THE COURT OF APPEAL
CIVIL

UNAPPROVED
Neutral Citation: [2022] IECA 258
Appeal Number: 2021/50

Murray J.
Whelan J.
Noonan J.

BETWEEN/

KEN FENNELL

RESPONDENT

- AND –

BEN GILROY

APPELLANT

- AND –

ANDERSON PRADO, SYLWIA WALISZEWSKA TRADING AS SUN BODY SOLARIUM, PAUL O'CALLAGHAN, MARIUSZ JURKIEWICZ AND ARTHUR FLUSKEY

DEFENDANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 9th day of November 2022

Introduction

1. This is an appeal from the judgment of Mr. Justice Sanfey delivered on the 15th January, 2021 and the ensuing order of the 11th February, 2021 perfected on the said date, dismissing the appellant's counterclaim and granting perpetual injunctions restraining the

defendants from interfering and obstructing or in any way preventing the plaintiff/receiver from exercising his powers and functions as receiver over two properties. The first is a property known as 131D Slaney Road, Dublin 11 comprised in Folio 6964F County Dublin (Slaney Road) and the second 89D Lagan Road, a property hitherto comprised within Folio 35527F County Dublin and later carved from the said Folio and now comprised in Folio 182881F of the Register of Freeholders, County Dublin.

2. At the outset, it should be said that there were two separate sets of proceedings before the High Court, Record No. 2016/948P which pertained to the Slaney Road property and Record No. 2016/949P which pertained to the Lagan Road property. Moreover, this appeal is exclusively brought by the first named defendant. None of the other defendants engaged with the proceedings to any material extent. That appellant has appealed only the judgment and orders in proceedings 2016/948P which pertain to the Slaney Road property and accordingly, this judgment is confined to same.

3. The proceedings were instituted by way of plenary summons by the receiver on the 4th February, 2016 seeking interlocutory orders against the defendants restraining them from interfering with the receivership of the plaintiff. That receivership arose in the context of default alleged to have arisen in a mortgage entered into on the 29th September, 2009 between AIB Mortgage Bank and Allied Irish Banks, plc as mortgagees and Christopher Noone as mortgagor. The dual mortgage identified the mortgaged property in the Schedule to same as *"the property known as 131D Slaney Road, Dublin Industrial Estate, Glasnevin, Dublin 11 in Folio 6964F County Dublin."* The mortgagor executed the said mortgage instrument. The appellant contends that the trial judge erred in his judgment and in making the orders referred to above and seeks that same be set aside.

Background

Folio 6964F

4. On the 13th October, 2009, approximately two weeks after execution of the said mortgage, Mr. Christopher Noone came to be registered as full owner of the lands in Folio 6964F (the Folio) at entry no. 3 in Part 2 of same.

5. Of relevance in the context of the rights of charge holders is the following: that in the first instance and on the same date Allied Irish Banks, plc and AIB Mortgage Bank were both registered as the owners of charges on the said Folio as tenants in common in undivided shares on terms expressly providing; *"the owner's share at any time being the proportion that the debt owing to the owner secured by charge bears to the total debt owing to the owners in common secured by the charge."* That state of affairs continued for almost two years. However, on the 22nd August, 2011 a modification of the mortgage burden on the Folio was effected and AIB Mortgage Bank was discharged as charge holder.

6. Thus, by act and operation of law with effect from the 22nd August, 2011, all the rights vested in the mortgagee pursuant to the said mortgage of the 29th September, 2009 thereupon vested in Allied Irish Banks, plc alone.

7. This is noteworthy for a number of reasons including, in particular, that in 2011 proceedings were instituted by the mortgagee against the borrower, Mr. Christopher Noone, arising from defaults alleged in relation to the payment and discharge of the said mortgage. On the 20th October, 2011, judgment in the sum of €2,181,120.95 was obtained by the mortgagee, who at that date for the reasons outlined above was Allied Irish Banks, plc alone.

8. With regard to the summary proceedings, it is noteworthy that the mortgagor, Mr. Noone, took no step to enter an appearance. Neither did he bring any application before the High Court over the intervening decade to have the said judgment, which was marked in the office on the 20th October, 2011, set aside on any basis. Thus, it stands unappealed and in full force and effect.

9. Following delivery of a very comprehensive written judgment on 15th January 2021, Sanfey J., made orders as outlined above including a perpetual injunction restraining the defendants from interfering with, obstructing or in any other way preventing the receiver from exercising his lawful power to enter upon and take possession of the said property and further restraining them, their respective servants or agents or anyone acting in concert with them from trespassing on the said property. The notice of appeal filed by Mr. Gilroy on the 10th March, 2021 identifies nine separate grounds of appeal and seeks an order that the respondent, Mr. Ken Fennell, is not a validly appointed receiver and has no power of sale, together with an order for costs.

Mr. Gilroy

10. A critical issue before the High Court was the standing of Mr. Gilroy to defend the matter at all or pursue the issues raised by him in the Defence and Counterclaim delivered. The issue is raised, *inter alia*, at Ground 9 of the Notice of Appeal but warrants some consideration otherwise.

11. At a date not specified by Mr. Noone in his evidence or under cross-examination at the hearing of this matter before the High Court, the mortgagor put Mr. Gilroy into occupation of the upper floor of Slaney Road. Mr. Noone gave evidence on the 15th January, 2020 in the course of the substantive hearing before the High Court. At p. 28 of the Transcript Mr. Noone's evidence was: -

> "Line 9 – *And he was going to do a dance studio*.
>
> Line 13 – *Slaney Road was different*."

In response to the question: –

> *"And when were those agreements reached then; was it 2009, 2010, 2011? You are the person who reached this agreement?*

Answer – "*I don't know. It's vague because I know it was pre-receivership because Mr. Gilroy was in there. I used to pop into him when I would be collecting rents off the other lads downstairs, you know, and I'd pop in and see him, you know*." (p. 28, line 16-18)

Mr. Noone further stated at p. 28, line 24: –

"It was a very loose arrangement" ... In other words, Mr. Gilroy was doing something which I perceived to be very good for the country and I said 'yes you can have these offices here you can have them indefinitely', that's the way I said it to him."

In response to a query whether it was intended that the arrangement would last forever he stated at p. 29, line 3: –

"I wouldn't say forever. Forever is a long time, you know."

He further stated at line 5:–

"... Me and Mr. Gilroy are friends."

12. With regard to any rental or tenancy being created at Slaney Road, a query at p. 29, line 22:

"So he wasn't paying you anything monthly, weekly, yearly?"

In response Mr. Noone stated: –

"No, but on the dance studio, if that had gone well for him, he was going to pay. ...

P.29, Line 25 – *He was going to spend the money refurbishing all that because the thing was a shell and he had agreed that he would spend the money, him, and wherever he was getting the money from I don't know but he had said that he had somebody to invest in it. And I said: 'You fire away and when it comes good for you start paying me some rent' and that was the agreement."*

Mr. Noone confirmed that the alleged agreement was in respect of 131D Slaney Road at line 32.

13. In response to the question on p. 30: *"So when was that agreement reached that he'd go in and if it got off the ground you'd – I don't want to put words into your mouth but you'd then formalise your relationship if he got a dance studio going; is that right?"*

Mr. Noone answered: –

> *"If he got the thing – system going that he had he was free to do what he wanted to do with it until such time as he got it up and running."* (line 4 and 5)

In response to a further query as to when the said arrangement had been reached, at line 7 he stated:-

> *"…it was definitely pre-receivership because I mean he was in the other premises with me and he was in that."*

He further stated: –

> *"I don't know the dates. I can't give you an answer to that."* (line 10)

Essentially, Mr. Noone was not in a position to recall the precise date that Mr. Gilroy went into possession of the Slaney Road property. He was, however, in a position to confirm that it predated the appointment of the receiver.

