THE COURT OF APPEAL
CIVIL

Neutral Citation Number: [2020] IECA 75

Record No. 2017 539

Baker J.
Ni Raifeartaigh J.
Murray J.

BETWEEN/

NED MURPHY

PLAINTIFF/
RESPONDENT

- AND–

PADDY MCKEOWN AND ADELAIDE MCCARTHY

DEFENDANTS/
APPELLANTS

JUDGMENT of Mr. Justice Murray delivered on the 26th day of March 2020

Background.

1. This is an appeal by the defendants against interlocutory Orders of Gilligan J. of 15 November 2017. The overall effect of the Orders was to restrain the defendants from interfering with the plaintiff in the exercise of his functions as receiver over certain properties owned by them. Cross applications by the defendants for injunctive relief restraining the plaintiff from disposing of those properties was refused.

2. The defendants are described in the Statement of Claim in these proceedings as professional landlords who own and operate a mixed portfolio of buy to let and commercial real estate. Included in that portfolio are four properties in Cork at 24 Patrick's Hill (owned by the second defendant), 4 South Terrace (owned by the defendants), Apartment 74 Block C Parchment Square, Model Farm Road (owned by the first defendant), and 1 Camden Quay (owned by the first defendant) ("the properties"). The plaintiff claims that between March 2009 and May 2013 the defendants entered into loan facilities with Allied Irish Banks plc (as the Statement of Claim describes it) evidenced by two letters of sanction dated 20 May 2013 between that entity and the first and second named defendant respectively, together with two guarantees of the second named defendant dated 2 March 2009 and 1 December 2009. As explained shortly, the defendants contend that a significant issue arises in these proceedings around the proper identity and description of the entity with which they had dealings, which they say (noting the absence of any comma in the description used by the plaintiff) was Allied Irish Banks,

plc. Nonetheless, for ease of reference, I will refer throughout this judgment to "the Bank" as denoting this entity while noting that in relation to some of the transactions and actions relevant to the proceedings the defendants contend that it was not the Bank so described, but another entity which undertook same.

3. The plaintiff claims that by various instruments executed between 9 January 1998 and 8 November 2007 the defendants mortgaged these properties in favour of the Bank or (in the case of the property at 1 Camden Quay), the Bank and AIB Mortgage Bank, the latter of which in turn he pleads - by Deed of Transfer and Assignment dated 17 January 2017 - transferred its interest to the Bank.

4. The plaintiff pleads at para. 9 of his statement of claim that these various securities became enforceable and the power to appoint a receiver arose in respect of each of the four properties in circumstances where the defendants and each of them are substantially indebted to the Bank. He says that by four instruments of appointment dated 13 January 2017 (in the case of the first three properties) and 23 January 2017 (in the case of the fourth), the Bank appointed him as receiver over those properties. The Statement of Claim refers to the entering of judgment on 12 May 2017 against the defendants by the Bank in High Court proceedings bearing the Record Number 2017/42S in the amounts of €1,469,251.43 as against the first named defendant, and €1,467,102.96, against the second. Since the hearing of this appeal, this Court has dismissed the defendants' appeal against that order ([2019] IECA 296).

5. In these proceedings, the plaintiff seeks possession of the properties. Injunctions are sought restraining the defendants from interfering with the functions of the plaintiff as receiver of those properties including orders preventing them from impeding him in changing the locks on the properties or taking steps to secure them, from trespassing on the properties, and requiring the delivery of keys and alarm codes, an account of rents and books and records relating to the properties. Damages are sought for trespass and conversion, and relief consequent upon the alleged unjust enrichment of the defendants is also claimed. The proceedings having been issued on 3 July 2017, and the summons being subsequently amended by order of 17 July 2017, a defence and counterclaim was delivered on 17 August 2017. This preceded delivery of the Statement of Claim, which is dated 11 September 2017.

6. That defence and counterclaim presents six substantive pleas:

   (i) Issue is taken with the plaintiff's use of the name 'Ned Murphy'. This, the Defendants say is an 'alias' of Edmund John Murphy. An alias, they say, cannot be appointed a receiver and cannot sue in a court of law as such. Reference is made in this regard to Article 34 of the Constitution.

   (ii) The defendants complain that the instruments of appointment of the plaintiff and the demands preceding the appointment of the plaintiff were made by an entity which is not a '*legal company*' in Ireland, namely '*Allied Irish Banks plc*'. The defendants, it is said, have a legal relationship with a different entity, '*Allied Irish*

Banks, plc'. The omission of the comma in the description of the appointor is said by the defendants to afford them a basis on which the instruments of appointment and demands made for monies, are and can be '*impugned*'. They specifically plead that the omission of the comma in the name of the appointor '*is not a typo as it is systematically done throughout all of the Instruments*'.

(iii) It is said that the plaintiff was appointed over properties with a certified valuation of €2,734,000 from May 2016, as against what is described as a '*cumulative valuation for the values used by him to justify his appointment of €1,640,000 from 2014*'. It is said that this is the subject of separate court proceedings taken by the defendants, and that the plaintiff is in unlawful control of properties far in excess of any outstanding liabilities of the defendants.

(iv) It is claimed that the plaintiff was allegedly appointed over four properties, three of which had zero balance mortgages since 2005. They say that the Bank had repeatedly refused to return the title deeds to those properties or to release the security on them despite numerous requests from the defendants. They say that the securities created by the documents were and are '*fully spent*' as all covenants regarding monies owed by the defendants were satisfied on 11th July 2005. They plead that those security documents could not thereafter be used in any way to appoint the plaintiff notwithstanding their inclusion in a much later facility from 2013 as alleged security. That which is spent, they say, cannot be used for further security.

