 6 February 2012 the National Asset Managment Agency appointed Peter Stapleton of Lisney as statutory receiver of the property pursuant to s.147 of the National Assets Management Agency Act 2010. In June 2014 Promontoria Eagle Limited ('PEL') acquired the loan and security from NALM. It also appointed Mr. Stapelton as receiver by deed of appointment dated 21 May 2015. On 11 January 2017, PEL appointed Ken Fennell as receiver of that part of the assets originally mortgaged by the plaintiff comprising unregistered land (the property being composed of one parcel of unregistered land and two folios of registered land). The appointment of Mr. Stapleton was not discharged. Throughout this judgment I shall refer to Mr. Stapleton as '*the Receiver'* and to Mr. Fennell as '*the second Receiver'*.

3. At the time of the negotiations leading to the execution of the contract concerns were expressed in a letter from the plaintiff's solicitors of July 8 2015 in relation to the quality of the maps furnished with the contract of sale and in respect of two areas of the estate being sold which were in occupation by two different third parties. The plaintiff's solicitors also noted that maps of another part of the property referred to a right of way which appeared to have been

blocked off by another party. In response, the Receiver's solicitors by letter dated 30 July 2015 declined to undertake any obligations with regard thereto. They quoted the provisions of the draft contract circulated which required the plaintiff to satisfy himself in relation to all matters pertaining to the identity of the property, including its boundaries and confirmed that the vendor gave no warranty and made no representations as to the coincidence of the actual boundaries in the vicinity of the property and the boundaries of the property shown on the title furnished, or as to encroachments made by third parties on the subject property.

4. From the date of signing of the contract, the parties' representatives engaged in a significant volume of correspondence directed to *inter alia* the mapping and identification of the property and encroachments thereon, and including the raising of objections and requisitions on title (3 September 2015), replies thereto (3 and 7 September 2015), a completion notice (12 November 2015), three notices requiring the withdrawal of objections and requisitions (13 November 2016, 13 June 2017 and 7 September 2017) and two meetings (held on 20 December 2016 and 23 February 2017).

5. The notice delivered by the defendant's solicitors to the plaintiff's solicitors dated 7 September 2017 purported to treat the contract for sale as rescinded after the expiry of five working days from the date of that letter unless the plaintiff withdrew certain requisitions and objections. That notice was served pursuant to General Condition 18 of the contract of sale. I will refer to it throughout as the third rescission notice (the two earlier such notices having been withdrawn by the defendant). Essentially, the notice required the plaintiff to withdraw his insistence on the defendant giving vacant possession, removing encroachments and defining the boundaries of the property. As I have noted, on 4 October 2017 and acting on foot of that notice and on the basis that the requisitions in question had not been withdrawn, the

defendant's solicitors returned the deposit paid in respect of the contract. On 20 October 2017, these proceedings (the summons in which was issued on 31 July 2017) were served on the solicitors for the defendant.

6. The contention underlying the plaintiff's claim for specific performance as opened to the High Court – that the third General Condition 18 notice was unreasonable – was based on four principal grounds. First, it was said that the plaintiff had not made objections and requisitions on title justifying service of such a notice. Second, it was contended that the plaintiff enjoyed a contractual requirement for vacant possession which he had not waived. Third, it was said that the defendant had been unable to give vacant possession in respect of approximately 50 acres encroached upon by third parties. Fourth, it was contended that the defendant had agreed to address the appellant's objections to completion and had failed to do so, thereby disentitling him from serving the third rescission notice.

7. The trial proceeded over six days in October and November 2018. On the fifth day of the hearing the plaintiff applied to introduce a new feature into his claim arising from the appointment of the second Receiver. The contention sought to be advanced in an amended pleading the subject of an application on that day was three fold – (a) that the appointment of Mr. Fennell was a repudiatory breach of contract, (b) that the third General Condition 18 notice had no effect as Mr. Fennell was not a party to it and (c) that the appointment of Mr. Fennell was a frustrating event which had the effect of '*stalling the contract'* and amounted to a wilful default by the defendant in breach of the contract.

8. Quinn J. refused to permit the Statement of Claim to be amended in this way on the basis that having regard to correspondence from early 2017, the plaintiff had been on notice of the

fact of the appointment of Mr. Fennell. Quinn J. concluded that had this been an issue of importance to the plaintiff, he ought to have pursued the matter at a much earlier stage. Quinn J. also expressed the view in ruling on this question that the amendment was not necessary for the determination of the true issues in controversy between the parties.

9. Quinn J's judgment addressing the substantive claims presents a comprehensive analysis of the evidence, following which he rejected each claim advanced by the plaintiff. Specifically, the trial Judge held that the property was identified in the contract with sufficient accuracy, that the plaintiff's entitlement to vacant possession was qualified by the special conditions in the contract and that the boundaries had not been warranted by the vendor. He found that the vendor had reasonable grounds for serving the third rescission notice and that in doing so he was not acting capriciously or arbitrarily nor in breach of the contract. He further held – aside from his rejection of the attempt to amend the pleadings - that the appointment of Mr. Fennell as receiver did not constitute a repudiatory breach of the contract, and that the failure to join him to the third rescission notice neither invalidated that notice nor rendered unreasonable the exercise by the Receiver of his rights under General Condition 18.

10. The issues presented by the grounds of appeal fall into three broad categories. As presented in the plaintiff's written submissions there are two: (a) the defendant's capacity to perform the contract by serving a notice to rescind having regard to the appointment of a second Receiver and (b) whether the defendant had reasonable grounds to issue a notice to rescind. To these, the defendant adds a third, (c), whether on the evidence the plaintiff had established that he was ready, willing and able to complete the contract and/or whether the plaintiff was precluded by general equitable principles from obtaining the relief sought by him. This third issue arises from findings made by the trial Judge at paras. 139-144 of his judgment to the

effect *inter alia* that a witness statement presented as having been that of Mr. Harte, the plaintiff's engineer, had never been seen or verified by him, and that that statement included inaccurate assertions, that witness statements had been presented on behalf of two witnesses who were never called verification of which statements, when called for, was not forthcoming, that Allied Irish Banks had obtained judgment against the plaintiff in 2017 for in excess of Euro 2.6M, that Allied Irish Banks had obtained an order for possession of his property in Tipperary (from which the plaintiff said in evidence he was seeking to downsize to the property) and that in June 2017 the plaintiff had in fact been in communications with a view to the onward sale of the property. At para. 142 of his judgment Quinn J. said of the evidence in relation to the order for possession obtained by Allied Irish Banks :

> *This feature of the plaintiff's evidence, taken together with unsatisfactory evidence of the plaintiff in relation to the map he proffered in evidence and the questionable authorship of witness statements all lead the court to conclude that the plaintiff has lacked candour in the presentation of his case to the court and this is a factor which the court must taken into account when the plaintiff is seeking to invoke an equitable remedy*.

The appointment of the second receiver and application to amend the statement of claim

11. His consideration of the reasonableness of the grounds on which the third rescission notice was served occupies the focus of the trial Judge's analysis of fact and law, and I will later revisit both in more detail. The question of whether the plaintiff was entitled to claim and/or had established that the notice was invalid because of the appointment of the second Receiver presents a distinct and more confined issue which falls to be dealt with separately and first.

12. As I have noted, Mr. Fennell of Deloitte was appointed as second Receiver over part of the property on 11 January 2017. The reason for the appointment, according to the defendant, was that Deloitte was on a 'panel' used by PEL, while Lisney was not. Mr. Stapleton was, however, maintained in place as Receiver having regard to the subsisting contractual obligations to the plaintiff. Although the party contracting with the plaintiff was always the defendant (not the Receiver) the plaintiff was requested to consent to a "*novation*" of the contract so that the reference to Mr. Stapleton in the contract could be replaced by reference to Mr. Fennell, upon which *"novation"* it was envisaged that Mr. Stapleton would be discharged. That request was made by e-mail on 30 March 2017 and was repeated by e-mail of 24 April and letter of 18 May. The plaintiff's solicitors did not respond to this request and no novation was executed.

13. The fact of Deloitte's appointment was advised to the plaintiff in an e-mail sent to him on 26 January 2017 by Mr. Mitchell of Cereberus European Servicing ('CES'), and in a mail of 18 May 2017 to the plaintiff from Mr. Morris of Deloittes. It was referred to in the affidavit of Peter Stapleton sworn on the 11 December 2017 for the purposes of the application for admission of the proceedings to the Commercial List, the witness statement of Brian Berg delivered on 24 August 2018, and that of Simon Morris delivered on 31 August. It was referenced in the chronology attached to the defendant's written submissions delivered on 5 October 2018. All of this was well in advance of the opening of the trial, which commenced on 23 October 2018.

14. When the plaintiff sought to raise this issue on day 5 of the trial (the 30 October) by way of an application to amend the statement of claim so as to plead the alleged infirmity in the notice arising from the fact of the second Receiver, his solicitor (Mr. Lohan) averred as follows:

> *'Within his witness statement and as confirmed in Court, Mr. Berg said that "... PEL made a decision to appoint Ken Fennell of Deloitte as receiver in place of Mr. Stapleton, however, this was not actioned in relation to the Property until 11 January 2017". I say that this was the first time that I became aware that Mr. Ken Fennell was allegedly appointed in place of Mr. Stapleton as "The Receiver" of the property*.'