Accordingly, his occupancy predates the 20th October, 2014.

14. On the 15th January, 2020 Mr. Gilroy, in addressing the High Court in the course of the hearing at p. 33, line 8/9, observed: -

> *"…If I was to hazard a guess I think it was around 2012-2014 that we had a contract. We were friends for years before that. But he has told the court in honesty that there was no written agreement from the bank but what he has proved is that the bank were aware at all times the properties were rented out and the rents were going in."*

15. It was acknowledged that Mr. Gilroy had never entered into or executed any agreement in writing with Mr. Noone regarding 131D Slaney Road. In response to enquiry as to whether Mr. Noone had ever informed the bank about his arrangement with Mr. Gilroy on the 15th January, 2020 p. 36, line 5 Mr. Noone stated: -

"I never told them about any specific arrangement with any individuals."

In response to the query "*do you think if you had told the bank about your arrangement with Mr. Gilroy they would have agreed that you could let somebody in indefinitely for no rent"* he responded at line 8: –

"I don't think it would have been any of the bank's business."

He further elaborated at line 10 *"It's my property."* At line 12 *"And until such a time as the bank have it it's still my property?"* At line 14 "*I'm the caretaker".*

16. When the terms of an affidavit of Mr. Gilroy were put to the mortgagor, Mr. Noone, in cross-examination, including a statement by Mr. Gilroy that *"any dispute that might arise will be between Chris and I and the same will be sorted out between family members",* Mr. Noone did not accept that same reflected the terms of any agreement he had made with Mr. Gilroy. He stated: -

> Page 36, Line 20-23 to 25 – *"It could be on Mr. Gilroy's part but as far as I am concerned what I just said to you is what our terms of agreement was. Mr. Gilroy might have another understanding of it. He might include family thing into it or something like that but … I don't remember Mr. Gilroy being in my family."*

He further stated at p. 37, line 8 *et seq.*:–

> *"Me and Mr. Gilroy had a lease as far as I am concerned…*
>
> Line 10 – *It may be a verbal lease but it was a lease."*

Mr. Noone confirmed further that he was aware that the bank had appointed a receiver over, *inter alia,* 131D Slaney Road on 20 October 2014.

17. From that exchange on the entirety of the evidence before the High Court, it is clear that:

(a) No written agreement of any kind came into existence between Mr. Noone, the mortgagor, and Mr. Gilroy.

(b) The arrangement between them was concluded prior to the appointment of the receiver on the 20th October, 2014.

(c) No rent or return or payment of any kind was agreed between Mr. Noone and Mr. Gilroy in respect of the property.

(d) No rent or return or payment of any kind was made by Mr. Gilroy in respect of the property.

(e) No mechanism was concluded between them for the ascertainment or calculation of any rent nor to identify the precise eventuality which would trigger a contractual obligation on the part of Mr. Gilroy to make such a payment. At best, Mr. Noone recalled an arrangement that involved refurbishing the premises and *"when it comes good for you start paying me some rent."*

Was Mr. Gilroy a tenant at Slaney Road?

18. The question arises as to the status of Mr. Gilroy's occupation of part of the Slaney Road property.

Section 3 of the Landlord and Tenant Law Amendment Act (Ireland), 1860 provides:

> *"The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases*

where there shall be an agreement by one party to hold land from or under another in consideration of any rent."

Section 4 provides –

"Every lease or contract with respect to lands whereby the relation of landlord of tenant is intended to be created for any freehold estate or interest, or for any definite period of time not being from year to year or any lesser period, shall be by deed executed, or note in writing signed by the landlord or his agent thereunto lawfully authorised in writing."

Section 1 of the 1860 Act defines "rent" to include *"any sum or return in the nature of rent, payable or given by way of compensation for the holding of any land."*

19. The clear evidence of Mr. Noone is that no rent was ever paid at any time by Mr. Gilroy for the property. Mr Gilroy neither disputed nor contradicted that unequivocal evidence. There was a future potential or expectation, contingent upon a whole series of events taking place - which never came to pass - that a funder might be procured potentially by Mr. Gilroy, that certain works might be carried out, that a dance studio might be established, that it could operate, that it might be profitable and that at some point thereafter, it would be open to Mr. Gilroy to offer to pay rent to Mr. Noone.

20. J.C.W. Wylie, *Landlord and Tenant Law*, (4th ed., Bloomsbury Professional, 2022) on the issue of rent observes at para. 2.19: -

"*This is an important element of section 3 which is often overlooked. As a result of it, it is probable that the relation of landlord and tenant does not exist in Ireland if no rent or other return in the nature of rent is to be paid or given by the occupier holding under the agreement in question. Thus some well-recognised concepts in this area of the law must be treated with particular caution in Ireland. For example, a "tenancy" at will usually involves no payment of rent by the "tenant", so that the*

relation of landlord and tenant may not exist. The same applies, a fortiori, to a "tenancy" at sufferance."

21. The decision of the Supreme Court in *Gatien Motor Company Limited v Continental Oil Company* [1978] WJSC-SC 1495, [1979] I.R. 406 is instructive; there Kenny J., Griffin and Parke JJ. concurring, observed: -

"A person may be in exclusive possession of land but not be a tenant. The existence of the relationship of landlord and tenant or some other relationship is determined by the law on a consideration of many factors and not by the label which the parties put on it.

…

All the terms of the document in the circumstances in which it was entered into have to be considered.

…

Broadly speaking we have to see whether it is a personal privilege given to a person in which case it is a licence, or whether it grants an interest in land, in which case it is a tenancy. At one time it used to be thought that exclusive possession was a decisive factor, but that is not so. It depends on broader considerations altogether."

Henchy J. otherwise observed: –

"Under s. 3 of the Landlord and Tenant Act (Ireland) 1860, (Deasy's Act) the relation of landlord and tenant is deemed to be founded on the express or implied contract of the parties and such relation shall be deemed to subsist in all cases in which there shall be agreement by one party to hold land from or under another in consideration of any rent. As there could be no question of an expressed contract in this case, the applicant was driven to allege an implied contract."

A factor considered critical by the Supreme Court in *Gatien* - and equally relevant in the instant case - was that at no time had there been any agreement for the payment of rent and no rent had ever been paid by the claimant. Henchy J. was satisfied that in such circumstances there was no other conclusion but that occupation of the premises was as caretaker and not as a tenant under a contract of tenancy during the relevant period.

22. Hence, as the trial judge correctly concluded, there was no basis for the contention that Mr. Gilroy was a tenant in occupation of the property. Contentions that the bank acquiesced or consented to a tenancy in respect of Mr. Gilroy consequently are unsustainable and simply fall away. However, for completeness it is appropriate to consider that aspect further also.

23. The clear evidence before the High Court and before this court on appeal was that the relationship of landlord and tenant did not subsist between Mr. Gilroy and Mr. Noone, the mortgagor. As regards Mr. Noone, Mr. Gilroy was not a trespasser at the time he initially went into occupation. It appears clear from Mr. Noone's evidence that he permitted Mr. Gilroy to go into occupation. There was some generalised expectation that a rent might be paid in the event that certain future events took place. Those eventualities never transpired. The significance of Mr. Gilroy not being a tenant is that he never held any interest in the property. As J.C.W. Wylie puts it succinctly in *Wylie on Landlord and Tenant Law*, (4th ed., Bloomsbury Professional, 2022), at para. 2.03: -

> *"A tenant, unlike many other users of land, has an estate or interest in the land in question."*

24. *Taylor v Ellis* [1960] 1 Ch. 368 is authority for the proposition that there is a positive onus on a person claiming that he is a tenant to prove that the mortgagee waived his rights or gave written consent to the grant of a tenancy in order for it to be binding. A mortgagee can take on a mortgagor's tenant whom he could otherwise treat as trespasser. This might occur in circumstances where a mortgagor has failed to pay the mortgage interest and the

mortgagee serves notice on the tenant to pay the rent to him. This would create a new tenancy between mortgagee and mortgagor's tenant, but it would not extinguish the mortgagee's right to later decide to subsequently treat such a tenant as trespasser – *Re O'Rourke's Estate* (1889) 23 L.R.IR. 497, 501*; Parker v Braithwaite* [1952] 2 T.L.R. 731, 735; [1952] 2 All E.R. 837.