(v) Issue is taken with the appointment of the plaintiff over the property at 1 Camden Quay. The Deed of Transfer of Assignment from AIB Mortgage Bank to the Bank of 17 January 2017 is stated to be '*impugned by the Defendants*'. The grounds on which it is so impugned are not pleaded, but are explained in the affidavit of the second named defendant of 17 August 2017 on the basis of the identity of the Bank named in the assignment, and because (it is said) there are no company seals for either entity (although called for), there are no legal printed names for any of the 'Authorised Signatory' personnel on that document, and (it is averred) there is no one 'legally present' to have effected or witnessed such a transfer.

(vi) Complaint is made throughout the defence and counterclaim of various actions of the plaintiff, including his threatening tenants until they paid him rents, trespassing through his agents on the dwellings of residents of the properties, threatening those persons that he would change the locks and failing to deliver rents to accounts of the defendants. The defendants plead that they challenged the appointment of the plaintiff from the outset and complain that he failed to provide any documentation required of him by the defendants. They say that the plaintiff failed to sue the defendants when they made these objections, but instead used the fact that they were distracted defending a case in the commercial court as his opportunity to coerce, compel and threaten the tenants of the properties. They

complain of the failure of their legal team to bring proceedings against the plaintiff although allegedly instructed so to do.

7. On these bases, the defendants seek the dismissal of the plaintiff's claim, together with an order that rent monies collected by the plaintiff be paid to the defendants. They further claim damages, including punitive damages. The defence and counterclaim suggest that some of these reliefs are sought against Moore Stephens (the firm of which the plaintiff is a partner) and Allied Irish Banks, plc, although these parties have not been joined to the proceedings.

The applications for injunctive relief.

8. On 16 July 2017, the plaintiff issued a motion seeking a range of interlocutory orders against the defendants. These included injunctions restraining the defendants from interfering with the functions and office of the plaintiff as receiver of the properties, orders restraining the defendants from impeding or obstructing the plaintiff in changing locks on the properties or otherwise taking steps to secure the properties, orders restraining the defendants from trespassing on the properties or otherwise entering upon or interfering with them, orders preventing the defendants from interfering with the quiet enjoyment of the properties by tenants lawfully residing in them, together with mandatory orders requiring the delivery up of keys, codes and other access mechanisms and books and records in respect of the properties, and the provision of accounts of rents and deposits received by them in respect of the properties since 18 January 2017.

9. On 24 August 2017, the defendants issued a motion seeking interlocutory orders against the plaintiff. These included orders restraining the plaintiff from marketing or attempting to sell the properties pending the determination of the proceedings. Following the issuing of that motion, the plaintiff through his solicitors (by letters dated 28 and 29 August) offered an undertaking not to dispose of his interest in the secured properties on or before 31 October, and to instruct their agent to withdraw advertisements for the sale of the properties.

10. That motion was thereupon adjourned to 31 October to be heard together with the plaintiff's motion seeking interlocutory relief. The hearing of the motions having commenced on that date, both were adjourned for further hearing before the Court (Gilligan J.) to 15 November 2017. By Order of that date, each of the reliefs sought by the plaintiff was granted with slight modification, and the Orders sought by the defendants were refused. That Order forms the subject of this appeal.

11. In the course of his *ex tempore* ruling, Gilligan J. reasoned as follows:

    (i) Noting the judgment of Costello J. in the proceedings brought against the defendants by the Bank, Gilligan J. observed that in 2013, the defendants entered into re-financing arrangement with the Bank, and that they accepted that funds were drawn down, that they '*got the money*', that it was accepted that the facility was a temporary facility, that it had expired at the end of December 2013, and that the monies had not been repaid.

(ii) That insofar as the defendants had raised an issue in the course of the hearing of the interlocutory application (as they do in their defence) as to the identity of the Receiver, this point was without merit. Gilligan J. said (at page 74 of the transcript):

> *"its Ned Murphy whose appointed, its Ned Murphy who appears in the proceedings, and its Ned Murphy who explains away in an affidavit that he's commonly known throughout Cork as Ned Murphy."*

(iii) He addressed a second point, which as I have noted, also features in the defence regarding the name of the Bank. He recorded the objection of the defendants as follows:

> *"[t]he case is made out principally by the second named respondent that AIB, Plc is a company that has a number 24173 and is registered in Ireland, and that a company, AIB Plc without any comma, has a registration number FC00724 registered in the United Kingdom."*

Rejecting this argument, Gilligan J. said:

> *"I have to have regard to the affidavit of Mr. Cooper on behalf of the bank who explains away the situation, who sets out the entire background and the reality of the situation is it is AIB plc who are the plaintiffs in the proceedings, they're the bank that are registered in Ireland, they're the bank that carry the registration number 24173, they're the people who granted the money to the respondents, they're the bank that maintain these proceedings insofar as at their end its Mr. Murphy who is the receiver that's been appointed."'*

(iv) Insofar as the defendants had complained that the properties were being sold at an undervalue, the Court (a) observed that if this occurred it was a matter in respect of which a claim for damages for that loss could be brought and (b) that the defendants – although given the opportunity to obtain a valuation – had failed to do this.

(v) Gilligan J. determined that there was '*abundant evidence*' of interference with the receivership, referring in this regard to the evidence in the affidavits of the defendants' daughter interfering with tenants and trying to divert rents.

(vi) Referring to the test applicable to the grant of an injunction – that an issue to be tried had been raised, that damages will not be an adequate remedy and that the balance of convenience favours the grant of relief – the Court said that it was not satisfied that an issue had been raised that in some sense rendered the appointment of the plaintiff unlawful.