15. Mr. Berg was an employee of CES and gave the oral evidence referred to here on day 4 of the trial (October 26). I would note again that the '*witness statement'* referred to by Mr. Lohan and which, on one view of what was being averred to, was the '*first time*' the deponent '*became aware'* of the appointment of Mr. Fennell, was delivered on 24 August 2018.

16. In a written submission delivered for the purposes of the application to amend, the legal argument underlying (and reflected in) the amendment sought was predicated on the contention that the appointment of a second receiver was a material fact in relation to the first receiver's ability to perform the contract and to exercise rights under the agreement after the date of appointment of the second Receiver, that the defendant had thus committed a repudiatory breach of the contract and that the third General Condition 18 notice was accordingly invalid. Thus, it was contended that the appointment of the second Receiver had the effect that control of the property was vested in the joint – but not several – control of two receivers, so that Mr. Stapleton could not act without the concurrence of Mr. Fennell.

17. The trial Judge ruled on the application to amend the proceedings on day 5. Noting the averments of Mr. Lohan, he said as follows:

> *'He's not here to be cross-examined or speak further to the matter, so I'm not going to make any particular findings in relation to the contents of that affidavit save to state that the Court itself has noted correspondence from an earlier stage in these proceedings in which references were made to the fact of an appointment of Deloitte. In the light of that information both available in discovery and elsewhere the Plaintiffs* [sic.] *have had sufficient earlier opportunity to pursue inquiries as to the effect of that event on these proceedings.'*

18. He continued:

> *'The last consideration for me in relation to all of this is whether the proposed amendments really what effect they have on the real issues in controversy. I've looked at the Plaintiff's own submissions and in particular paragraph 11 in which there is a summary of issues which fall to be determined in the case. With one position* [sic.] *exception it seems to me the amendment required at this stage is not necessary for the purpose of determining the issues that are already at issue in this case and that's 11(e) the question of the effect or otherwise of that appointment on the ability of Mr. Stapleton to serve a rescission notice. The question (e) which was:*
>
> > *"Was the Defendant in breach of contract by purportedly serving and acting on a notice to rescind ?"*

Again, I think that is a matter that can be considered as part of the submissions. I think we will have heard enough evidence in relation to the powers and scope of Mr. Stapleton's appointment to deal with that without making amendments.

In all the circumstances I am going to decline the application for an amendment to the proceedings.'

19. Quinn J. explained his refusal of the amendment in the course of his judgment on the substantive issues in the case, as follows (at para. 121):

'This court refused the application to amend, largely by reason of the fact it was evident from correspondence as early as 2017 that the plaintiff had been on notice of the fact of an appointment of Mr. Fennell and if this had been an issue of such importance he ought to have pursued the matter further before this late stage of the hearing.'

20. The refusal of the trial Judge to accede to the plaintiff's application to amend his statement of claim has not been appealed, although the plaintiff in his notice of appeal (at para. 3) asserts this:

'The learned Judge erred in law in determining that the Plaintiff had prior knowledge of the appointment of Mr. Ken Fennell as a second receiver from January 2017, in circumstances where almost all correspondence post appointment referenced Mr. Fennell as not being appointed, the weight given to one email from Mr. Mitchell to the plaintiff on 26th January 2017 was given undue weight considering the voluminous correspondence between the parties.'

The admissibility of the issue regarding the second receiver in this appeal

21. The plaintiff faces three initial and equally significant hurdles in seeking to advance any case based upon the appointment of Mr. Fennell as the second Receiver. The case sought to be advanced by means of the proposed amended proceedings was, obviously, not pleaded and the plaintiff correctly apprehended that it was necessary to amend his pleadings to advance that case, and indeed accepted this at the hearing of this appeal. His obligation to plead the issue was not obviated by the manner in which the parties had agreed the issues in the case (which did not contemplate the argument in question). The attempt to introduce the amendment on day 5 of the hearing was rejected by the Court, and there is no appeal against the refusal of that application. Therefore, the issue is not before this Court. Indeed, there is not even an application to amend the notice of appeal so as to include as a distinct ground of appeal the refusal of the trial Judge to allow the amendment. The fact that the trial Judge treated of the issue in his judgment does not convert it from an inadmissible and un-pleaded issue, into an issue that was properly before the Court.

22. Second, even if paragraph 3 of the plaintiff's notice of appeal is treated as an appeal against the refusal of the High Court Judge to enable the amendment of the statement of claim as sought by the plaintiff on day 5 of the hearing (and although noting the correctness of the statement that '*almost all of the correspondence post appointment referenced Mr. Fennell as not being appointed',* I do not believe it can be so treated), I do not believe that this Court should accede to such an appeal. The principles governing the amendment of pleading are of course well traversed in the case law and are synthesised recently and with particular clarity by Humphries J. in *Habte v. Minister for Justice* [2019] IEHC 47 at para. 32. In the instant case,

three features of the proposed amendment leaned heavily against its being allowed. For a start, the amendment was sought after the case had opened, in a context where there had been oral evidence with the potential for significant logistical prejudice through the introduction of a new case at a late stage of the trial (see by analogy *Moorview Developments Ltd. v. First Active plc* [2012] IEHC 211 at para. 3.13 and 3.14). Furthermore, the case had been admitted to the commercial list and, in consequence, had been case managed, these facts imposing a particular obligation on litigants to attend in early course to the perfection of their pleadings (see *Woori Bank v. KDB Ireland Ltd.* [2006] IEHC 156). These considerations were particularly acute in this case, having regard to the late stage of the hearing at which the question was raised, and the fact that additional evidence would have been required to address it (and see, in this regard, *Quinn v. IBRC* [2019] IEHC 181).

23. Moreover, I do not believe it can be said that the trial Judge erred in his conclusion that the plaintiff was on notice of the fact of the appointment of Mr. Fennell. Whatever about the proposition suggested by paragraph 3 of the notice of appeal that there had been a deal of correspondence so that the e-mail from Mr. Mitchell of 26 January 2017 was, effectively, overlooked (and I do not think that a reasonable proposition, at least when there was no specific and detailed evidence before the Court to that effect, and in particular no evidence on the issue from the plaintiff himself, to whom the e-mail in question had been sent) and even allowing for the fact that subsequent correspondence from the defendant's solicitors referred to Mr. Fennell's appointment in the future tense, it is impossible to see how the plaintiff can explain the failure to act on the issue once the affidavit grounding the application for admission to the commercial list was sworn and thereafter when the witness statements were delivered in the case. As I have previously noted, the fact of Mr. Fennell's appointment was noticed not merely in the statement of Mr. Berg, but also in that of Simon Morris delivered on 31 August 2018.

Having regard to the preceding considerations, this was a factor that weighed heavily in the balance against the permitting of the amendment. I would not interfere in the exercise by the trial judge of his discretion in the management of the case then at an advanced stage of hearing to refuse the application for an amendment.

The powers of a plurality of receivers: case law

24. Even if all of these issues are put to one side, I do not believe that the contentions raised by the plaintiff in connection with the appointment of the second receiver are well placed. In addressing the substance of these issues, I do so conscious that the trial Judge, while disallowing the application for an amendment, engaged with at least some of the arguments advanced by the plaintiff and that on one view of his comments made at the time of the application to amend, he did so believing he was entitled to do so because the question fell within the issues agreed by the parties. To avoid any doubt around the issue, however, I reiterate my view that this matter was not properly before the High Court and is not properly before this Court either.

25. In reviewing the substance of this question, it bears emphasis that the plaintiff has never sought to contend either that the appointment of Mr. Fennell was invalid, nor that the effect of that appointment was to render ineffective Mr. Stapleton's appointment. The issue thus does not and did not arise as to whether under the mortgage deed in issue it was possible to appoint two or more receivers: instead the plaintiff's argument was addressed exclusively to the proposition that having appointed two receivers, they must act jointly and not severally. As it is put in the plaintiff's written submissions to this Court, '*[w]here two receivers are appointed, then unless they have statutory or express authority to act severally so as to bind the other,*

they must act jointly'. Therefore, he says, where there are two receivers a vendor could not complete the contract of sale except by both of his receivers. Accordingly, he contends, a vendor when acting through the solicitors appointed by one receiver, cannot perform the contract by giving notice to rescind. Rescission, he says, must be given and authorised by the duly appointed receivers and as it was not so given in this case, the rescission is invalid.

26. The defendant, on the other hand – while maintaining its position that the issue is not before this Court at all – makes two points. First, and stressing the fact that General Condition 18 enables the rescission notice to be served by '*the vendor'* defined in turn as '*Alastair Jackson acting by his Receiver Peter Stapleton'*, the defendant says that the issue falls to be resolved within the contract itself: Mr. Fennell, he says, could not serve or join in a rescission notice. There is an inherent contradiction, he argues, in the position adopted by the plaintiff as were it necessary for Mr. Fennell to join in the third rescission notice, it would follow that he was also required to join in all steps necessary to conclude the contract despite his never having entered into any contractual relationship with the plaintiff. Indeed, the point is made that if that contention was well placed, both Mr. Fennell and Mr. Stapleton would be necessary parties to the proceedings. It is stressed that the plaintiff never applied to join either to the suit.