> What percentage of Irish people have a masters? *"It is well established in this jurisdiction that a lease or agreement for a lease granted in breach of a negative pledge does not bind the mortgagee or any receiver appointed by it: see in particular the judgment of Dunne J. in Re N17 Electrics [2012] 4 IR 634. This decision has been followed in numerous subsequent decisions of this Court and must be regarded as settled law."*

The stance of Mr. Noone *vis-à- vis* the Receiver

25. The receiver was appointed, as stated above, on the 20th October, 2014, some three years or so after the bank had obtained judgment against the mortgagor for €2,181,120.95. Thus, insofar as it was contended by Mr. Gilroy that the bank was aware at all times that the property had been rented out and that rents were going in, this cannot relate to the subject property since no rent was being paid by him or was ever paid by him at any time in respect of same.

26. None of the other defendants contested the proceedings and accordingly, whether or not written agreements were in place and the level of knowledge of the bank in regard to same or the application of the rents derived thereunder in and towards discharge of the mortgage are entirely irrelevant and do not assist in the determination of any issue in these proceedings or in this appeal. The Orders made against them in the High Court are final and binding.

27. On the 14th October, 2014, Messrs. Eversheds Solicitors wrote to the mortgagor in advance of the appointment of the receiver. Mr. Noone did not take any step to engage with that process beyond communicating that he was not in agreement with the appointment of the receiver. He never instituted proceedings contesting the appointment.

28. Mr. Gilroy contends that the appointment of the receiver is invalid and in particular, that the instrument of appointment of Mr. Ken Fennell as receiver dated the 20th October, 2014 is invalid and not operative for that purpose. He contests whether the instrument of appointment was duly executed. He contests the eligibility of the two individuals, Mr. Aidan Maher and Ms. Louise Cleary, who executed in each case as *"'authorised signatory' present when the Common Seal of Allied Irish Banks, plc was affixed hereto."* He appears to challenge that the instrument constitutes a deed; he denies that the bank had an entitlement to appoint a receiver. All these issues he raises in the context of never having held any estate, title or interest in the subject property capable of binding the mortgagee or the receiver as elsewhere set out in this judgment.

Grounds 1, 3 and 4 – Mr. Aidan Maher

29. Three of the grounds of appeal are directed towards or concern Mr. Aidan Maher, a party to the execution of the instrument of appointment of the receiver:

> *"(1) The judge erred in fact and law by finding that Mr. Maher was a co-secretary of Allied Irish Banks, plc.*
>
> *…*
>
> *(3) The judge erred in fact and law by stating in his judgment that "It should be noted that both mortgages and both deeds of appointment refer to "Allied Irish Banks, plc", which is the correct formulation of the title of the Irish entity which Mr. Maher swore was his employer and on behalf of which he*

acted in the matter. His evidence in this regard was uncontradicted" while it is now accepted that the court was misled in this regard.

(4) The judge erred in fact and law by not properly considering the evidence of Mr. Maher as being unreliable as he misled the court on every occasion as to his role in the bank and as to which bank he actually worked for."

Formalities for a valid Deed

30. Given that Grounds 1, 3 and 4 arise in the context of the execution of deeds by Mr. Maher it is necessary to consider the statutory requirements pertaining to execution of same and as to what may constitute "a deed" in that context. With regard to the formalities for a valid deed, given that the instrument of appointment of the receiver was executed after the coming into operation of the Land and Conveyancing Law Reform Act, 2009 on the 1st December, 2009, the provisions of that Act apply. The formalities for deeds are to be found in s. 64 of that Act and were applicable to the Deed of Appointment of the receiver dated the 20th October, 2014. It is noteworthy that s. 64(2) provides: -

"(2) An instrument executed after the commencement of this Chapter is a deed if it is—

(a) described at its head by words such as "Assignment", "Conveyance", "Charge", "Deed", "Indenture" ... or other heading appropriate to the deed in question, or it is otherwise made clear on its face that it is intended by the person making it, or the parties to it, to be a deed, by expressing it to be executed or signed as a deed,

(b) executed in the following manner:

...

(ii) if made by a company registered in the State, it is executed under the seal of the company in accordance with its Articles of Association..."

And it is also noteworthy that same is executed: –

> *"(i) if made by an individual—*
>
> *(I) it is signed by the individual in the presence of a witness who attests the signature, …"*

31. The document purporting to appoint the receiver is expressed on its cover to be a *"Deed of Appointment of Receiver."* The receiver is expressed in the testimonium of the said instrument to have been: –

> *"Signed and delivered as a deed by …*
>
> *Ken Fennell"*

The testimonium clause of the instrument of appointment further provides: -

> *"IN WITNESS whereof the Common Seal of Allied Irish Banks, plc was hereunto affixed the day and year above written and the receiver hereunto set his hand and seal by way of receipt and acknowledgment of his appointment.*
>
> *PRESENT when the Common Seal of ALLIED IRISH BANKS, plc was affixed hereto:"*

32. As I have noted above, two authorised signatories appear, that of Mr. Aidan Maher who swore an affidavit confirming his execution of the instrument of appointment of the receiver on the 6th April, 2016 and Ms. Louise Carey who swore a similar affidavit on the 5th April, 2016. In addition, Mr. Maher was made available for cross-examination and was robustly cross-examined by Mr. Gilroy at the hearing of this action and, as the Transcript attests, confirmed due execution by both whereby the common seal of Allied Irish Banks, plc was affixed to the Deed of Appointment.

Statutory requirements

33. Section 64(3) of the 2009 Act provides: -

"Any deed executed under this section has effect as if it were a document executed under seal."

Section 64(4) provides: –

"A deed, whenever created, has the effect of an indenture although not indented or expressed to be an indenture."

34. I find it relevant that the bank's Memorandum and Articles of Association were referred to by Mr. David Nolan in his affidavit sworn on the 30th March, 2016, where at para. 5 he refers to Article 118(b) which provides: -

"A document issued in the ordinary course of the banking business of the Company may be signed on behalf of the Company by an official (or officials) of such rank and in accordance with such arrangements or directions as may be prescribed from time to time by the Directors, a Committee or, in the case of any delegated or sub-delegated function in accordance with such arrangements or directions as may be prescribed, by the Chief Executive, Deputy Chief Executive, Assistant Chief Executive, Chief General Manager, General Manager, Assistant General Manager, Executive or Manager or by any management committee having such delegated responsibility for the area or division of the business to which the document relates."

35. Further, there was clear evidence before the High Court that by a Board Resolution on the 25th June, 2014 a number of employees of the mortgagee bank, including Mr. Aidan Maher and Ms. Louise Cleary, were authorised to describe themselves as authorised signatories and to subscribe their names as part of the sealing process to any instrument to which the seal of the bank was to be affixed. It appears to me that that Resolution was before the High Court, not alone at the substantive hearing, but at the hearing for interlocutory injunction relief which took place on 6th April, 2016, wherein judgment was delivered on 20th April, 2016. Thus, I conclude that the instrument of appointment is validly executed in

accordance with the requirements mandated by s. 24 of the Conveyancing Act, 1881, being *"by writing under its hand"* and also in accordance with the provisions of the Land and Conveyancing Law Reform Act, 2009.