(vii) Even if such an issue had been raised, the Court noted, these were purely commercial transactions, there was no family home involved, and very substantial sums of money were due and owing in respect of properties which had been given

as security for the loans in question. If it transpired at trial that there were monies due and owing to the defendants, the Court could award damages, and the Bank was a mark for any damages that might be obtained. The balance of convenience, he said, favoured the plaintiff. Thus, Gilligan J. said:

> *"I'm satisfied applying the Campus Oil principles, Mr. Murphy is entitled to the reliefs which he seeks, which effectively will prevent the respondents … from interfering in any way with the receivership."*

(viii) The Court addressed the defendants' application for injunctive relief as follows:

> *"Insofar as the respondents seek the relief of preventing the sale of the properties, I'm not satisfied for the reasons which I have outlined that they raise an issue to be tried. Likewise, it may well be because it's a commercial transaction, that if they are entitled to damages or the receiver is in legal default and a court comes to the conclusion that the respondents are entitled to damages, they'll be able … to maybe raise that claim in proceedings … I take the view that damages would be an adequate remedy in the event that the respondents suffer any loss and the balance of convenience appears to me to clearly favour the applicant."*

12. The defendants do not, in this appeal, dispute the legal test applied by the High Court. Their objection is instead to the manner in which the test was applied by the High Court Judge. While more recent case law emphasises that it is undesirable that the three-fold test governing the grant or refusal of relief by way of interlocutory injunction as formulated in *Campus Oil v. Minister for Industry and Commerce* [1983] IR 82 be applied in an overly mechanical way (*Merck Sharp & Dohme Corporation v Clonmel Healthcare Limited* [2019] IESC 65), the essential approach adopted by Gilligan J. remains the correct one. As this Court said in *Betty Martin Financial Services v. EBS* [2019] IECA 327 (at para. 34) allowing that establishing a serious issue to be tried is a necessary (but not sufficient) condition to the grant of an injunction at least where that issue, if established at trial, would provide a basis for a permanent injunction, the decision to grant or refuse thereafter becomes a matter of overall assessment of where the balance of justice lies, though with particular (and, in many cases, decisive) weight being given to the adequacy of damages within that overall assessment. In this case, that assessment falls to be undertaken in a context in which some of the relief sought by the plaintiff is essentially prohibitory in nature (see *Kavanagh v. Lynch* [2011] IEHC 348) and in which even if the receiver is enabled to proceed to dispose of the secured properties consequent upon the grant of that relief, the defendants will still be in a position to maintain any claim for damages they might enjoy.

13. The defendants advance twelve grounds of appeal. Some of these overlap. They can be categorised, and are most conveniently addressed, as follows.

Grounds one, two, six and eight: the name of the Bank.

14. Grounds one, two, six and eight relate directly or indirectly to the proper description of the Bank and the defendants' contention that the trial Judge erred in holding that two companies, Allied Irish Banks PLC and Allied Irish Banks, plc, were one and the same company and that he was mistaken in the related conclusion that what the defendants describe as a 'third entity' ALLIED IRISH BANKS P.L.C, actually existed and could appoint the Plaintiff. As it is explained by the defendants in Ms. McCarthy's affidavit evidence, this issue arises in the following way.

15. The instruments by which the plaintiff was purportedly appointed describe the appointor as '*Allied Irish Banks plc*'. The defendants exhibit and point to a form filed in Companies House in the United Kingdom where a certificate of registration of an overseas company is presented for a company of this precise name, where it is given the number *FC007244*. However, the mortgages pursuant to which this appointment was made record the name of the Bank as '*Allied Irish Banks, plc*'. This is the entity with which the defendants say they had dealings. This name is distinguished from that of the appointing company by a comma after the word 'Banks'. The defendants point to the registration at the Companies Registration Office in this jurisdiction of a company of this name, with number 24173. Against that context, they make the simple point that the named company which purported to effect the appointment of the plaintiff is not the company with which they had dealings and is not the entity named on the mortgage documentation. Accordingly, they say, the plaintiff's appointment as receiver, is ineffective.

16. The position of the plaintiff in respect of this issue is explained in an affidavit of Tony Cooper, an officer of the Bank. He explains that what he describes as '*the Irish company*' was in 1966 registered in the Companies Registration Office in this jurisdiction with number 24173, having previously been a private company limited by shares. It re-registered as a public limited company on 2 January 1985. Its name as so registered is '*Allied Irish Banks, p.l.c.*'. He further explains that on 10 September 1993, the Irish company was registered in the Companies House, Cardiff, as an overseas company (establishment of a branch) using the number FC007244. He says that the Irish company and the UK Branch do not purport to distinguish themselves from each other by reference to the presence or absence of a comma between 'Banks' and 'plc'.

17. He refers to the listing of the Bank on the relevant Central Bank registers as being '*Allied Irish Banks plc*' (without a comma). Having referred to those registers and picking up a reference to the proceedings against the defendants in which Costello J. entered judgment, Mr. Cooper makes the following statement in his affidavit (para. 12):

> *"The Summary Proceedings were commenced by summary summons on 12 January 2017 and, accordingly, the listing on the Credit Institutions Register of the 24173 company at that time was "Allied Irish Banks plc", the title of the Plaintiff in these proceedings. The Plaintiff was also appointed by Deeds of Appointment in January 2017. If the presence or omission of a comma were significant (which is not accepted), then the only correct form in which the Summary Proceedings could have issued (and the Deeds of Appointment executed) in January 2017 is as they*

have been, namely with the Irish Company described as "Allied Irish Banks plc". I say and am so advised that the printouts from the Central Bank's Financial Service Providor Register and Credit Institutions Register are suggestive that the presence or omission of a comma does not affect the description or identification of a company."

18. In the course of his oral submissions to the Court counsel for the plaintiff, Mr. James Doherty SC, identified and opened authority that "*[w]here a person or corporation is once properly described, a subsequent error in referring to the name is immaterial, unless it causes uncertainty by producing a doubt as to the identity of the person. Parol evidence may be adduced to correct an erroneous description of the parties*" Emmet, "*On Title*" 14th Ed. (London, 1955) Volume 1 at p. 228. Thus, in *Re Howgate and Osborn's Contract* [1902] 1 Ch. 451, the misdescription of a party to a deed of mortgage was held immaterial, in circumstances where it was established that the misdescription was due to inadvertence. Once the evidence established that there had been a misdescription, Kekewich J. held, parol evidence could be adduced to prove that the person named in the Deed (William Gray) was in fact someone else (Thomas Gray).