27. Second, the defendant says that it is common case that the mortgagee was entitled to appoint receivers severally and that in the absence of any authority or principle of law imposing such a restriction as a matter of law, severally appointed receivers are entitled to act severally. In this regard, the defendant draws attention to the specific provisions of the INBS mortgage and the terms of s.24 of the Conveyancing (Ireland) Act 1881, as amended. He also emphasises the fact that the appointments of the Receivers were effected by separate deeds, neither of which made reference to the other.

28. Issues as to the power of, and relationship between, two or more receivers operating concurrently can arise in a number of different circumstances, and for a variety of different reasons. Lightman and Moss '*Law of Administrators and Receivers of Companies'* (Sixth Ed. 2017) identify three distinct factual circumstances – a case where more than one receiver has been appointed over the same property but under different debentures, a case where more than one receiver has been appointed over the same property under a debenture in favour of a number of lenders as a result of separate appointments by those different lenders, and a case where more than one receiver has been appointed over the same property at the same time under the same debenture (para. 7-003). This case discloses a fourth – a variant of the third – where the receivers stand appointed over some of the same property under the same debenture, albeit appointed at different times. In this case, the question of whether two or more receivers must act jointly arises because of a challenge to the validity of an action of one receiver undertaken without the participation of the other: it can also arise because of a challenge to the validity of the appointment in the first place, or because of an issue as to whether receivers are jointly liable for the consequences of particular acts or omissions.

29. Obviously, the precise analysis in any given case will depend on the mode and context of appointment, and the specific question thus arising. However, generally speaking the approach adopted in other cases to the resolution of these issues suggests an unsurprising sequence of inquiry. The first is directed to whether – and if so how – there was authority to appoint more than one receiver to begin with. Second, where there is such authority, whether the specific terms of the underlying mortgage, charge or debenture and the appointment itself, are consistent with an authority that is joint, or several. Third, where the matter is not expressly addressed in the relevant instrument, whether there is a basis for implying or deducing a joint

or a several power. In some cases, these inquiries have been approached on the basis of an initial presumption – although the cases have differed as to whether that presumption should be of joint, or of several, authority.

30. Both parties referred to the decision in *Gwembe Valley Development Co Ltd (In Receivership) v. Koshy,* (‘*Gwembe*’), the plaintiff contending that certain comments in the judgment of the Court of Appeal ([2002] EWCA Civ. 1805) favoured the contention he advanced, the defendant arguing that the Court of Appeal decision turned on a different issue, and that the correct analysis relevant to the issues in this case appears in the judgment of Rimer J. at first instance ([2000] 2 BCLC 705).

31. In *Gwembe* Rimer J. addressed the issue of when the powers of a plurality of receivers would be joint and when they would be several by reference to a number of authorities. Of these, the most wide-ranging consideration appears in *Kendle v. Melsom* (1998) 193 CLR 46. There, the issue before the High Court of Australia was whether an appointment pursuant to a deed of charge of two receivers on a purportedly joint and several basis was valid. The question arose in the context of a claim in tort against the receivers, one of the issues in which depended upon whether certain actions of the purported receivers were taken pursuant to the powers conferred by their appointment. The essential theory advanced by the plaintiff was that the purportedly joint and several appointment was not authorised by the relevant charge, and that therefore the appointment was a nullity, thus depriving the receivers of a defence based upon it. While all members of the Court agreed that the *appointment* was valid, they disagreed as to whether the powers conferred by the charge on the receivers were in fact joint or several.

32. The majority (Gummow, Kirby and Hayne JJ) held the powers were joint and several, albeit on distinct grounds. Gummow and Kirby JJ. focussed *inter alia* on the terms of the mortgage agreement, attaching significance to a clause in the charge which stipulated that '*every … such receiver'* was empowered to take possession of, collect and get in the whole or any part of the mortgaged premises. This, they held, dictated that the powers in issue could be exercised collectively or individually (at para. 40), and thus neither receiver required the authority of the other to exercise the powers in the deed.

33. Hayne J. approached the matter somewhat differently, viewing the mortgage as silent on the issue but emphasising the need in construing it to prefer the construction that will give effect to the commercial bargain that has been struck between the parties. Three particular features of the mortgage supported his conclusion that the application of such a construction pointed to the receivers being empowered to act independently of each other – the fact that the mortgage allowed separate appointments in respect of different parts of the mortgaged premises, the absence of any authority compelling a confining interpretation and the fact that such a construction would not work any harm to the mortgagor but would at the same time affect the mortgagee detrimentally. He said (at p.70, para. 66) :

> *'If, then, it is the mortgagee that has the principal interest in determining the way in which the powers of the receiver or receiver and manager are to be exercised, there is, in my view, nothing to indicate that the power to appoint more than one person is, in the absence of express provision, to be read as a power only to appoint those persons on terms that they act together in all respects.'*

34. The minority on this issue (Brennan CJ and McHugh J.) started from the proposition that where a charge is authorised to confer on a plurality of persons powers over the assets and undertaking of the persons creating the charge and the purpose for which those powers are conferred is such that they must be exercised in an orderly or consistent manner, the powers must be conferred jointly unless the terms of the charge otherwise provide expressly or impliedly (at page 53, para.8). Noting that in *DFC Financial Services Ltd. v. Samuel* [1990] 3 NZLR 156 and *NEC Information Systems Australia Pty. Ltd. v. Lockhart* (1991) 2 NSWLR 518 ('*DFC*' and '*NEC*') the Courts of Appeal of New Zealand and New South Wales had both concluded that the exigencies of the expeditious conduct of a receivership suggested an underlying commercial purpose that was consistent with a several rather than a joint power, the minority in *Kendle* rejected the proposition that that practical consideration indicated or warranted that conclusion. In this regard it might be observed that the presumption in favour of joint authority favoured by the minority contrasts with conclusion reached in *DFC*. There, Somers J. expressed the view ([1990] 3 NZLR 156 and 161) that '*a power to appoint one or more receivers or managers empowers a joint and several appointment unless … it can be seen that such an appointment is not authorised'*.

35. Thus, in the view of the minority in *Kendle* the independent exercise by different receivers over the same property of the various powers of a receiver and manager could result in a chaos and potential deadlock that was not consistent with the orderly conduct of the receivership presumptively intended by the parties to the charge. Furthermore, they felt that it could produce an unfairness in that receivers who were jointly responsible for the discharge of their duties could be held jointly responsible for a breach of those duties by receiver if each was severally authorised to exercise those powers. At the same time, however, the minority concluded that this did not mean that *every* decision to be made in connection with the

receivership had to be agreed and executed by both receivers: while they felt that the receivers must jointly together '*resolve on the general course of the receivership'* the implementation of that resolution could be left to one of their number or some agent jointly appointed for the purpose.

36. In *Gwembe*, the facts were complex and arose from the appointment by two creditors (DEG and Lasco) of different receivers over the same assets. Both creditors made the appointments on foot of the same two instruments – a mortgage and debenture – which while executed as part of the same transaction, differed in their identification of the power of appointment of receivers, the mortgage (in clause 7 thereof) clearly allowing the appointment by a party of more than one receiver either acting jointly with the other lenders or individually, while the debenture (in clause 5) did not expressly enable either individual appointment or more than one receiver. The issues before Rimer J. arose from the institution of proceedings by the mortgagor (the named plaintiff in the action) acting through the DEG appointed receiver, but that receiver (because of the subject matter of the action) was acting only on foot of the powers granted by the debenture. The defendant sought to strike out the proceedings contending, effectively, that the DEG receiver did not have authority to cause the plaintiff to commence the suit.

37. The application presented three issues arising from the terms of clause 5 of the debenture – who was empowered to appoint a receiver thereunder, whether the appointor could appoint only a single receiver or whether he or they could appoint more than one receiver, and if each of Lasco and DEG was entitled to make an appointment, whether the first appointment exhausted the power. Having answered these questions by concluding that under clause 5 it was possible for either lender to appoint a receiver individually or jointly with the other lenders,

that an appointor could appoint only a single receiver, and that the appointment of a receiver by one lender did not exhaust the right of another lender to do so, Rimer J. proceeded to address the consequence of that ruling. One of the issues thus arising was whether the DEG receiver could determine to institute the proceedings without obtaining the agreement of the Lasco receiver.

38. Rimer J., having referred to the decisions in *DFC., NEC* and *Kendle v. Melson,* adopted the reasoning of Gummow and Kirby JJ. in the latter case, concluding that the more natural interpretation of the debenture was that each receiver so appointed was entitled to exercise the powers and could do so severally. He continued (at p.722):

> *'There is nothing in the debenture pointing to the conclusion that the appointed receivers can only act jointly; and, as the cited cases show, a conclusion that receivers may act severally need not be assumed to be a recipe for chaos. Rather, a power for receivers to act severally as well as jointly ought, in my view, to be regarded as providing a convenient regime under which the duties of the receivership can be divided between them.'*

39. The end point of Rimer J.'s analysis was that one of the receivers appointed by DEG after a receiver had been appointed by Lasco was entitled to determine independently of the Lasco appointee, to institute the litigation.