Ratification of execution

36. The evidence before the High Court was that, in addition to the execution and steps taken in pursuance of same referred to above, almost a year subsequently on the 3rd September, 2015 in light of a decision of the High Court in *McCleary v McPhillips* [2015] IEHC 591, the bank by written resolution of its Board of Directors, expressly ratified the signatures of all persons authorised to witness the affixing of the bank's seal upon all existing deeds of appointment to the extent that the said signatures had not already been ratified expressly or by implication.

37. I am satisfied that there was ample evidence before the High Court, firstly, that the Deed of Appointment of the receiver was a valid deed for the purpose of the 2009 Act and that the execution of the said Deed of Appointment of the Receiver by Allied Irish Banks, plc was valid and in accordance with its Articles of Association. Further, there was clear evidence before the trial judge which entitled him to conclude that both Mr. Aidan Maher and Ms. Louise Cleary were authorised signatories for the purposes of the Articles of Association of Allied Irish Banks, plc and including for the purposes of Art. 118(b) of same. No basis was identified for going behind the Board Resolution dated the 25th June, 2014 which clearly conferred authority upon Mr. Aidan Maher and Ms. Louise Cleary, whereby they were entitled to describe themselves as authorised signatories and to subscribe their names as part of the sealing process of any instrument to which the seal of the bank was to be affixed and that the said provision was operative on the relevant date in accordance with the evidence namely, on the 20th October, 2014. I am satisfied that the original of this

instrument was shown to the appellant, Mr. Gilroy, on the afternoon of the 14th January, 2020 and he acknowledged that he observed the seal of the bank thereon. Clearly there was evidence from Mr. Ken Fennell, the respondent, with regard to his own execution of the deed which is expressed to be executed *"as a deed"* and he further gave evidence, which was not contradicted, that Mark Degnan of Deloitte was the attesting witness to his signature.

38. The execution of a deed by an agent without authority can generally only be ratified by deed, by part performance, where a mortgagor by conduct becomes estopped from challenging the appointment (such as occurred in *Farrell v Petrosyan* [2015] IEHC 522) or by a matter of record. However, there was no evidence whatsoever that the execution of the Deed of Appointment of the receiver on behalf of the bank by either Mr. Aidan Maher or Ms. Louise Cleary was without authority. The decision of Romer J. in *Mayor, Aldermen and Citizens of Oxford v Crow* [1893] 3 Ch. 535 is authority for the proposition that in circumstances where a contract was not under the seal of the Corporation or signed on its behalf by any person authorised under seal to do so, or ratified under seal, or part-performed or acted upon, it could not be enforced by the Corporation. This was based on the earlier decision of *Mayor of Kidderminster v Hardwick* (1873) L.R. 9 Ex. 13. Such issues are not engaged here.

39. I am satisfied that there was clear evidence before the High Court judge on which he was entitled to rely that on the 20th October, 2014, Mr. Aidan Maher and Ms. Louise Cleary were authorised signatories and had been validly appointed as such by the bank and I am further satisfied that the said instrument constitutes a valid deed for all purposes and was validly executed in all material respects, both by and on behalf of Allied Irish Banks, plc and Mr. Ken Fennell. I am further satisfied that the resolution of the 3rd September, 2015 was intended to acknowledge the authority of the signatories and their status as authorised signatories and amounts to an express ratification of the appointment and is consistent with

the conduct of the bank at all material times from the 20th October, 2014. Furthermore, for the reasons stated elsewhere in this judgment, this appellant lacks *locus standi* to challenge any aspect of the appointment of the receiver in light of the facts of this case.

40. In light of the ratification of the execution of the deed of appointment, as a strict matter of law, it matters not whether Mr. Maher was "*a co-secretary of Allied Irish Banks plc*" or not. However, there was evidence before the trial judge, upon which he was entitled to rely, that Mr Maher was "*a co-secretary of Allied Irish Banks plc*" at the relevant date of execution. Thus, it follows that Ground 1 of the appeal does not succeed.

Mr. Maher – Grounds 3 and 4

41. As I have earlier noted, Mr. Aidan Maher signed the Deed of Appointment of the receiver dated 20th October, 2014 as *"authorised signatory"* who was *"present when the Common Seal of Allied Irish Banks, plc was affixed to same."* Likewise, he executed as authorised signatory the deed of appointment of receiver over the premises 89 Lagan Road on the 20th October, 2014 and was expressed to have been *"present when the Common Seal of Allied Irish Bank, plc was affixed thereto."*

42. In the course of the hearing of this appeal, the appellant contended that in effect the court was misled by Mr. Maher in certain respects and in particular, that he had failed to disclose to the court that he was an employee of AIB Mortgage Bank, one of the original mortgagees under the dual mortgage registered on the 13th October, 2009 on Part 3 of Folio 6964F. AIB Mortgage Bank ceased to have any registered interest or charge on Part 3 of the said Folio on the 22nd August, 2011.

43. Mr. Maher gave his evidence before the High Court on the 14th January, 2020. At p.33 of the Transcript he was asked: -

".. When Mr. Fennell was appointed by the bank in October 2014 what position did you enjoy at that stage?

A. At that stage I was one of the assistant company secretaries of Allied Irish Banks plc." (line 22)

At page 34 of the Transcript he was asked in relation to an affidavit sworn by him on the 6th April, 2016 in support of interlocutory injunctions: -

".. in that affidavit you identified that at that time, certainly in 2016, you were employed as a business banking manager in the North East by Allied Irish Banks plc. That's a role you had since January 2015. That's a continuing role; is that correct?

A. It is, yes.

Q. And you also confirm that prior to that you were the assistant company secretary in the office of the company secretary at Bank Centre in Ballsbridge…"

44. Mr. Maher confirmed that he was appointed as authorised signatory on behalf of the bank to authenticate the fixing of seals to documents (p. 34 of the Transcript). Additionally, an extract from the minutes of a meeting of Directors of Allied Irish Banks, plc held on the 25th June, 2014, certified to be a true copy by Mr. David O'Callaghan, the company secretary, was adduced in evidence. The said extract states as follows:-

"It was resolved that the following be and with effect from the date hereof is hereby substituted for paragraph C. of the Resolution governing the sealing of documents which was passed by the Board on the 6th November, 1990 'That, in connection with the sealing of instruments as aforesaid, David O'Callaghan, Aidan Maher, … Louise Cleary… and each of them is hereby constituted a person authorised to participate in the sealing of any instrument under the Common Seal and, describing himself or herself as an authorised signatory, to subscribe his or her name as part of the sealing process to any instrument to which the seal shall be affixed.'"

That extract identified nine individuals who were duly authorised signatories in respect of the sealing process of any instrument to which the seal of Allied Irish Banks, plc was to be affixed.