19. Today, the same result in achieved through what is described in the cases as '*correction of mistakes by construction*'. This arises where a reasonable and informed person might conclude that the words used are an obvious mistake and can also conclude what words ought to have been used. In these circumstances, through application of the familiar principles of contractual construction, looking in particular at the applicable factual matrix, the Court can interpret the contract so as to – effectively – ignore the error and give effect to the actual intentions of the relevant parties. Thus, in Moorview Developments Limited v. First Active plc [2010] IEHC 275, to which Mr. Doherty SC also drew the Court's attention, a company had been described in a guarantee as being "*Moorview Properties Limited*", whereas the relevant company was "*Moorview Developments Limited*". Clarke J. explained the correct approach to that error as follows (paras. 3.5 and 3.6) :

> *"This aspect of the case concerns what has, in some of the case law, (see for example **East v. Pantiles (Plant Hire) Ltd** (1981) 263 E.G. 61) been described as "correction of mistakes by construction". As is clear from **East v. Pantiles (Plant Hire) Limited** and from the speech of Lord Hoffman in **ICS v. West Bromwich B.S.** [1998] 1 WLR 896, two conditions must be satisfied in order for such a correction to occur. First, there must be a clear mistake. Second, it must be clear what the correction ought to be."*
>
> *It is also clear from the speech of Lord Hoffman in **ICS Limited v. West Bromwich B.S.** [1998] 1 WLR 896 that a correction of the type with which I am concerned is not a separate branch of the law, but rather an application of the general principle that contractual documents should be construed according to their text but in their context. That context may make it clear that the words used in the text are a mistake. Thus, a reasonable and informed person may conclude that the*

words used are an obvious mistake and may also be able to conclude what words ought to have been used. In those circumstances, as a matter of construction, the court will, as it were, construe the contract as if it had been corrected for the obvious mistake. The reason for so construing the contract in that way is that the proper principles for the construction of contracts lead to that construction in any event. I am satisfied that those cases, most recently restated by the House of Lords in ***Chartbrook Limited v. Persimmon Homes Limited*** *[2009] UK HL 38, 2009 1 AC 1101, represent the law in this jurisdiction."*

20. Similar principles were applied in *Bank of Ireland v. Fergus* [2012] IEHC 131, [2014] 4 IR 428. There, it was asserted by the defendant that the name of a company described in a guarantee which the plaintiff sought to enforce, was wrong, as it was missing a parenthesis around one of the words in its name. Looking to the context in which the guarantee was given by the defendant to the bank, Finlay Geoghegan J. determined that this was defined by a series of facilities advanced by the bank to the company in issue. The facility letters were produced in evidence. The undisputed evidence was that the facilities were granted to the company and there was no evidence to suggest the existence of any other company other than the company, Fergus Haynes (Developments) Ltd. However, several of the facility letters also left out the brackets in the name. Accordingly, and applying the decision in Mooreview, the Court was satisfied that the parties to the guarantee of the 1 June, 2006, intended that the principal referred to therein was the company and construed the guarantee accordingly.

21. While the legal authorities relied upon by the plaintiff were thus exclusively directed to an erroneous misdescription of a party, I do not exclude the possibility that the Court could achieve the same outcome where a misdescription was deliberate, depending of course on the reasons for that deliberate misdescription. However, a misdescription cannot be both deliberate and accidental, and it is hard to my mind to see how the plaintiff could present a case based on these as alternatives (as was at one point suggested in oral argument). Here, however, the plaintiff eventually committed to the proposition that the misdescription of the Bank was in error, the authorities relied upon it in that connection are directed to how the Court should treat of such an error, and that is the basis on which the issues in this application fall to be addressed.

22. That being so, two features of this jurisdiction so invoked are relevant to this case. Clearly, it must be possible for a reasonable and informed bystander to conclude that the misdescription is an obvious mistake, and of course therefore it must actually be a mistake. If these are established, it must then be proved that, viewing the factual context as a whole, the parties to the instruments understood which entity was in fact being referred to.

23. At the hearing of this appeal, the Court drew attention to para. 12 of Mr. Cooper's affidavit (quoted above), and noted that the statement there that the only form in which the summary summons proceedings could have issued was with the Bank described as

'*Allied Irish Banks plc'*, that is without the comma, seemed to suggest that the name of the Bank had been deliberately misstated at least in the summary proceedings.

24. In submissions delivered following the hearing, the Bank says that a deliberate decision was not taken to omit the comma from the Bank's name. This is put as follows:

> *"The Bank's instructions are that, in the use of the terms "Allied Irish Banks plc" and "Allied Irish Banks, plc" in the Instruments of Appointment of Receiver executed in January 2017, a deliberate decision was not taken to omit a comma between "Allied Irish Banks" and "plc" (or "p.l.c."). The Instruments of Appointment were prepared by solicitors for the Bank, naming the Bank as it was without adverting to the presence or absence of a comma in the Bank's title."*

25. While it is accepted by the Bank in that submission that Mr. Cooper's affidavit might suggest such a deliberate decision, it contends that in fact he was merely setting out an argument as to why the naming of the Bank in the Instruments of Appointment without the comma was not a matter of significance. This is not an untenable interpretation of the averments. In particular, at para. 10 Mr. Cooper makes clear that the Irish company and the UK branch do not purport to distinguish themselves from each other by reference to the presence or absence of a comma in their names. He further makes clear at para. 13 that the underlying proceedings were at all times brought by the Irish company. At para. 20 he refers to a possible '*typographical error*' in the description of the Bank (although in respect of which description he reserves his position). Certainly, the suggestion that in the production of documents of the kind in issue the omission of a comma might easily happen is not difficult to accept. If that is what transpires to have been the case, the defendants' position will, as a matter of law, be extremely difficult to sustain. They would do well to bear that in mind.