40. The Court of Appeal differed from Rimer J. on the first of the questions identified and answered by him, determining that the appointment of a receiver under the relevant provision in the debenture had to be effected jointly. As this had not happened, the other two questions

did not arise. The Court of Appeal decision, accordingly, does not address the effect of two receivers being appointed under the same security and it does not determine that they must act jointly. The only English decision addressing that authority appears to be the decision of Rimer J. at first instance. The Court of Appeal decision was addressed solely to the requirements attending appointment of a plurality of receivers under the relevant debenture. That issue does not arise here.

The powers of the receivers under the INBS mortgage

41. In this case, clause 14 of the mortgage deed applies the statutory powers of sale and appointment of a receiver conferred by, and incidental provisions contained in, the Conveyancing Acts 1881 to 1911 to the security. The Interpretation Act 2005 (s.18(a)) has the effect that, save where the context otherwise requires, the singular in a statute should include the plural. It follows that, absent a contrary intention evident from that context, the 1881 Act and in this context, accordingly, the debenture must be construed so that two or more receivers can be appointed under its terms. *Kendle v. Melsom* proceeded on the basis that a clause in a mortgage deed providing that the singular includes the plural is sufficient to confer a power to appoint more than one receiver (at pg. 60, para. 31 and pg. 66, para. 51) so that insofar as the decision on an application for an interlocutory injunction in *Wrights Hardware Pty Ltd v. Evans* (1988) 13 ACLR 631 and relied upon the plaintiff here suggests otherwise, it has been presumably overtaken in that jurisdiction. In *Doherty v. Perrett* [2015] NICA 52, the Northern Ireland Court of Appeal applied the same logic across the similar effect of the Interpretation Act there, upon the provisions of the 1881 statute where the relevant provisions of that legislation were incorporated by reference into a mortgage deed (see para. 16 of the judgment of Weir J.). I have already noted that in this case the plaintiff does not dispute that more than

one receiver may be appointed under the mortgage; these considerations suggest that that concession was correctly made.

42. That being so, the question of whether the power is joint or several starts as one of interpretation of the deed of mortgage. That exercise is properly approached in accordance with the analysis reflected in *Law Society v. Motor Insurers Bureau of Ireland* [2017] IESC 31 and *Jackie Greene Construction Ltd. v. Irish Nationwide Building Society* [2019] IESC 2, described by Clarke CJ in the latter decision as that of '*text in context'* (para. 3.2). Recognising that phrases or terminology rarely exist in the abstract, and thus that the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence, the court must approach the mortgage here on the basis that governing legal rights and obligations should be interpreted as they would be understood by a reasonable and informed member of the public who understands the purpose and intent of, and background to, the document in question. Important to that exercise (but obviously not dispositive of it) is the '*commercial and practical context in which the agreement was meant to operate'* (per O'Donnell J. *Law Society v. MIBI* at para. 12).

43. Here the mortgage deed uses language similar that found by Gummow and Kirby JJ. in *Kendle v. Melsom* to justify the conclusion that the security in issue in that case enabled the exercise by more than one receiver of their powers individually or collectively – *'any receiver'* (clause 14(c) and (e), clause 22(B)), and *'such receiver'* (clause 14(d) and (e), clause 22(C)(ii)). If the logic of their judgment is correct (and it was acted upon in this regard by Rimer J. in *Gwembe*) this points strongly to the conclusion that a several power is envisaged. Clause 22(B), iterating what it describes as '*Additional Powers of a Receiver'* is particularly important in that regard: it posits that '*any*' receiver appointed by the INBS shall have the power *inter*

alia to sell the mortgaged property '*with all the powers of an absolute beneficial owner'*. The strong implication is that one of a plurality of duly appointed receivers may exercise that power.

44. That is not changed, I should say, by the assumption (urged by the plaintiff in oral argument) that the imposition of the plural should apply across all parts of the deed: while '*any'* could refer neutrally to any receiver or receivers so appointed, I think that it most naturally references both singular and plural : a plurality of receivers may act jointly, or they may act severally. It appears to me having regard to the words used that had it been intended that the power could be exercised only jointly and with the concurrence of co-receiver, the clause would have to be qualified.

45. However, it would be wrong, not least of all having regard to the proper approach to interpretation reflected in the more recent authorities to which I have referred, to focus unduly on these nuances of language. The context is critical, and a key part of that context lies in the reality that those parts of a mortgage deed enabling the appointment, and prescribing the powers and duties, of a receiver are of limited – if any - relevance to the interests of the mortgagor. The position of a receiver is, as the authorities repeatedly stress, unique, and the agency of a person holding that position, exceptional. In emphasising both adjectives, Denham J. in *Bula Ltd v. Crowley (No.3)* [2003] 1 IR 396, 423 rightly underlined the '*duality'* in the receiver's agency-: although agent of the mortgagee his concern is for the benefit of the mortgagor, who will be responsible for the appointment, and who will have the immediate interest in the scope and definition of the receiver's powers.

46. It is difficult to my mind to discern what in the context would justify the conclusion that the mortgage deed envisaged receivers with only joint powers. The only conceivable basis on which a contrary intention could be imputed is the potential for deadlock identified by the

minority in *Kendle v. Melsom* or the possible unfairness of one receiver being held responsible for the acts of another receiver – possibly indeed of another receiver of whose appointment he was not aware. However, I do not see that any of this alters the interpretation so as to displace the terms of the deed and the proper appreciation of the mortgagee's commercial interests. Whatever about the type of arrangement in place in *Gwembe*, where there were multiple lenders whose interests could diverge, the mortgage agreement here envisaged a single mortgagee nominating as receivers persons to whom it was prepared to entrust the protection of its interests. It seems reasonable to assume that the deed was executed in a context where it was understood that those persons would be chosen to act in tandem and where receivers could insist on mutual indemnities. And of course simply because the mortgage authorises the appointment of receivers with several authorities does not mean that the mortgagee must appoint them as such. Absent provision to the contrary, the mortgagee is entitled in the appointment to stipulate that the appointment will be joint. In any event, as observed by Forde, Kennedy and Simms, "*The Law of Company Insolvency*", 3rd Ed., (Dublin, 2015) at para. 4-27 (in positing the joint and several power) a situation of deadlock where it arises can be met by an application for directions to Court.

47. Against these possibilities stand the far greater likelihood that dual receivers required to act jointly on all matters require the consent and participation of the other will face unnecessary logistical complications in the discharge of their functions. That is acknowledged by the minority in *Kendle v. Melsom* in the concession that some functions could be discharged separately once the general course of the receivership was determined jointly. The distinction between the two appears to me to be laden with potential ambiguity.

48. Of course, the fact that the mortgage deed authorises the appointment of receivers who may act severally does not mean that this is what the mortgagee here has done, or has to do. Whether this authority has been implemented depends on the deed of appointment. Here, both deeds of appointment (which are in identical terms) are silent on the issue. As emphasised by Mr. O'Connell SC in his oral submission, while the fact of a joint appointment in a single deed might suggest the intention that the jointly appointed receivers would act jointly, the fact that they were appointed separately from one another strongly signals in the opposite direction. Having been appointed independently of each other, it makes sense that they can act independently of each other. Were the position otherwise, a receiver's freedom of action would be significantly constrained by an appointment to which he was not a party, to which he has not consented, and of which in theory he might even be unaware.

49. Once that is understood, the argument as sought to be advanced by the plaintiff arising from the appointment of Mr. Fennell entirely falls away. The appointment affected neither the third Rescission notice, nor the ability of the defendant acting through Mr. Stapleton to conclude the contract. There was, therefore, no repudiation of the contract and no requirement that Mr. Fennell in some sense join in the third rescission notice.

50. Before leaving this issue, one further point should be noted. In the course of the hearing of the appeal, it was contended by Mr. Dalby SC, counsel for the plaintiff, that although no issue had been pleaded as to the authority of Mr. Stapleton to serve the third rescission notice having regard to the appointment of Mr. Fennell, the essential argument he sought to advance could be '*shoehorned'* into the plaintiff's case that the vendor was acting unreasonably. Because the burden was on the defendant to establish the reasonableness of the rescission notice, it was thus contended, there was no necessity to plead the point. Leaving to one side

the fact that, as follows from what I have said above, the point has no merit, I do not see how this can be correct. The issue of reasonableness depends on the grounds on which the notice was served. The question of whether the Receivers had to act jointly goes to the power to issue the notice in the first place. They cannot be conflated, and each must be separately addressed, and distinctly pleaded.

Pre-contract

51. The evidence of the Receiver was that when he was appointed, he found the lands in poor condition, having been neglected and overgrown, the boundaries being poorly defined and issues of encroachment presenting themselves by known and unknown parties whose stock was roaming the property. His evidence that none of this was uncommon with large landholdings in rural areas, particularly when the owner of the lands was no longer present, was accepted by the trial Judge.