45. Mr. Maher confirmed that the position specified by Mr. Nolan, a bank official in an affidavit sworn on the 30th March, 2016 in the context of the interlocutory injunction proceedings, particularly at paragraphs 6, 7 and 8 - insofar as it related to the practice of the execution of instruments by Mr. Maher on behalf of the bank accorded with his understanding and he confirmed to the court that he was duly authorised to execute the two instruments of appointment of the receiver. Mr. Maher confirmed that he worked in the offices of Mr. David O'Callaghan, the company secretary at the time (p.35) and he informed the court that there were probably nine such authorised signatures, one being himself (p. 36, line 16). He outlined in detail the procedures generally followed in relation to the affixing or application of the seal: -

> *"…in applying the seal you want to make sure you have two authorised signatures that verify the application of the seal and that it's appropriate to apply the seal. …"* (p. 36)

He confirmed that in relation to the authenticating of deeds of appointment of receivers *"… to the best of my knowledge at that stage the policy was always that they would be executed under seal. And I cannot recall ever doing one other than under execution of the seal."* He was then questioned by counsel on behalf of the receiver and clearly confirmed that he had no reason to consider that either of the Deeds of Appointment were created other than with the consent and authority of Allied Irish Banks, plc. He identified the signatures on the instruments as his own and that of Ms. Louise Cleary. He confirmed to the High Court that he left his role in January 2015. At p. 38 of the Transcript in cross-examination Mr. Maher confirmed *"my employment is Allied Irish Banks, plc, the ultimate parent company."* He

confirms that he was assistant secretary of the said bank. In cross-examination in response to a query from Mr. Gilroy *"You were an assistant to the secretary or you were assistant secretary?"*, at p. 39, line 20, Mr. Maher replied *"I was assistant secretary."* He confirmed he was not registered in the CRO as such. Mr. Gilroy continued at line 31: -

> *"I am just astounded that you were assistant secretary and you're registered at the CRO, and you weren't aware of two parent companies, one whom the secretary was – is also the secretary of the London company. So you're assistant to the secretary of Allied Irish Banks, plc and that secretary is a secretary of Allied Irish Banks without the comma in London and you don't know anything about it; am I clear …"*

Answer page 40, line 3: –

> *"… I was the assistant company secretary to Allied Irish Banks, plc and my sole role was to the Irish bank. I didn't have any involvement in the UK company or the Northern Ireland company."*

46. A reading of the Transcript suggests that a primary purpose of Mr. Gilroy in pursuing this line of questioning was in connection with certain name changes effected to other companies within the AIB umbrella: -

> *".. The reason I'm making this issue is because there were certain name changes in London which actually just changed the name from a small plc to a large PLC. So there was obviously something going on there in relation to those companies."* (page 40, lines 8-10)

However, Mr. Gilroy did not develop or pursue that line of argument or questioning and I am satisfied that it does not advance or assist any ground of appeal advanced by him. Mr. Gilroy accepted that the witness Mr. Maher had not signed certain other documents being the minutes of the meeting of directors, the extract therefrom of the meeting of directors held

on the 25th June, 2014 or the subsequent ratification of September 2015. At page 41 of the Transcript Mr. Maher states: -

> *"...I can't recall whether I was at that particular board meeting at which that resolution was passed. I did attend some but I did not attend all."* (Line 6/7)

47. At pp. 42-43 of the Transcript Mr. Gilroy observed in the course of cross-examining Mr. Maher: -

> *"... I intend at a later stage to give evidence, €20 billion worth of mortgages sold and then another €10 billion of mortgages sold, Judge, and the reason I am saying this is that in those circumstances it's very important as to who knew what in the bank to allow a deed be sealed for mortgages that the bank may not have. And especially in terms of the second mortgage here as well – well in terms of all the mortgages – but especially in terms of the second mortgage because I make an application to remove my interest which may have been a beneficial interest only from Land Registry, that is not proof that the trust – that the – what Allied Irish Banks, plc held in trust for AIB Mortgage Bank, just the removal of that alone from Land Registry was not evidence that in actual fact the rights had been given up. All it means was that that was withdrawn from Land Registry, and I believe that may have been done for another purpose, which I will deal with in summing up. So I don't want to keep going, just so you know where I'm going with this. So you would have to get some sort of memorandum to say, 'I'm going to fix the seal of a Deed of Appointment' and you know little or nothing about – or do you, I'm asking that as a question, about whether those mortgages and the rights contained therein – because I have seen a number of these mortgage sale agreements where – and I did ask the other side to produce them, where there's multiple sale agreements where they say 'All right, title and interest' and the word 'all' and 'all rights' would be the rights to*

appoint a receiver. You wouldn't be involved in any of that or you would have no knowledge of any of that?"

Mr. Maher's response was *"correct".* (Page 43, line 18)

48. Mr. Gilroy then queried: -

"...was there an authority… from Allied Irish Banks – sorry, Allied Irish Mortgage Bank, you had no authority from them and you didn't work for them whatsoever; isn't that correct?

A. *No. In this instance I believed the seal on behalf of Allied Irish Banks."*

Mr. Gilroy at line 27 questioned: –

"Just on plc, that's okay. And also your authority to do that – so do you accept that you were properly authorised to bind Allied Irish Banks, plc to those transactions?"

Answer (at line 29): –

"No, I am happy that I was authorised as an authorised signatory for the application of the seal to those documents."

Question: –

".. so what you are saying is then that you feel you were not authorised to bind the company to that transaction?"

Answer: –

"Well the application of the seal is what binds the company, correct."

At line 34 Mr. Gilroy stated: -

"… I'll go back then to the first part of my question, you accept then that you were an authorised person… to bind… plc, yes, to that transaction being a deed which is a very important transaction, it's basically, if you like, taking a property worth millions from someone. <u>So you're saying you were such an authorised person to bind plc in that transaction?</u> (emphasis added)

A. *Yes." (emphasis added)*

Mr. Gilroy at line 9 states: –

"That's grand. I don't think I have any further questions, Judge."

49. It is very clear from that exchange that the focus of the witness, Mr. Maher, was on the execution of the two instruments appointing the receiver over the Slaney Road property and the Lagan Road properties respectively. The use of the words in his reply *"in this instance"* is only consistent with that response. As regards a suggestion that there had been a disposition of €20bn worth of mortgages and then another €10bn worth of mortgages, Mr. Gilroy was clearly addressing the High Court when he informed it that he intended at a later stage to give evidence pertaining to same. (p. 42, lines 30 – 34). However, as it transpired Mr. Gilroy did not go into evidence in this case or adduce the evidence he had earlier alluded to.

50. I am satisfied that while the issue of sales of mortgages was adverted to in the course of his cross-examination of Mr. Maher, particularly at pp. 42/43 of the Transcript, it was not one that was pursued in any meaningful sense, nor could it reasonably have been in light of the issues that had been joined in the proceedings as disclosed in the plenary summons, statement of claim and defence and counterclaim delivered on Mr. Gilroy's behalf. At no stage did Mr. Gilroy adduced evidence in the course of the hearing that mortgages had been sold. The issue was alluded to separately in cross-examination of the receiver such as at pp. 62 and 64 where Mr. Fennell was asked in light of sales of AIB loans: *"[D]id you ever ascertain on any appointment, including this one here, was this part of any pool for all right, title and interest sold?"* (p. 64, lines 6-9). Mr. Fennell responded: *"Maybe not specifically."* It is not an issue in this appeal.

51. A key issue being pursued by Mr. Gilroy in the context of the application before the High Court and in the context of the cross-examination of Mr. Maher was as to whether the

receiver had been validly appointed over the secured properties by Allied Irish Banks, plc. It is clear that that was the primary focus of the cross-examination by Mr. Gilroy. Mr. Maher's evidence was clear and confirmed, *inter alia*, that:

(a) He was employed by Allied Irish Banks plc.

(b) That he was assistant company secretary at the time of Allied Irish Banks plc.

(c) That he was one of nine such persons.

(d) That his appointment took effect on foot of a resolution of Allied Irish Banks, plc on the 25th June, 2014 and he proved same by means of an extract from the said resolution.

(e) That subsequently the bank ratified the said appointment at a meeting of the Board of Directors held on Thursday the 3rd September, 2015 and a certified copy of that extract was proven.

(f) That he recognised, confirmed and acknowledged the signature of Ms. Louise Cleary as a co-signatory and also as one of the parties appointed by the bank on foot of the resolution of the 25th June, 2014 in respect of execution of instruments and in particular as a person authorised also to participate in the sealing of any instrument pursuant to the Common Seal of Allied Irish Banks plc.