26. Ultimately, the question of whether this omission was deliberate (as the defendants in their defence and counterclaim plead) or inadvertent (as the Bank contends) is an issue to be resolved at the trial of the action rather than in the course of this interlocutory application. What is clear for the purposes of the interlocutory relief in issue in this appeal, is that the plaintiff's case that the comma was omitted without adverting to its presence or absence is arguable on the facts and, if established, the legal argument that the Court should construe the instrument so as to correct the error, is overwhelming.

27. Insofar as a point is made by the defendants in ground six that Mr. Cooper's affidavit was tendered on behalf of Allied Irish Banks plc (without the comma) not Allied Irish Banks, plc, this falls to be determined by reference to the same principle. If the trial court determines that the comma was not included in the description of the Bank in error, the objection falls away. The curiosity that Mr. Cooper (in an affidavit which the Bank now says was intended to confirm that the omission of the comma was in error) records Mr. Cooper as being an employee of the Allied Irish Banks plc (without the comma) and that this description is repeated throughout the affidavit is a matter that can be agitated by the defendants at the trial of the case. It may well be explicable on the precise basis

suggested in the plaintiff's supplemental submissions: the presence or absence of a comma in the recitation of that name was not generally adverted to.

28. I have reached these conclusions without finding it necessary to resolve a potentially significant difficulty facing the defendants in agitating this issue at all. It is not evident that the issue as to the correct name of the Bank was raised before Costello J. when hearing the application brought against the defendants for summary judgment. It appears that the point was made in an affidavit to which attention was drawn by counsel for the Bank, but that counsel for the defendants did not place reliance upon the argument in either written or oral submissions. It did not feature in the judgment of the Court. More importantly, no reference to the issue was made in the notice of appeal from that decision. An attempt was made to raise the issue before this Court, but this was refused by Order of Irvine J. of 20 October 2017. In its judgment of 28 November 2019 ([2019] IECA 296 at paras. 21 and 22) this Court refused to determine this issue. It is certainly arguable that the defendants are now estopped from litigating the question. However, the Court heard no argument around this question, and a final determination of the issue will depend on the extent to which such an estoppel can operate vis a vis this plaintiff (as opposed to the Bank) in respect of different proceedings and regarding what it might be said is a distinct issue (the validity of the appointment of the plaintiff under the relevant deeds).

Grounds three, four and ten: conduct of the proceedings.

29. Grounds three, four, and ten, raise complaints as to the conduct by the trial Judge of both the substantive hearing of the application for an injunction, and of some earlier procedural hearings. These complaints, in summary, are as follows:

    (i) The trial Judge did not accede to the request of the defendants that they be given a motions booklet in Court on 31 October containing the same tabs and contents listing as that being used by counsel for the plaintiff;

    (ii) The Judge erred in directing that the plaintiff be given until the evening of the 14 November to deliver a replying affidavit, and the defendants did not have sufficient time to consider those affidavits which were thus delivered (one on 14 November at 4.30 pm and another at 11.10 am on the morning of the hearing);

    (iii) The Judge failed to allow the defendants to read their affidavit on to the Court record, and allowed the plaintiff's counsel to read parts of their affidavit and his own;

    (iv) The Judge permitted the plaintiff to obtain valuations following the commencement of the hearing of the application;

    (v) The Judge did not examine the deeds of appointment of the plaintiff as receiver.

30. Arguments of this kind fall to be considered in the light of the conduct of the hearing as a whole and having specific regard to the necessarily broad discretion enjoyed by the High Court Judge in connection with the conduct and management of proceedings before him

or her. It is a matter for a trial Judge in hearing an application of this kind to determine the appropriate procedure for the opening of affidavits and addressing of the evidence and legal argument advanced in the course of the hearing. Trial Judges have to achieve a balance between ensuring that proceedings are conducted efficiently (thereby enabling other parties to have access to the necessarily limited resources of the Courts) and at the same time rendering the processes fair to all involved (see *Tracey v. Burton* [2016] IESC 16 at para. 45). It is a matter for that judge, not an appellate court, to determine how in each individual case that balance is appropriately struck. Provided the process viewed in its entirety is fair, and in particular that each party is afforded a reasonable opportunity of presenting its case, an appeal court has no role in intervening to direct how in retrospect the evidence might have been presented or the hearing might have been conducted. Viewing the matter thus and considering in particular the transcript of the hearing of 15 November in its entirety, I would reject outright any claim that the proceedings were conducted in a manner that was other than scrupulously fair.

31. While the defendants did raise an issue – once – at that hearing that they were unable to locate an affidavit being referred to by counsel, they were advised by the Court that it was their own affidavit, and they appear to have accepted that. While they expressed concern that they had received an affidavit sworn by the plaintiff addressing valuations of the property only a few minutes before the hearing, at no point did they advise the Court that they were unable to deal with the affidavit nor did they seek any adjournment consequent upon its being provided to them.

32. The defendants were given a full opportunity to advance their case in relation to the identity of the party which had appointed the plaintiff. Indeed, when counsel for the plaintiff referred to this as 'the comma issue' (a description which is maintained in the legal submissions delivered in this appeal), the Court intervened to make clear that it regarded the argument they raised as important:

> *"Just so that nobody is under any misunderstanding. I didn't see it as a comma issue. I saw it has a much more serious issue that was raised."*

33. Counsel was similarly challenged when opening the affidavit of Mr. Cooper, the Court observing (as I have above) that the affidavit was sworn on behalf of Allied Irish Banks plc (without the comma).

34. Ms. McCarthy was invited at an early stage of the hearing on 15 November to open her affidavit evidence by the Court, and she did so over three pages of the transcript, before the judge (as is common) indicated that he had completed his reading of it. She was then invited to open the replying affidavit. Counsel for the plaintiff having indicated that he would open the replying affidavit, the Court said that the second named defendant was perfectly entitled to read it out if she wished. She did not insist on doing so. As counsel opened those affidavits, the defendants were neither constrained nor evidently inhibited, when (as they did on a number of occasions) they interrupted to correct what they perceived as errors in counsel's presentation.