52. After rejecting an initial offer from the plaintiff in April 2014, in January 2015 Sherry Fitzgerald acting on behalf of the Receiver confirmed that they had agreed sale terms to the plaintiff. On 25 May 2015, the Receiver's then solicitors, Gartlan Furey, wrote to the plaintiff's solicitors, Lohan & Company, enclosing amended contracts for sale and relevant documents including the deed of assurance of the mortgage and deed of appointment of the Receiver. On 3 June 2015, Gartlan Furey furnished the plaintiff's solicitors with Property Registration Authority compliant maps relating to the unregistered portions of the property. The plaintiff's solicitors thereafter expressed dissatisfaction with the maps furnished to them, and on 18 June 2015 forwarded a map received from their engineer showing the property in sale.

53. On 8 July 2015, the plaintiff's solicitors wrote to Gartlan Furey asking that the latter confirm that their engineer's map could be treated as the current map, and identifying parts of the property which, they said, had been in adverse occupation by third parties. This was eventually responded to on 30 July 2015, the defendant's solicitors stating as follows :

> *'With regard to the alleged encroachment over the areas hatched and marked with the letters A and B on the map prepared by your client's engineer, we would refer you to special condition of the Contract for Sale which provides as follows:*
>
> *The Vendor gives no warranty and makes no representations as to:*
>
> *(a) The coincidence of actual boundaries in the vicinity of the Subject Property and the boundaries of the Subject Property shown by the title furnished.*
>
> *(b) Encroachments made by third parties on the subject property. The Purchaser is placed on its own inquiry in this respect to satisfy himself prior to the signing hereof of any discrepancy in relation to the size and dimensions of the Subject Property as described in the documents of title and maps and the position on the ground.'*

54. On 31 July, 2015, Lohan & Company replied enclosing contracts for sale duly executed together with deposit cheque in the sum of €70, 000 and confirming that the closing date of this transaction would be 30 days from receipt by that office of one-part contract duly executed by the Receiver. Gartlan Furey never confirmed that the map enclosed with Lohan's letter dated 18 June, 2015 could be treated as the contract map. The portion of the lands which are registered is defined exclusively by reference to the Folios.

The contract

55. At the root of the issues between the parties giving rise to the service of the third rescission notice were difficulties in defining the boundaries of the property in sale, questions as to the nature and extent of encroachments on those properties by third parties, and the contention of the plaintiff that the defendant had contracted to deliver vacant possession. As the trial Judge noted (at para. 114 of his judgment) while these were identified as separate matters, they were continuously associated with each other during the hearing. This was unsurprising. The Receiver's evidence relating to the condition of the estate at the time of his appointment made it clear that these issues, at least to some extent, had a common cause.

56. That context was reflected in the contract. The particulars and tenure were described as follows:

> *'All that and those the dwelling house, premises, out offices and lands situate at and known as Whitfield Manor, Whitfield Court, Kilmeaden, in the County of Waterford together with part of the pleasure grounds park and lands formally (sic) occupied or held with the mansion house of Whitfield now called Whitfield Court which same lands consist of part of the land of Dooneen together with part of the lands at Powersknock which said land are situate in the Barony of Middle third and County of Waterford, all of which said lands are more particularly outlined and hatched in pink and the map attached to Indenture of Conveyance dated the 4th day of March, 2005 between Major Hugh Danway (sic) (otherwise known as Hugh Danway) (sic) of the one part and Alistair Jackson of the other part as more particularly delineated in red on the map attached hereto for identification purposes only and all that and those the lands comprised in Folios 7914F*

and 33848F of the Register of Freeholders in the County of Waterford (together referred to as the 'Subject Property)'.

57. There was some uncertainty associated with the map referred to here – that dated 4 March 2005. Thus, Special Condition 4.3 stipulated that while the map furnished with the contract was held with the title deeds to the Subject Property the map was not actually attached to the deed of conveyance. It recorded that it appeared that that map had become detached from the Deed of Conveyance, but that the vendor could not conclusively confirm the position. It stated:

'No further documentation shall be furnished and no objection, requisition or enquiry shall be raised in relation thereto.'

58. General Condition 21 – which states that the purchaser shall be entitled to vacant possession of the subject property on completion of the sale – was deleted by Special Condition 7.3, which special condition provided that the property was '*sold as seen'* with the vendor being under no obligation to remove debris or carry out a clean-up of the property. Clause 7.5 was as follows:

'The Purchaser shall be deemed to have satisfied itself in relation to all matters pertaining to the identity of the subject property including the boundaries thereof and shall raise no objection requisition or query in this regard. The Vendor shall not be required to furnish a declaration of identity or separately identify parts of the Subject Property held under a different title or to specify what boundaries are of a party nature. General Condition 14 (which concerns evidence of identity of the property in sale) is hereby deleted'.

59. Special Condition 7.6 (the text of which I have already noted had been recorded in the letter from Gartlan Furey of 30 July 2015) provided:

> *'The Vendor gives no warranty and makes no representation as to –*
>
> *(a) The coincidence of actual boundaries in the vicinity of the Subject Property and the boundaries of the Subject Property shown by the title furnished.*
>
> *(b) Encroachments made by third parties on the subject property.*
>
> *The Purchaser is placed on its own enquiry in these respects and shall satisfy himself prior to the signing hereof of any discrepancy in relation to the size and dimensions of the Subject Property as described in the documents of title and maps and the position on the ground.'*

60. Special Condition 7.7 was as follows:

> *'The Purchaser shall be deemed to have satisfied itself in relation to the actual state and condition of the Subject Property including all easements rights reservations exceptions privileges covenants restrictions rents taxes and other liabilities affecting the Subject Property prior to the execution hereof and shall raise no objection requisition or enquiry in this regard. General Conditions 15 and 16 [which concern the rights and liabilities of the parties as regards the condition of the subject property] are hereby deleted.'*

The objections, correspondence and meeting of December 20 2016

61. Over the course of fifty-six paragraphs of his judgment (at paras. 39-95), Quinn J. meticulously recorded the exchanges between the parties regarding the closing of the sale from the signing of the contract to the return of the deposit. I do not propose to repeat that detail. Suffice to say that the first General Condition 18 notice served on 13 November 2016 arose from requisitions delivered by the plaintiff regarding encroachment by a Mr. Power and a Mr. Kelly, the presence on the lands of horses belonging to unknown persons, and the condition of the house. When the entitlement of the defendant to rescind the contract was queried by the plaintiff's solicitors they complained of an '*abrogation of ... responsibility'* by the Receiver '*to ensure a sale proceeds with all essential ingredients, such as a proper identifiable map, no boundary disputes, no adverse possession claims etc'*.

62. That correspondence (dated 6 December 2016) was accompanied by a letter headed '*strictly without prejudice/off the record'* proposing a round table meeting '*to finalise a map and hopefully a solution to the continuous encroachment'*. That meeting took place on 20 December at the premises of CES. CES was described in evidence as an '*affiliate'* of PEL, acting in an advisory capacity overseeing the activities of service providers appointed on PEL's behalf. The meeting was attended by the plaintiff, his solicitor and two employees of CES. It was not attended by the Receiver, and the defendant adopted the position throughout that no one present at the meeting from CES had the authority to bind the Receiver. It was also the defendant's position that this meeting was without prejudice, a description with which the plaintiff disagreed throughout.

63. In the course of that meeting five specific matters were addressed – a proposal by PEL to replace Mr. Stapleton with a new receiver, Mr. Ken Fennell of Deloitte, the fact that the plaintiff still wished to proceed at the original contract price, the necessity to finalise

outstanding mapping issues, the question of how to deal with any encroachments and the condition of the property. However, the trial Judge was clear that although these matters were discussed at the meeting, it was his view based on the oral evidence he had heard that no agreement was reached in respect of these matters. Referring to these five issues as he found them to have been thus discussed, he said (at para. 77):

> *'I have considered the evidence given by the plaintiff and Mr. Lohan and by Mr. Berg. There is no doubt that all of the matters referred to above were discussed at the meeting and the email from Mr. Mitchell to the plaintiff on 26 January, 2017, and from Mr. Lohan to Mr. Maurice on 10 February, 2017, reflect that fact. The Plaintiff places particular reliance on Mr. Mitchell's email. Taken in conjunction with the oral evidence and subsequent correspondence, I do not consider either of these emails to constitute evidence of a binding agreement. In particular, Mr. Lohan's email of 10 February, 2017, insists that the communications are 'without prejudice' to our legal remedies and the contract/correspondence to date' and that the contract and previous correspondence applies in any event.*
>
> *I have concluded that this meeting was convened and held in a combined endeavour to progress practical matters towards completion of the transaction, but no binding variation was made to the contract itself and no new binding commitments were entered into on the part of either party to the contract, let alone in the terms contended for in the statement of claim.'*

64. I have explained earlier that on 11 January 2017 Mr. Fennell, of Deloitte, was appointed as second Receiver. On 25 January 2017, Deloitte wrote to the plaintiff's solicitor inquiring as

to what was required to complete the sale. On 25 January 2017, Mr. Mitchell e-mailed the plaintiff referring to the meeting of 20 December 2016, recording the plaintiff's agreement that he remained committed to the purchase, that the plaintiff required his mapper to meet Deloitte's mapper on site to agree the boundaries, and that he wanted action taken in relation to encroachments on the property. He introduced this mail as follows:

> *'Tony, further to our meeting in Dublin on 20th December with Cormac Lohan and Brian Berg, Deloitte were appointed as FCR (replacing Lisney) and ready to progress as we discussed.'*

65. On 10 February 2017, Mr. Lohan mailed Mr. Morris of Deloitte. That mail referred back to the meeting of 20 December 2016, stated that the plaintiff wished to proceed to finalise the contract as quickly as possible, but made it clear that this was subject to the resolution of five issues: the mapping issue, boundary disputes, the issuing of proceedings against two persons alleged to be responsible for encroachment, the provision of all correspondence with Waterford County Council regarding the structure, and any in the correspondence and specifically :

> *'... that we shall require absolute vacant possession on closing. This speaks to the regular trespass of live/equine stock'.*

66. Following further correspondence (including draft novation agreements and proposed amendments to the description of the property to accommodate proposed transfers to one of the third parties) together with a meeting on site on 23 February 2017, the second General Condition 18 notice was served on 13 June. This referred to the plaintiff's requisitions as to

the encroachment by Messrs. Power and Kelly, the presence of horses on the property, and the condition of the subject property under the contract.