Accordingly, I am satisfied that there is no basis for a contention that the trial judge erred in fact and law in finding that Mr. Maher was assistant company secretary of Allied Irish Banks, plc. The only evidence before the court was that he was so. Notwithstanding robust cross-examination, that position did not change. Mr. Gilroy disputed the position but did not adduce any evidence to contradict the clear evidence of Mr. Maher.

52. In part, Mr. Gilroy's complaint appears to be that the witness did not answer questions that he was not asked. At p. 43 of the Transcript, Mr. Maher stated that he had been properly

authorised to bind Allied Irish Banks plc in the transactions, by virtue of the execution of the two Deeds of Appointment of the receiver. He further confirmed at line 26 that *"in this instance I believe the seal on behalf of Allied Irish Banks."* (emphasis added). It is evident that in answering this question the focus of the witness was directed towards his capacity on the 20th October, 2014 to execute the deeds of appointment of Mr. Ken Fennell as receiver and the processes whereby he so appended his signature as authorised signatory in connection with the affixing of the Common Seal of Allied Irish Banks, plc to the two instruments. There is no basis or justification for a contention that his evidence in that regard was either unreliable or that he misled the court as to his role with the said bank as asserted.

53. It was perfectly open to Mr. Gilroy at the hearing to pursue lines of questioning regarding any other employment or any other offices or positions he held with, *inter alia*, AIB Mortgage Bank, one of the original co-mortgagees who was discharged as a charge holder on Folio 6964F on the 22nd August, 2011. He did not do so.

Ground 3

54. With regard to Ground 3, the appellant took issue with the determination of the trial judge at para. 39 of his judgment that: -

> *".. both mortgages and both deeds of appointment refer to "Allied Irish Banks, plc", which is the correct formulation of the title of the Irish entity which Mr. Maher swore was his employer and on behalf of which he acted in the matter. His evidence in this regard was uncontradicted."*

The instruments were executed by Allied Irish Banks, plc. It cannot be in contention that that is other than the correct formulation of the title of the Irish entity which Mr. Maher had sworn was his employer. There was no evidence that Mr. Maher was not an employee of Allied Irish Banks, plc or, in particular that the resolution of the 25th June, 2014 was not

operative in respect of him when he came to execute the two Deeds of Appointment on the 20th October, 2014.

55. Mr. Gilroy did not tender any competing evidence to cast doubt on the evidence of Mr. Maher in relation to any of the relevant elements of execution, including that on the date of execution of the Deeds of Appointment he held the position of assistant secretary of Allied Irish Banks, plc.

Section 149

56. It is noteworthy that as of the 20th October, 2014 the relevant statutory obligation to be found in s. 195 of the Companies Act, 1963 did not provide for the registration of assistant secretaries with the CRO. That position was altered on 1st June 2015 when s. 149 of the Companies Act, 2014 came into force. It provides: -

> *"149. (1) A company shall keep a register (the "register") of its directors and secretaries and, if any, its assistant and deputy secretaries*."

Section 149(8) provides –

> *"(8) The company shall, within the period of 14 days after the date of the happening of—*
>
> > *(a) any change among its directors or in its secretary or assistant or deputy secretary; or*
> >
> > *(b) any change in any of the particulars contained in the register,*
>
> *send to the Registrar a notification in the prescribed form of the change and of the date on which it occurred*."

The prescribed form is governed by Statutory Instrument No. 147 of 2015. Since the said measure was not operative on the relevant date and came into effect subsequently and does

not have retrospective effect, registration with the CRO was not a requisite in the instant case as of the 20th October, 2014.

57. Non-compliance with s149 *per se* would not necessarily operate to invalidate, annul or defeat the validity of a deed as to its due execution since authorisation derived from the Board's Resolution at common law.

Conclusions regarding Grounds of Appeal 1, 3 and 4

58. I am satisfied that there is no basis identified by the appellant for asserting that Mr. Maher misled the High Court or was an unreliable witness. No evidence has been adduced in support of that contention beyond bare assertion. The assertions at Grounds 3 and 4 and implicitly at Ground 1 are not made out nor is there any evidence that the trial judge erred as is contended for in any of the said grounds of appeal. All of the said grounds of appeal fall to be dismissed.

Ground 2 – *delegatus non potest delegare*

"The judge erred in fact and law by wrongly defining the applicability of the principle of 'delegatus non potest delegare'."

59. Neither in his written or oral submissions did Mr. Gilroy clarify his complaint in that regard. The High Court judgment under appeal at para. 33 states: -

> *"It was submitted that the principle of "delegatus non potest delegare" precluded the receiver from delegating his duties to anyone else. This submission is misconceived; a receiver is clearly entitled to employ professional advisers or other agents on his behalf, and such actions do not infringe against the principle of non-delegation."*

Generally, this principle arises in the context of the delegation by a trustee of his powers and functions. In that context, it is noteworthy that the Transcript records that under cross-examination the receiver denied that he was a trustee.

60. Hilary Biehler in *Equity and the Law of Trusts in Ireland*, (7th ed., Round Hall, 2020) at p. 576 observes: -

> *"The rationale behind the principle of non-delegation of a trustee's duties is that the office is viewed as one where confidence is placed in the abilities of the particular individual appointed and it is therefore expected that he should personally look after the interests of the beneficiaries."*

She further notes: –

> *"It has been suggested that while trustees will often be required to take advice from appropriate experts, '[i]t is for advisors to advise and for trustees to decide'"*

Citing Robert Walker J. in the decision *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All E.R. 705 at 717, she continues –

> *"However, this proposition should be read with a degree of caution and the principle of delegatus non potest delegare cannot be applied inflexibly to the position of trustees. Indeed, it is long been recognised that a trustee may delegate in situations of 'legal necessity' or 'moral necessity.'"*

Citing Ex *p. Belchier* (1754) Amb. 218 – a case which illustrates that delegation and the power to employ agents has long been permitted in cases of legal or moral necessity -, Biehler notes: –

> *"In addition, it has been recognised that the proper administration of a trust would not be practicable if a trustee was not free to delegate the performance of certain functions to professional agents, such as solicitors and brokers. So, a trustee may*

employ a qualified professional person as his agent where the exercise of his office demands that these services be obtained …"

The maxim *delegatus non potest delegare has* come in modern times to be construed in a purposive fashion and indeed Biehler, *opus cit*., at p. 576 observes: -

"The general principle is that where an ordinary prudent man of business would employ an agent to act on his behalf, a trustee will be entitled to delegate his functions and will not be liable for the default of an agent employed in these circumstances."

61. Citing on *Wylie on Irish Land Law,* (now in its 6th Edition), at p. 673 Biehler notes: -

"So, a trustee may employ a qualified professional person as his agent where the exercise of his office demands that these services be obtained and, as Wylie has commented, it may even in certain circumstances amount to a breach of trust not to delegate."

This analysis accords with the jurisprudence in other jurisdictions which makes clear that whilst trustees should, insofar as practicable, perform their duties personally, they should, where the circumstances so warrant, appoint an expert or agent whenever a person of reasonable prudence and judgment would do so. The discharge of a trustee's duty in engaging expertise to assist in the administration of a trust encompasses the competent selection of the appropriate expert or agent in light of the nature of the trust and the circumstances giving rise to the need for professional expertise. The trustee should ensure continued supervision of the professional expert or agent and take reasonable care in accepting advice tendered.

62. In conclusion, I am satisfied that the trial judge was correct in his observations at para. 33 and elsewhere in the judgement, which accurately reflect the obligation of a receiver and also of a trustee to act prudently and as a reasonable person of business would act and who

engaged such expertise as is appropriate to enable him to discharge his function. Trustees are empowered to delegate wherever they require professional assistance. That ground of appeal does not succeed.