35. At the conclusion of the opening of the affidavits, the defendants were invited to make submissions as to the import of the material thus opened to the Court. They acceded to that invitation. The second named defendant addressed the Court over nine pages of the transcript, responding to various queries raised by Gilligan J. as she did so. She then indicated that she wished to read from the affidavit evidence as to the appointments, *"and how they were … manipulated."* She opened to that end her supplemental affidavit of 7 November, starting at that section of the affidavit entitled '*Instruments of Appointment of Receiver*'. That took the proceedings to lunchtime. The second named defendant resumed her opening of that affidavit after lunch. When she completed the affidavit, she was asked if she wanted to say anything else.

36. She indicated in response that she did. She proceeded to refer to (and address various queries from the Court regarding) the loan to value ratios on the defendants' loans, the rent taken to date by the receiver, the failure of anyone from Allied Irish Banks, plc (with the comma) to make a statement, and the issue the defendants had with the identity of the appointor. At the end of this, the second named defendant was asked by the Court "*Anything else you want to say to me*" to which the response of the second named defendant was "*No*".

37. Counsel for the plaintiff thereupon made his submissions. Once again, the defendants were not prevented from interjecting when they believed that counsel erred in his submissions (as they did on a number of occasions). The defendants were then asked if they wished to say anything in reply, which the second named defendant indicated she did. She thereupon further addressed the court inter alia in respect of alleged overcharging, issues the defendants had with a tracker mortgage, and the reason the bank was wrong in implying that the defendants had not paid the mortgages after 2013. The second named defendant then sought permission (and was allowed by the court) to open an extremely detailed seven-page letter from her solicitor to the Bank of 29 November 2016. This letter – which outlined at some length the history of the dealings between the defendants and the Bank and explained a wide range of the defendants' complaints in that regard - was read in full.

38. As to the specific complaints made by the defendants in their notice of appeal, and turning to the first of these as outlined above, it is clear that the only material referred to in the course of the hearing on 15 November were the papers comprising the affidavits sworn by the defendants themselves and/or documentation exhibited to those affidavits and the affidavits sworn by the plaintiff and the documentation similarly exhibited there. It is also clear from the transcript that there could have been no doubt as to what documentation was referred to at any point in time, and if there was any such doubt the defendants were entirely free to interject (as they did on a number of occasions). Insofar as a particular point is made in regard to the hearing of 31 October (when the interlocutory applications were opened and the hearing had commenced), this Court has not been provided with a transcript of that hearing. What is clear, however, is that if any irregularity occurred, or if the defendants were in any sense unclear as to what had been opened to the Court in the course of that hearing they had ample opportunity to address

that with the plaintiff prior to, or with the Court at, the hearing on 15 November. The transcript of that hearing as a whole makes it absolutely clear that the defendants were extended by the judge every opportunity to make any point, any submission, and to open any document they wished in the course of the hearing.

39. Similarly, insofar as complaint is made of the direction of the trial judge that affidavits be exchanged by the defendants on 7 November and by the plaintiff on 14 November, the time to raise an objection to that direction (if there was one) was when it was made. There is no evidence before this Court that any such objection was in fact made. And if the defendants on 15 November felt prejudiced by the time scales as they unfolded, or indeed if they wished a further adjournment to deal with any such matter, they were free to make those objections at that time. They did not do so.

40. The transcript discloses the complaint that the Judge failed to allow the defendants to read their affidavit on to the Court record and allowed the plaintiff's counsel to read parts of their affidavit and his own, to be utterly groundless. On 15 November, the defendants were not prevented from reading anything into the Court record. If they felt that there was material which was not opened at the earlier hearing and to which they wished to refer, they were free to seek to do so. The Court indicated at one point that it had completed reading an affidavit then being read aloud by the second named defendant. This occurs frequently, and is entirely acceptable. The second named defendant did not press to continue to open the affidavit, and if she had done so the Court would have been entirely within its rights to decline to permit her to do so. For the same reason, the objection that counsel for the plaintiff did not read all of his affidavits falls away. If the defendants felt there was some part of the affidavit evidence filed by the plaintiff to which they wished to draw attention, they were entirely free to open or refer to it.

41. Nor can the Judge be faulted for permitting the plaintiff to obtain further valuations. He was entirely within his rights in ensuring that the Court had before it all information necessary to determine the proceedings. A similar facility was extended to the defendants. Finally, I cannot see how the defendants are in a position to complain about the failure to read 'the appointments'. As I have noted, the second named defendant specifically opened that part of her supplemental affidavit dealing with the instruments of appointment.

Ground five: the valuations.

42. These same principles apply to ground five. This relates to a direction issued by the trial Judge on 31 October requiring the defendants to submit valuations on the properties. It appears from the transcript of the hearing of 15 November, that this issue arose in the following way.

43. At para. 7 of her affidavit of 24 August, the second named defendant averred that the plaintiff was attempting to sell the properties at an undervalue. She said that the plaintiff was seeking to dispose of the properties in this way in order to "*support*" a valuation report from 2014 from Lisney Auctioneers. The second named defendant exhibited a valuation from May 2016 which she said showed a significant increase in the valuation of

the properties. At para. 8 of that affidavit the second named defendant detailed the values at which each property was being offered for sale, and the values according to the 2014 and 2016 valuations. It appears that the Court wished the plaintiff to deal with this issue on affidavit, hence the opportunity given to him to that end, with which I have just dealt. The defendants were also given an opportunity to put in further valuation evidence. At the hearing on 15 November, the second named defendant said that the defendants did not submit an affidavit in respect of the valuations because their valuations were a year old and they could not get anyone to actually value them from outside. She said that a reputable auctioneer would just not do that. The following exchange then occurred:

> *"JUDGE: All right, but I did give you the opportunity if you wanted to put in a supplemental affidavit because your prices are considerably lower. But, as Mr. Fanning points out to the Court there is a judgment of this court from Judge Costello against you. I know it's a subject matter of a stay by the Court of Appeal but that judgment is for 1.4 million and if the properties are sold it would appear they raise a figure in the region of 1.69 million. So, I did give you the opportunity if you wanted to put in any - -*
>
> *MS McCARTHY: Well, we have our valuations."*

44. Gilligan J. addressed this issue in the course of his ruling, as follows :

> *"But specifically on the last occasion when the matter was before the Court approximately two weeks ago, because of the point that was raised by the respondents, this Court allowed them to prepare a further valuation that was up to date in respect of the valuations which were proposed by the receiver. I remember distinctly one or other of the respondents raising an issue that they mightn't be able to gain access to the property, but then I was conscious that, in fact, Lisney's had already been in the property and another valuer, as I understand it, had been in the property, or if they wished, they could have contacted the bank's solicitor and said we want access to prepare an up to date valuation and that opportunity was not taken up, and that opportunity was of significance to the Court to at least understand that if the plaintiffs were making out a case that the properties were going to be sold at a gross undervalue that they'd have the opportunity to produce an up to date report and no such report has been produced in a court and also no realistic explanation has been given or offered to the Court as to why a valuer couldn't have been obtained and even if there was a difficulty with access, as I say, the solicitors to the receiver could have been asked for permission for the valuer to enter the property to carry out a valuation. So, it doesn't appear to me necessarily that the properties are being offered for sale at an undervaluation, that may be a matter for another day."*

45. The specific complaint now articulated in the defendants notice of appeal is the claim that:

"…we received no support from the Judge to enable proper independent professional valuations, since the Plaintiff was in control of the properties. When this was highlighted to the Judge he said we could do 'drive by' valuations. No professional property valuer could, would or should be expected to provide a valuation in a 'drive by' manner. We had already supplied professional valuations to the Court and the Plaintiff had no valuations of his own prior to the 15th November 2017."

46. No attempt was made by the defendants on 15 November to obtain any further time to submit valuations, or to compel the plaintiff to allow a valuer to access the properties or otherwise. The matter was simply left as I have recorded it above. Even if the defendants could not obtain 'drive by valuations' (and they proffered no evidence to that effect), they cannot both allow the proceedings to continue, not object to the fact that they have been deprived of the opportunity to put evidence before the Court and then appeal because such evidence was not obtained. Finally, in this regard, while it was at one point suggested by the second named defendant in the course of the hearing on 15 November that the defendants did not obtain valuations because of a lack of resources, this claim – which were it to be made would require the defendants to explain precisely what resources were available to them – was not substantiated by any evidence.

Ground seven: alleged attempt to sell properties.

47. Ground seven posits that the trial Judge erred "*regarding irrefutable evidence … that the Plaintiff had attempted to sell the properties illegally and contrary to the Judge's own directions of 26th day of July when the matter first came before him*". The sequence of events in this regard (as recorded in the second named defendant's affidavit of 24 August 2017) is as follows. She says that on 26 July, the plaintiff applied to the High Court for interlocutory reliefs. That became, as she describes it, a 'direction hearing'. She says that at that hearing directions were given for delivery of pleadings and complained that the plaintiff had used this time to prepare the properties for sale. On 24 August, the defendants issued a motion seeking to restrain any such sale. Documentation was exhibited in the affidavit grounding that application purporting to demonstrate this attempted sale, and it was claimed that the properties were being offered for sale at an undervalue. That application was met with an undertaking by the plaintiff not to dispose of an interest in the properties. However, this Court has been provided with no evidence that there was a breach of any order by the defendants who are not alleged to have taken any steps in disregard of the undertakings thus given. Even if there was such a breach, no sale actually took place. It is difficult to see how this claim – even if it had been substantiated – affords a basis for reversing the substantive decision of the trial Judge.

Ground nine: challenge to appointment of the receiver.

48. The defendants also complain (ground nine) that (a) the plaintiff asserted that no challenge to the appointment of the receiver had taken place and (b) that the trial Judge showed bias by not challenging counsel in respect of this. The reference in this regard is, it appears, to para. 57 of the affidavit of Trevor Leacy sworn on 7 July 2017, in which it is indeed averred that the plaintiff had (as was then the case) been appointed as receiver over the secured properties over five months ago and that "*no challenge has been made*

to his appointment". The defendants appear to believe that because they voiced such an objection, the plaintiff in some sense acted *mala fides* in proceeding as receiver. So stated, this proposition is based on an incorrect premise. Just as the defendants are fully entitled to raise an objection to the plaintiff's appointment, the plaintiff is fully entitled to take his own view as to the merits of that objection and, if he believes it well founded, to proceed. At that point, it is a matter for the defendants to litigate their grievance. This, as they acknowledge, they did not do until the delivery of the defence and counterclaim in this case.

49. In a context where the defendants had ample time to bring their grievance before the Court and in which they failed to do so, I do not read the statement in Mr. Leacy's affidavit as being necessarily untrue and I can see no reason why the Court would wish to "*challenge counsel*" in respect of it. While the defendants had in correspondence disputed the entitlement of the plaintiff to act as receiver, they had not "*challenged*" that appointment in the sense of bringing a complaint in respect of it before the Court. The critical question which this ground of appeal ignores is that what is relevant is not when or how the defendants challenged the appointment of the receiver, but whether they had any basis for so doing.

Ground eleven: suing under an alias.

50. Ground eleven arises from the defendants' argument that the plaintiff in these proceedings sues under an alias, and that this vitiates both his appointment, and the proceedings. They contend that the trial Judge by permitting the plaintiff to proceed other than in accordance with 'his true legal identity' ignored the ruling in *Brigid M. Roe v. the Blood Transfusion Service Board and others* [1996] 3 IR 67.