67. This prompted a response from the plaintiff's solicitors of 20 June 2017, which stressed the plaintiff's claim that an agreement had been reached at the meeting on 20 December 2016. They stated:

> *'Your client has previously attempted to resile from the contract herein but decided not to proceed for obvious reasons. You now reissue the same threat despite your client having agreed to deal with and ultimately properly address the outstanding matters, such as the mapping the encroachment and the condition of the property as set out in previous correspondence. As part of that agreement your client's engineer was to make contact with our client's engineer to deal with the mapping and to assess the extent of the encroachment onto the property in sale. Your client's engineer did liaise with our client's engineer and met on site to assess the situation. As part of the agreement your client was to issue proceedings against those third parties responsible for the encroachment. We are not aware of your client taking such steps to date, notwithstanding any other outstanding matters. We understand the encroachment is significant.'*

68. The defendant's solicitors responded to this on 24 July 2017 rejecting the contents of this letter, denying that any agreement had been reached at the meeting on 20 December 2016, and disputing in particular the claim that there had been any agreement reached to issue proceedings against any third parties or that assurances had been given as to the condition of the property. Nonetheless, the second General Condition 18 notice was waived, requesting the plaintiff's agreement within seven days to the map sent on 18 May 2017, and to the novation agreement.

If this was done, they said, letters would be sent to the alleged trespassers notifying them of the trespass and calling them to cease it, whereupon the plaintiff would be obliged to complete the sale of the property.

69. Upon receipt of this letter, the plaintiff's solicitor responded to the effect that Mr. Lohan was on leave until 28 August 2017. By letter dated 30 August 2017, the defendant's solicitors extended the time for response to 1 September 2017. Not having received a response, on 4 September 2017 the defendant's solicitors advised Lohan and Company that they were taking instructions.

The third rescission notice

70. The notice served on 7 September 2017 identified three objections that had been made and insisted upon by the plaintiff :

> *'(i) That vacant possession of the entire lands in sale be provided, despite the clear terms of Special Condition 7.6 of the Contract for Sale dated 7th August, 2015, ('the Contract') to include the taking by our client of proceedings to remove certain trespassers (known and unknown) on part of the lands in sale.*
>
> *(ii) That a new map of the property be agreed when — having been (without obligation) provided with that map in May of this year — he has failed to either confirm or dispute the accuracy thereof; and*

(iii) That he be furnished with all correspondence/files in respect of the estate house between the Vendor and previous owners and Waterford County.'

71. Referring to what were described as efforts by the defendant to resolve these matters and to the withdrawal of the two previous such notices served under General Condition 18, the notice continued:

'Notwithstanding this and notwithstanding that two years has now elapsed since the date of the contract, your client has failed, refused and/or neglected to close the sale of the property or withdraw the said objections. The Vendor is not in a position to comply with these objections and/or further attempts to comply therewith will involve unreasonable delay and/or expense.

Accordingly please note that pursuant to General Condition 18 Contract the Vendor hereby gives notice to the Purchaser that the Vendor shall rescind the contract after the expiry of 5 Working Days (as defined in the Contract) from the service of this notice (as defined in the Contract) unless the Purchaser's said objections are withdrawn prior to the expiry of the said 5 Working Days.'

72. On 19 September 2017, the plaintiff's solicitors responded by letter saying, *inter alia*, as follows:

Your client has no grounds whatsoever to terminate and/or otherwise forfeit the contract between respective clients and/or renege on all matters it agreed to carry out prior to completion. Your clients agreed to carry out and/or complete certain

matters as set out in previous correspondence between them and/or agents to address the serious issues which have arisen. You have ignored all said correspondence and agreements. Your client, Cereberus, called a meeting last December and agreed a way forward with our client and they have failed to adhere to same. Brian Berg at one stage during the meeting offered our client E50,000.00 to walk away.

73. As I have also noted, the defendant's solicitors forwarded the deposit to the plaintiff under cover of letter dated 4 October 2017, and this was returned by the plaintiff under cover of a replying letter of the following day. A certified copy of the proceedings was served on 20 October 2017.

General condition 18

74. The second limb of the plaintiff's appeal is framed by the provisions of General Condition 18. As it appeared in the 2009 Edition of the Law Society's conditions, it provided:

'If the purchaser shall make and insist on any Objections or Requisitions as to title, the Assurance to him or any other matter relating to or incidental to the sale, which the Vendor shall, on the grounds of unreasonable delay or expense or other reasonable grounds, be unable or unwilling to remove or comply with, the Vendor shall be at liberty (notwithstanding any intermediate negotiation or litigation or attempts to remove or comply with same) by giving to the Purchaser or his Solicitor not less than five working days' notice to rescind the sale. In that case, unless the Objection or Requisition in

question shall in the meantime have been withdrawn, the sale shall be rescinded at the expiration of such notice.'

75. The entitlement conferred by such a provision is not unbounded: the balance is struck within the cases by the principle that if a vendor, having stipulated for or been conceded such a right of rescission, is to be precluded from asserting it in any particular context, it must be by virtue of some equitable principle which enures for the protection of the purchaser (*per* Lord Radcliffe in *Selkirk v Romar Investments Ltd* [1963] 1 W.L.R. 1415 at 1422). The application of that equitable principle was explained by Finlay CJ in *Williams v. Kennedy* (Unreported, Supreme Court, 19 July 1993): the vendor in exercise of the right conferred by this clause must not be acting unreasonably, arbitrarily or capriciously, the purchaser must, at the time the clause is invoked, have been persisting in the objection or requisition in question and the contractual obligations must have been surviving at the time of the invocation of the clause and purported rescission of the contract. The focus of the court is thus properly on the ground of rescission, and the determination of whether that ground is a reasonable one (see *Kiely v. Delaney* [2012] IESC 41 at para. 36). The proper operation of the clause is frequently explained on the basis that '*the vendor must not invoke it without reasonable cause'* (Wylie "*Irish Conveyancing Law"* 4th Ed. (Dublin, 2019) para. 7.30).

76. In this appeal, the plaintiff's challenge to this aspect of the decision of the trial Judge is based wholly on the requirement that the vendor be acting reasonably in serving the notice. Quinn J. addressed this issue, as follows (at para. 138):

'... the efforts which were made by and on behalf of the receiver to satisfy the varying and growing objections and requirements of the plaintiff were genuine efforts by the

receiver to complete the contract and exceeded measures which he was obliged to undertake by the contract itself. The plaintiff was seeking to achieve a degree of perfection in relation to encroachments, boundaries and mapping and what was referred to as 'absolute vacant possession' none of which the defendant was obliged to deliver having regard to the terms of the contract. In the circumstances I am satisfied that the receiver acted reasonably and properly in calling on the plaintiff to withdraw his objections and, when the plaintiff declined to do so, in rescinding the contract pursuant to General Condition 18.'

77. The plaintiff identifies four discrete reasons why, as he argues, Quinn J. erred in permitting the defendant to rely upon the third General Condition 18 Notice:

'(1) The earlier letter of 21 August 2017 from the Receiver's solicitors was unreasonable in itself;

(ii) The vendor had engaged in working through the issues identified in the 20 December 2016 'Agreement/Discussions' and had acted consistently with an agreement (if not the specific agreement contended for by the Buyer) as demonstrated by subsequent acts;

(iii) The vendor, contrary to its engagement in the preceding months, suddenly and unfairly characterised or wholly mischaracterised the outstanding issues as objections and requisitions which the buyer had agreed not to make after a certain period of time;

(iv) The vendor was acting inconsistently with contractual conditions in relation to vacant possession.'

Vacant possession

78. Although presented as his fourth and final objection to the third rescission notice, the plaintiff's claim that the parties agreed a requirement of vacant possession is the most fundamental and falls to be dealt with first. There are two reasons why this is so. To begin with, it is clear and undisputed that the plaintiff maintained a claim to vacant possession which he had not withdrawn at the date of service of the third rescission notice. If the plaintiff is incorrect in his contention that he was in fact entitled to vacant possession, it follows that the notice was properly served – irrespective of the entitlement of the defendant to complain of the other two matters referred to in the third rescission notice. In this regard it is important to observe that the defendant contended in the course of his oral submissions that once one requirement recited in the third rescission notice was properly made, the notice was validly served. I did not understand the plaintiff to demur from this.