Ground 5

"The judge erred in fact and law by finding there existed in the mortgage a power of sale and a power to appoint a receiver."

First aspect – power of sale

63. References to the power of sale are to be found at paras. 41 - 44 of the judgment: -

> *"44. This appears to be an objection to the sale of the Lagan Road property after it had been held and ordered by Gilligan J. that the receiver was entitled to possession of both properties. This point is not pleaded by the first named defendant and forms no part of his case. In any event, there was no evidence before this Court as to how the sale of Lagan Road was effected, although it is clear that there was a judgment against Mr. Noone for in excess of €2m, secured by a mortgage which contained at Clause 8 thereof a power of sale and a power to appoint a receiver."*

64. The difficulty in this appeal is that the Lagan Road proceedings, High Court Record No. 2016/949P, are not the subject of any appeal before this court. We are confined to an appeal in proceedings 2016/948P which pertain to the Slaney Road property alone. For completeness, I observe that Clause 8 of the Lagan Road mortgage of the 2nd February, 2009 states at 8.01: -

> *"The Bank shall have the statutory powers conferred on mortgagees by the Conveyancing Acts with and subject to the following variations and extensions. That is to say:*
>
> *(a)*

...

(b) The power of sale shall be exercisable without the restrictions on its exercise imposed by Section 20 of the Act of 1881.

(c) ...

(d) Any receiver appointed by the Bank under the power to appoint a receiver shall be deemed to be the agent of the Mortgagor and the Mortgagor shall be solely responsible for the acts and defaults of any such receiver and for his remuneration the Bank shall not under any circumstances be answerable for any loss or misapplication of the rents and profits of the mortgaged property or any part thereof by reason of any default, neglect or breach of trust of or by such receiver for the time being and all moneys received by any such receiver after providing for the matters specified in paragraphs (i) to (iii) of subsection 8 of Section 24 of the Act of 1881 and the remuneration of such receiver and the discharge of all costs charges or expenses of or incidental to the exercise of any of the powers of such receiver may and shall if the Bank in its absolute discretion shall so direct be applied in or towards satisfaction of the secured moneys and in such order as the Bank may from time to time conclusively determine."

65. As regards the Slaney Road mortgage of the 29th September, 2009, Clause 1 states "AIB Mortgage Conditions" means AIB Mortgage Conditions (2006 edition). Clause 4 is entitled AIB Mortgage Conditions: "*The AIB Mortgage Conditions are hereby incorporated in this Mortgage. In the event of any conflict between the terms of the AIB Mortgage Conditions and this Mortgage the terms of this Mortgage shall prevail."*

66. Such incorporation by reference is relatively standard in mortgages and indeed the authors J.C.W. Wylie and Una Woods, *Irish Conveyancing Law* (4th ed., Bloomsbury Professional, 2019) note at para. 19.52:-

> *"It is then usual for the mortgage to contain a number of other provisions which relate specifically to the law of mortgages or the nature of a mortgage transaction, e.g., express incorporation by reference to the mortgagee's statutory powers of sale and other powers conferred by the Land and Conveyancing Law Reform Act 2009, exclusion or variation of the mortgagor's power of leasing, and, perhaps, dealing with the right of consolidation."*

I am satisfied that the Mortgage Conditions (2006 Edition) were incorporated by reference into and comprised an integral part of the terms of the Slaney Road mortgage between Mr. Noone and the bank.

67. Clause 7.2 provides: -

> *"Each Lender shall have the statutory powers conferred in mortgagees by the Conveyancing Acts as varied and extended by the Mortgage and in particular subject to the following variations and extensions that is to say:*
>
> *(a)* ..
>
> *(b) The power of sale shall be exercisable without the restrictions on its exercise imposed by Section 20 of the [Conveyancing] Act of 1881.*
>
> *(c)* ..
>
> *(d) Any Receiver appointed by a Lender under the power to appoint a Receiver shall be deemed to be the agent of the Mortgagor and the Mortgagor shall be solely responsible for the acts and defaults of such Receiver and for the remuneration and the relevant Lender shall not under any circumstances be*

answerable for any loss or misapplication of the rents and profits of the Mortgaged Property…"

The language in Clause 7(2) is sufficiently wide to vest in each lender all of the statutory powers conferred on mortgagees and same are to be found in Part 1V of the Conveyancing Act, 1881 from s. 15 to s. 25 inclusive. Said powers include the power to appoint and remove a receiver pursuant to s. 19(1)(iii).

68. It will be recalled that s. 19(1)(i) of the 1881 Act provides that the powers incident to the estate or interest of a mortgagee include: *"a power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not …"*

Land and Conveyancing Law Reform Act, 2013

69. In *The Land and Conveyancing Law Reform Acts: Annotations and Commentary*, (2nd ed., Bloomsbury Professional, 2017), J.C.W. Wylie notes that section 1 of the 2013 Act was designed to negate the uncertainty that arose from the decision of Dunne J. in *Start Mortgages Limited v Gunn* [2011] IEHC 275 in which she cast doubt on the right of mortgagees to invoke the statutory provisions in Acts such as the Conveyancing Acts, 1881-1911 and the Registration of Title Act, 1964 which had been repealed by the 2009 Act in respect of mortgages that were created prior to the 1st December, 2009. The issue arising in the *Start Mortgages* judgment arose only in respect of mortgages that predated the coming into operation of the 2009 Act on the 1st December, 2009. All subsequent mortgages are governed by the replacement provisions to be found in the 2009 Act itself.

70. The 2013 Act was signed into law on the 24th July, 2013. It is the relevant date that marks the commencement of sections 1 and 4 of the Act in particular. Sections 2 and 3 of

the Act became operative on the 31st July, 2013. This is provided by the Land and Conveyancing Law Reform Act, 2013 (Commencement) Order, 2013 (S.I. 289/2013).

71. Of particular note is s. 1(2) of the 2013 Act:-

> *"As respects a mortgage to which this section applies, the statutory provisions apply and may be invoked or exercised by any person as if those provisions had not been repealed by s. 8(3) and Schedule 2 of the Act of 2009."*

72. As Wylie points out in his annotations on s. 1 at footnote 5: -

> *"…The statutory provisions in question remain repealed but mortgagees holding pre-1 December 2009 mortgages were given the right from the 24 July 2013…to invoke them despite the Start Mortgages ruling:"*

He points out that this court in *Allied Irish Banks Plc v D'Arcy* [2016] IECA 214 so held. The Slaney Road mortgage predated the commencement of the 2009 Act on 1st December 2009.

73. I am satisfied that once section 1 of the Land and Conveyancing Law Reform Act, 2013 became operative on 24th July, 2013 it reversed, in accordance with its terms, the effect of the repeal that had taken effect under the terms of the 2009 Act of the statutory provisions - sections 2 and 18–24 of the Conveyancing Act, 1881, sections 3, 4 and 5 of the Conveyancing Act 1911 and s. 62(3), (7) and (8) of the Registration of Title Act, 1964 - for mortgages created prior to 1 December 2009.

74. Since the Deeds of Appointment of the receiver were executed several months later on the 20th October, 2013 at a point when all provisions of the Land and Conveyancing Law Reform Act, 2013 were operative and in full force and effect, the statutory provisions at issue here, and in particular the provisions of the Conveyancing Act, 1881 as amended were applicable and were amenable to being invoked or exercised, as appropriate by or on behalf of the mortgagee, as if the said provisions had never been repealed by s. 8(3) and Schedule

2 of the Land and Conveyancing Law Reform Act, 2009. The trial judge correctly analysed the position in his judgment and no basis has been identified by the appellant which would warrant interference with his analysis or conclusions in that regard.