51. This argument is utterly without merit. In Roe, what was condemned by the Court was the use by the plaintiff of a fictitious name for the purposes of keeping her identity out of the public domain (see [1996] 3 IR at 71). The Court held that this was impermissible, because it felt that the disclosure of the true identities of parties to civil litigation was essential if justice is to be administered in public.

52. None of this arises here. The defendants aver as follows:

> *"[T]he Plaintiff is legally 'EDMOND JOHN MURPHY, with a Date of Birth of 31st October 1963 and with an address of Fernwalk, Greenfields, Ballincolig, Co. Cork. This data is publicly available from CRO records and I refer the Court to a summary of this man's personal details and to a list of his Directorships and past Directorships and appointments as Secretary to companies enclosed herein by way of Exhibit marked 'B', whereupon I have sworn by name."*

53. The averment is self-defeating. The defendants know precisely who the plaintiff is and have had no difficulty ascertaining a considerable body of information about him. Mr. Murphy responded in his supplemental affidavit making this point and observing that 'Ned' is a common abbreviation for the name Edmund, and that it is the name by which he is known in his personal and professional life. None of this is disputed by the plaintiffs.

It follows that the actual basis for the *Roe* decision is inapplicable: the evidence points only to the conclusion that the name in which the plaintiff has proceeded is a name that identifies him, not one that conceals his identity. The fact that he is registered as an insolvency practitioner under his full name does not change this. That being so, the plaintiff is fully entitled to proceed in this action in the name by which he is commonly known. In the event that the trial Court decides it is necessary to do so, it can amend the title of the proceedings. However, it is not evident to me that this is or can be in any way necessary.

Ground twelve: alleged asset stripping by use of unlawful contracts and fake instruments.

54. In ground twelve of their appeal, the defendants say that the trial Judge erred in disregarding evidence that the appointment of the plaintiff was *"part of an attempt by Allied Irish Banks Financial Solutions Group and their agents to asset strip the Defendants by the use of unlawful contracts and false instruments which were presented to the Court."* There appear to be three aspects to this claim. One relates to the fact that the defendants have no relationship with Allied Irish Banks plc (without the comma). I have addressed this earlier. The second is an objection that the receiver was appointed prior to the summary judgment which was (at the time of delivery of the notice of appeal) itself under appeal. I have noted earlier that this Court has since dismissed that appeal. In any event, this objection is similarly misconceived. The Bank had an entitlement to appoint a receiver under each of the relevant securities *inter alia* where the mortgagor failed to discharge upon demand any money payable. The Bank contends that such monies were payable, and no substantive basis has been suggested for the contention that it was not. Thus, the Bank was fully entitled to appoint a receiver and the fact of the then pending summary proceedings did not change that fact. Given the manner in which those proceedings have now been determined, the Bank's claim to that effect has since been conclusively established. However, the Bank was entitled to appoint the receiver without issuing such proceedings, just as it was entitled to do so while pursuing such proceedings.

55. Finally, within this ground it is said that the trial Judge "*showed bias to the Plaintiff and his counsel*". As clear from my conclusions in respect of grounds three, four, and ten, this claim is unsustainable.

The interlocutory orders sought by each party.

56. I have outlined earlier the test to be applied in determining whether to grant the reliefs the subject of this appeal. It is not in controversy. In particular, if all of the relief sought by the plaintiff is granted, and all that sought by the defendants refused, the plaintiff will be enabled to dispose of the property. He must therefore establish that there is a *strong argument* that he will succeed in his claim (*Charlton v. Scriven* [2019] IESC 28 at para. 4.4). However, in approaching this question the Court must have regard to the reality of the defendants' case. As the Chief Justice explained in *Charlton v. Scriven* (at para. 6.13):

> *"Where no real case of any substance is made by a defendant which puts forward a credible basis for suggesting either that receivers were not validly appointed or that receivers, although validly appointed, are seeking to exercise powers which they do*

not have, then it will not matter whether any interlocutory injunctive relief which the relevant receivers seek can properly be characterised as respectively mandatory or prohibitory, for there will be a more than adequate basis for suggesting that a strong case has been made out. The potential for a distinction between relief which is essentially mandatory, on the one hand, and that which is prohibitory, on the other, arises where there is at least some significant defence put forward which the Court assesses might arguably provide a basis for suggesting that the receivers might fail at trial."

57. Having regard to these factors, it is clear to me that the balance was correctly struck by Gilligan J., and that this appeal should be dismissed. In that regard, the following are relevant:

(a) Viewing the defendants' case in the most favourable light possible, the defendants have disclosed in their argument in this Court one and only one remotely arguable ground of claim against the plaintiff (that relating to the validity of his appointment having regard to the identity of the appointing bank). Their argument around that issue will likely fail if it is established as a matter of fact that the misdescription of the Bank in the appointing deed was due to an error, as the Bank contends. It is also vulnerable to the contention that the defendants are estopped from advancing it.

(b) Judgment for very significant sums has now been obtained by the Bank against the defendants and upheld by this Court on appeal.

(c) If the defendants should succeed at trial in the only arguable point they have at their disposal, and if any award of damages made in their favour exceeds the amount of the judgement obtained against them (each of which contentions appears optimistic) they will enjoy a cause of action in damages against the plaintiff and the Bank the latter of which – it has not been disputed – would be a mark for any such award.

(d) The defendants have not shown that they are in a position to compensate the plaintiff for any loss arising should injunctive relief be refused.

(e) The proceedings involve properties owned by professional landlords operated by them in furtherance of a purely commercial activity. The properties do not comprise assets such as a family home, or family farm in respect of which the Court may be reluctant to enable sale at an interlocutory stage (see *Charlton v. Scriven* [2019] IESC 28 at para. 6.12);

58. All of this being so, the defendants have failed to establish any basis on which the I could conclude that the High Court fell into error in granting the relief sought by the plaintiff, and refusing that claimed by the defendants. It follows that this appeal should be dismissed, and the order of Gilligan J. affirmed.