79. The second reason the issue of vacant possession is so fundamental arises from a broader feature of the plaintiff's claim. The essential case advanced by him is that he had an entitlement to vacant possession, from which he granted the defendant a concession in the form of the various terms recorded in Mr. Lohan's e-mail of 10 February 2017. Thus, he says, the trial Judge was wrong to construe the third rescission notice without regard to the fact of such concession and, he contends, the positions adopted by the plaintiff in respect of the matters recited in the third rescission notice ought to have been viewed in that light. As it was put in the course of the hearing, the core of the plaintiff's case as argued on appeal was that the plaintiff was entitled to more, from which he was prepared to make a concession of less. It follows that if he was not entitled to absolute vacant possession, everything else falls away.

80. The correctness of the argument that the plaintiff was entitled to vacant possession depends on the proper construction of the contract. The relevant principles of interpretation have been referenced by me earlier in the context of the issues around whether the receivers were required to exercise their powers jointly or could do so severally. To repeat : the Court must construe the language of the contract having regard to the relevant factual matrix giving effect to the intention of the parties as deduced from both. I should emphasise that the factual matrix is an inherent aspect of this exercise: it is not the case (as suggested by counsel for the plaintiff at one point in the course of his oral submissions) that the Court looks to that matrix only if there is some ambiguity in the language used in the agreement. As Fennelly J. explained in *ICDL v. European Computer Driving Licence Foundation Ltd.* [2012] IESC 55, [2012] 3 IR 327 at paras. 66-70, the proper exercise in interpretation commences with the words of the contract, construed in accordance with their natural and ordinary meaning, with evidence of the surrounding circumstances (but not of the parties subjective intent) admitted to explain the subject matter and what words used should be understood as referring to. However, that does not mean that a literal interpretation of the language used in the agreement trumps the meaning dictated by that context: as O'Donnell J. explained in *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31 at para. 30, if the ordinary meaning of the words would lead to a conclusion contrary to the intention which emerges from the rest of the agreement and the relevant background, then the ordinary words must give away. At para. 39, he put it as follows:

> *'Words are important as a guide and often the surest guide to the agreement made by the parties. But where other guides suggest a different approach to that suggested by the dictionary meaning of the words taken on their own and out of context, then that is a reason to reconsider the interpretation to be given to the contract.''*

81. This means that it is never possible to render a reliable interpretation of a contract by simply looking at words on a page. An exercise in interpretation can only be undertaken with an understanding of the relevant background that would have been reasonably available to the parties at the time of the agreement, and that that background comprises everything which would have affected the way in which the language of the document would have been understood by a reasonable person *except* the previous negotiations of the parties and their subjective intent. It must be stressed that it is with the objective meaning of the contract so construed that the Court is concerned, not the subjective intent, interpretation or understanding of one of the parties. Insofar, therefore, as the plaintiff focusses exclusively on the language of the agreement and emphasises that no evidence was adduced by either party as to their intention in relation to the relevant clauses, he errs in both respects. The agreement cannot be understood outside its context, and evidence of the subjective intention of the parties is irrelevant to that context.

82. As I have already noticed General Condition 21, which provides for the obligation to deliver vacant possession, was deleted by Special Condition 7.3. The central point made by the plaintiff is that that deletion did not affect an obligation to deliver vacant possession which, he says, is retained by General Condition 27(a). The language of the three conditions is important. In considering them it is relevant that clause 3 of the contract states that '*[h]eadings and marginal notes inserted in the Conditions shall not affect the construction thereof nor shall the same have any contractual significance'* and that the same provision defines '*Conditions'* as the General Conditions and attached Special Conditions.

83. General Condition 21 is headed '*Vacant Possession'* and states:

'Subject to any provision to the contrary in the Particulars or in the Conditions or implied by the nature of the transaction, the Purchaser shall be entitled to vacant possession of the Subject Property on completion of the Sale.'

84. This is the only freestanding reference in the contract to '*vacant possession*'. The deletion thereof by Special Condition 7.3 is effected in the following terms:

'For the avoidance of doubt, the Purchaser hereby acknowledges that the Subject Property is "sold as seen" and the Vendor shall be under no obligation to remove debris or carry out any of the clean-up of the Subject Property. General Condition 21 is hereby deleted accordingly.'

85. The plaintiff pays close attention to the language of this provision with a view to suggesting that the deletion of General Condition 21 is of limited effect. It is, he says, restricted in its operation to the dwelling house. That is said to follow from (a) the use of the term '*sold as seen'* which it is said is referable to a dwelling house, (b) the reference to debris which it is said is similarly directed to the structure, (c) the use of the term '*accordingly'* at the conclusion of the condition and (d) the retention of general condition 27(a).

86. The latter condition appears under the heading '*Apportionment and Possession'* and provides:

'Subject to any provision to the contrary in the Particulars or in the Conditions or implied by the nature of the transaction, the Purchaser shall be entitled to vacant possession of the Subject Property on completion of the Sale.'

87. The starting point in the analysis of these provisions is the deletion of General Condition 21. That is consistent only with an intent that the vendor be released from the sole obligation imposed by that clause of the contract. That is underlined by the terms of a number of conditions I have quoted earlier - Special Conditions 7.5 (the purchaser satisfying himself in relation to all matters pertaining to the identity of the subject property), and 7.6 (confirming that no warranty was given by the vendor as to the boundaries and that the purchaser was placed on enquiry in relation thereto). All of these provisions combine to suggest an intention that the vendor was derogating from the usual obligation to deliver vacant possession and was doing so generally. The overall context, as outlined by my earlier, explains why this was the position being adopted.

88. For a number of reasons, the construction urged by the plaintiff fails to displace the apparent effect of the deletion of General Condition 21. First, had the intention been as he asserts the obvious course of action for the parties to adopt would have been to vary that provision, not to delete it. Such variations are effected by other provisions of the contract where this was the intention (Special Condition 7.11 and 7.18). Second, none of these provisions are consistent with '*sold as seen'* bearing anything other than its ordinary meaning, or with the suggestion that '*debris'* referred exclusively to the structure on the property or with the deletion of General Condition 21 being limited to the dwelling-house. I should stress in this regard that the plaintiff has pointed to nothing in the context that would dictate that these words should be given such a restricted meaning. Third, the contention advanced by him disregards the differing purposes of the two clauses: clause 21 defines *what* the purchaser was entitled to. General Condition 27(a) is addressed to *when* the purchaser is entitled to possession. That is why that condition does not have to be deleted in order to deprive the

purchaser of vacant possession. Fourth, the plaintiff has pointed to nothing within the agreement, and nothing within the context, to suggest that the parties intended to differentiate in this, or any other respect relevant to the issues in this case, between different parts of the property. Fifth, his construction fails to respect the overall structure of the agreement whereby the Special Conditions govern: the interpretation he urges reverses this.

89. General Condition 27(a), concerned with apportionment and possession in contrast, readily accommodates the removal of any obligation to deliver vacant possession, as it is expressed to be subject to the Special Conditions of the contract, the primacy of the Special Conditions also being confirmed by Special Conditions 2 and 7.21. Thus, those conditions have qualified General Condition 27(a) to the extent that the provision was ever intended to confirm a general obligation of the kind contended for by the plaintiff.

90. Finally, while a point was made in reference to a response tendered by the defendant to a requisition on title requesting confirmation that clear vacant possession of the entire property would be handed over at closing, I do not believe that that response (even if admissible to construe the contract – an issue on which I express no view) changes matters, as it did no more than refer back to the effect of the Special Conditions : '*Confirmed* ***subject to special condition 7.3*** *of the contract of sale'* (emphasis added).

91. Once this is understood, the third rescission notice itself falls to be construed in a context in which the plaintiff had no entitlement to insist on vacant possession and in which, in consequence, the defendant's insistence on the withdrawal of that demand cannot be unreasonable. On this ground alone, accordingly, the notice is valid.

The letter of 21 August 2017

92. I have referred earlier to the letter of 21 August 2017. There, the defendant's solicitors called upon the plaintiff to agree the map and novation agreement. They said that if the defendant so agreed, letters would be sent to the alleged trespassers notifying them of the trespass and calling upon them to cease it. At that point, they said, the plaintiff would be obliged to complete the sale of the property. If, however, this was not agreed, the letter recorded that the defendant would '*proceed as he deems appropriate',* reserving the defendant's rights – including his right to serve a further notice under General Condition 18. The plaintiff did not substantively respond to this letter, advising by e-mail that his solicitor was on leave until 28 August 2017. By further letter of 30 August 2017 the time for response was extended by the defendant's solicitors to 1 September 2017. On 4 September 2017, the defendant's solicitors noted that they had received no reply to their letter and were taking instructions. The notice was served three days later.

93. The plaintiff's reasoning, insofar as he bases a challenge to the trial Judge's conclusions in relation to the third rescission notice upon this letter is three-fold. First, he says, the letter of 21 August was unreasonable. Second, he says the trial Judge determined that it was reasonable to serve the third rescission notice because of the letter of 21 August. Third, and accordingly, he contends that it must follow that if the letter of 21 August was unreasonable, the notice was similarly unreasonable.

94. This chain of logic collapses in on itself at a number of points. For a start, I do not understand the trial Judge to have based his rejection of the challenge to the third rescission notice upon the letter of 21 August 2017 in the manner suggested by this argument. In fact, he observed a number of times in his judgment that the defendant could not compel the plaintiff

to execute a novation of the contract. What the trial Judge did was to observe that the third rescission notice was issued after what he termed at para. 128 of his judgment '*extensive correspondence and communications'* of which the letter of 21 August 2017 was the last. What was critical to the trial Judge's conclusion was not the requests made in the letter of 21 August 2017 *per se*, but the fact that the plaintiff was insisting on vacant possession and the removal of encroachments which he had no right to demand all - of which objections he had been afforded many opportunities to withdraw. I cannot see any error in that conclusion.

The meeting of 20 December

95. The plaintiff had pleaded his case on the basis that an oral agreement was concluded at the meeting of 20 December 2016 to resolve what are described as '*outstanding issues'.* He claimed that this agreement involved the finalisation of a map before completion of sale and the resolution of boundary disputes and incursions on the property and at least the issuing of letters to one person (Mr. Power), and the issue of proceedings against two others (Mr. Kelly and Mr. Dowley). The alleged agreement had two other elements – the provision of correspondence and files with Waterford County Council in respect of the estate house, and what was termed '*absolute vacant possession of the property on closing, including the regular trespass of live/equine stock.'*

96. The trial Judge determined, based on the oral and documentary evidence before him, that no binding variation was made to the contract itself and no new binding commitments were entered into on the part of either party to the contract (at para.77 of the judgment). He summarised his conclusions in respect of the meeting, as follows (at para. 145(5)):

'The meeting of 20th December 2016, did not give rise to any separate rights or obligations from those in the contract of sale. Before and after this meeting the parties continued to reserve their rights under the contract. Whilst the meeting identified certain steps to be taken by both parties to facilitate completion of the sale, and certain actions were taken by both parties and others after that meeting in pursuant of that objective, no binding commitments were made by or on behalf of the defendant.'

97. The position of the plaintiff in respect of this meeting before this Court is far from straightforward. He consistently refers to the '*agreement reached on 20 December'*, saying that Quinn J. erred in three respects: (a*)* '*in mistaking the context of the agreement as being one that purportedly attempts or is intended to amend the contract for sale*', (b) '*if it is not contractual it creates an estoppel by representation and/or conduct'* and (c) even if the agreement is not binding, it is said that Quinn J. erred in not taking into account when considering the reasonableness of the notice to rescind the combined endeavour to progress practical matters towards completion of the transaction. The first of these is elaborated upon by reference to an acceptance that there was no intention on either side to amend the contract of sale, continuing:

'[t]he fact that it is or is not binding in relation to the contract of sale is besides the point. It may be that it does not have a clearly defined remedy. However on its own terms it is contractual in that non-pecuniary consideration passes between each of the parties on the form of engage [sic.] *with each other.'*

98. In disaggregating these various propositions, in my view the issue around the meeting of 20 December 2016 falls to be resolved by reference to the following five propositions.

99. First, the contract of sale was not amended at the meeting of 20 December 2016, or otherwise. On this, both parties are in agreement.

100. Second, if by the plaintiff's first point it is intended to suggest that Quinn J. directed his attention solely to the question of whether there was an agreement to amend the contract of sale, this is not correct. Even if one assumes that an agreement of the kind pleaded by the plaintiff would not in fact have been an amendment of the contract of sale (and I find it difficult to see how it could be characterised in any other way), Quinn J's conclusion was clear and unequivocal: there was, he held, no binding variation made to the contract itself and no new binding commitments. Therefore, his finding was not limited to the issue of whether the '*agreement*' was '*binding in relation to the contract of sale'*. The finding that there was no '*binding commitment'* meant that inevitably there was no '*contractual'* commitment. Therefore, the issue of '*consideration'* did not arise.

101. Third, the plaintiff has not laid any foundation for an argument that, having regard to the well-established principles governing appellate review of findings of fact or of mixed findings of fact and law, this Court can interfere with the decision of the trial Judge that there were '*no new binding commitments'*. Therefore, whatever legal analysis is applicable, it must proceed on the basis that that finding is fixed. Accordingly, to repeat, there was no contract of any kind agreed at or following that meeting of 20 December 2016 and no *binding commitment* entered into.

102. Fourth, I see no basis on which it can be said that there was an estoppel. The Notice of Appeal presents no such case, and the plaintiff's written legal submissions (as delivered in

either this Court or in the High Court) lay no structured foundation for such a claim. Moreover, the plaintiff has failed to establish how there was at the same time '*no new binding commitment'* and a representation by act or conduct such as to give rise to an estoppel. The argument was presented at the hearing but faintly, and correctly so.

103. Fifth, in determining whether the defendant acted unreasonably in serving the notice, the initial point of reference is the undisputed consideration that the plaintiff was, at the time of service of the notice and thereafter, persisting in objections based on an alleged entitlement to vacant possession, to an alleged obligation on the part of the defendant to remove encroachments and to an insistence that communications with Waterford County Council in relation to the house be furnished. It follows from my examination of the contract, that he had no entitlement under the contract of sale to any of these. It follows from the findings of the trial Judge that there was no other binding commitment to do any of these things. In this respect I should note that while it was suggested by counsel for the plaintiff at the hearing that the communications with Waterford County Council had been provided, this was not stated in response to the third rescission notice and was, albeit with some diffidence, disputed by counsel for the defendant. The hearing concluded without the issue being resolved.

104. The plaintiff has identified no authority in which it has been held that what the trial Judge characterised as '*a combined endeavour to progress practical matters towards completion'* but which fell short of any legally binding commitment could operate to render an otherwise lawful rescission notice, unreasonable. It is hard to see how such an argument could be structured given that condition 18 itself makes it clear that the entitlement to serve such a notice is preserved '*notwithstanding any intermediate negotiation or litigation or attempts to remove or comply with'* the objections or requisitions in question. The case law is clear that where a

vendor has undertaken a legally enforceable obligation to the purchaser outside the contract of sale and failed to comply with it, he cannot avoid that duty by invoking General Condition 18. In *Kennedy v. Wrenne* [1981] ILRM 81, for example, the vendor was held to have entered into a collateral contract with the purchaser to obtain the release of a mortgage over the subject property, and was therefore precluded from invoking the condition so as to defeat that obligation: '*the vendor cannot rely on the terms of the main contract to defeat the obligation which he entered into under the collateral prior agreement* (at p.82).

105. Here, however, there was no such obligation. That being so, the defendant was fully entitled to invoke the clause in respect of those objections which had been raised, notwithstanding attempts to engage with the purchaser in respect of them. The plaintiff's objection to the notice on the basis of the meeting of December 20 2016 must, accordingly, fail.

Mischaracterisation of outstanding issues

106. The final objection revolves around the plaintiff's claim that the trial Judge erred in determining that the plaintiff's queries in regard to possession amounted to '*objections and requisitions'* within the meaning of General Condition 18. Issues of title following execution, he says, are really issues of vacant possession and *vice versa*. The outstanding issues maintained by the plaintiff consisted of matters of vacant possession as they consist of encroachments beyond the boundaries in two areas and equine trespass across the lands.

107. Having regard to the conclusion I have reached in relation to the obligation to give vacant possession, it is not clear where this argument takes the plaintiff. The agreement, as it was

construed by Quinn J. and with which I agree, did not provide an obligation to deliver vacant possession. However they are characterised, it is clear that the condition confers an entitlement on the vendor that is operative not merely where objections or requisitions are raised which fall within the provision, but which also arises in respect of '*any other matter relating to or incidental to the sale eg as to description of quantity*' (*Kiely v. Delaney* [2012] IESC 41 at para. 32). The objections in issue here plainly fall within these descriptions.

Conclusion

108. In consequence, the plaintiff's appeal must fail. The attempt to amend the Statement of Claim so as to plead that the Receiver could only act jointly with the second Receiver was correctly rejected. The point is, in any event, without merit. The parties had agreed to the deletion from the contract of an obligation to deliver vacant possession. It follows that the defendant was entitled to serve the third rescission notice if only for the purposes of requiring the plaintiff to withdraw his demand that vacant possession be delivered. The plaintiff has identified no other basis on which it could be held that the trial Judge erred in determining that the defendant acted reasonably in so doing. The issues raised by the defendant as to the plaintiff's ability to complete the sale and whether his conduct was such as to preclude him from obtaining discretionary relief, do not accordingly arise.

109. Both Costello J. and Power J. are in agreement with this judgment and with the Order I propose. That is an Order dismissing the appellant's appeal. Having failed in his appeal, costs will normally follow that event. It is the preliminary view of the Court that it should so order and leave in place the order as to costs made by the High Court Judge unless either party makes application to the Court within 14 days of the date of this judgment. That application should

be supported by written submissions not exceeding 1000 words explaining the basis on which it is contended the Court should, in either respect, order otherwise.