Contract

75. Furthermore, insofar as it is relevant, the relationship between Mr. Noone, the mortgagor, and the lender was founded upon contract. In each case the mortgage contracts incorporated by reference provisions of the 1881 Act at various points. In my view, at the point of incorporation and in particular, upon execution of the said mortgages by Mr. Noone, the mortgagor, those incorporations by reference of the various provisions of statute, including the Conveyancing Act, 1881 became specific terms of the contract *i.e.* the mortgage contract. That state of affairs continued as a matter of law irrespective of the repeal of the said measures that became operative on the 1st December, 2009.

76. In that regard, Laffoy J. in *Kavanagh & Anor v Lynch & Anor* [2011] IEHC 348 in her judgment at para. 6 3.5 observed concerning the terms of a mortgage: -

> *"6 3.5 On the basis of the provisions of the 2007 Mortgage and the Mortgage Conditions to which I have referred and the contents and provisions of the documents exhibited by Mr. Lowe, I am satisfied that on the 13th May, 2010 the power of Permanent to appoint a receiver was exercisable and, further, that it was properly exercised by the deed of appointment of that date. By the combined operation of the 2007 Mortgage and the Mortgage Conditions, certain rights, remedies and powers were given to Permanent, in some instances by reference to the Act of 1881. At the time the 2007 Mortgage and those rights, remedies and powers were created, the Act of 1881 was in force. In properly construing the extent of the mortgagee's rights, remedies and powers, one must read into the 2007 Mortgage and the Mortgage*

Conditions, where appropriate, the relevant provisions of the Act of 1881 where they have been incorporated therein, subject to any variations which are expressly provided for. The fact that since the commencement of the Act of 2009, on the 1st December, 2009, ss. 15 to 24 of the Act of 1881 have been repealed cannot vary the proper construction of the 2007 Mortgage or impact on the contractual relationship of the mortgagors and Permanent, as mortgagee, thereby created. The rights, remedies and powers conferred on Permanent ab initio in the 2007 Mortgage still apply."

I am satisfied that that is a correct statement of the law.

77. Insofar as any provision in either mortgage adopted or effectively incorporated one or more provisions of the Conveyancing Act, 1881 or indeed, any other statute into the terms of the mortgage and where the language is clear that that was so done, same became freestanding contractually enforceable terms of the mortgage. Their operation was not in any way contingent upon the continued operation of the provisions of the Conveyancing Act, 1881. The statute might have been varied, amended or altered from time to time. This could not give rise to an outcome whereby the terms of the mortgage would likewise be subject to variations not contemplated by the parties. Further, in the event of repeal of the legislation, effective and valid terms in contracts of mortgage as subsisted at the date of repeal continued in full force and effect, unaffected by such repeal.

78. In that regard, there is force in the argument advanced on behalf of the receiver that the decision in *Moran & Ors. v AIB Mortgage Bank & Ors.* [2012] IEHC 322 is of relevance, where at para. 12 McGovern J. noted: -

"... the defendants argue that the parties to the mortgage should be presumed to have intended that the rights they were acquiring and the obligations they were assuming would be certain. It could not be presumed that they were willing to be

> *bound by terms which were [unknown] to them at the time the contract was concluded. In each case, the relevant Mortgage Deeds predate the commencement of the 2009 Act on 1st December, 2009. The defendants ask whether any sensible business organisation would commit itself to being bound by future changes in the law of which they had no knowledge? I think the answer to that question has to be 'no'."*

I agree with that analysis.

Upon valid incorporation of the terms of a statutory provision into a contract as between the parties, those provisions become freestanding, operative and certain terms as between the parties and not subject or amenable to change by reason of extraneous factors. This aspect of Ground 5 is not made out.

Power to appoint a receiver – second aspect of Ground 5

79. The issue is whether there was a power to appoint a receiver vested in the mortgagee under the relevant mortgage instrument. The mortgage is expressed to be *"for present and future advances"* and as stated earlier, is dated the 29th September, 2009. Clause 4 incorporates by reference the operative AIB mortgage conditions as of the said date and states: -

> *"The AIB Mortgage Conditions are hereby incorporated into this Mortgage. In the event of any conflict between the terms of the AIB Mortgage Conditions and this Mortgage, the terms of this Mortgage shall prevail."*

I am satisfied that said provision is valid and effective to incorporate the relevant mortgage conditions, (the 2006 Edition) into the mortgage agreement between Mr. Noone and the banks.

80. Clause 5.2 provided: -

"Until the AIB Mortgage Bank Release Date, this Mortgage may be enforced only by AIB Mortgage Bank and AIB shall not take any steps to enforce this Mortgage, appoint any receiver or take possession of the Mortgaged Property without the prior written consent of AIB Mortgage Bank."

AIB is defined in the mortgage as "Allied Irish Banks, plc." As stated above, AIB Mortgage Bank was discharged as charge holder in its entirety with effect from the 20th October, 2011, as is clear from the entry 8(b) at Part 3 of Folio 6964F. Thereby Clause 5.2 of the mortgage had been superseded by act and operation of law over three years prior to the execution of the instrument of appointment of the receiver.

81. In that regard, the court must have regard to s. 31 of the Registration of Title Act, 1964 which provides: -

(1) *"The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land…*"

Therefore, in circumstances where one of the dual mortgagees, AIB Mortgage Bank, ceased to have a registered interest by act and operation of law, eEntry 8(a) is conclusive evidence that the sole remaining holder of enforceable rights of the mortgagee pursuant to the mortgage instrument as and from the 22nd August, 2011 was Allied Irish Banks, plc the sole owner of the charge.

82. Of particular note is Clause 7.2 of the 2006 Mortgage Conditions, which states: -

"*Each Lender shall have the statutory powers conferred on mortgagees by the Conveyancing Acts as varied and extended by the Mortgage and in particular subject to the following variations and extensions that is to say:*

...

(d) Any Receiver appointed by a Lender under the power to appoint a Receiver shall be deemed to be the agent of the Mortgagor and the Mortgagor shall be solely responsible for the acts and defaults of such Receiver and for the remuneration and the relevant Lender shall not under any circumstances be answerable for any loss or misapplication of the rents and profits of the Mortgaged Property or any part thereof by reason of any default, neglect or breach of trust of or by such Receiver for the time being…"

83. The relevant provisions of the Conveyancing Acts, 1881-1911 incorporated by reference are worthy of note. They apply to this mortgage - as outlined above - because it was entered into and executed prior to the coming into force of the Land and Conveyancing Law Reform Act, 2009 on the 1st December 2009.

84. Part 1 (IV) of the Conveyancing Act, 1881 governs mortgages. Section 19(1) included a power, when the mortgage money has become due, *"to sell or concur with any other person in selling the mortgaged property*…" Section 19(1)(iii) implies in favour of the mortgagee: *"A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof…"*

Section 20 of the 1881 Act governs the regulation of the exercise of the power of sale by the mortgagee, including the obligation to serve notice requiring payment of the mortgage monies.

85. Section 24 of the 1881 Act governs the appointment, powers, remuneration and duties of a receiver. It states: -

"(1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to

exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same."

Thus, the power to appoint a receiver is given to the mortgagee by s. 19 to the like extent as if, in terms, that power had been conferred by the mortgage deed itself.

86. I have explained earlier that on the 1st December, 2009, the Conveyancing Act, 1881, sections 15 to 24 inclusive, were repealed by the Land and Conveyancing Law Reform Act, 2009, and noted that that it was in light of subsequent litigation, particularly *Start Mortgages v Gunn* [2011] IEHC 275, that the Land and Conveyancing Law Reform Act, 2013 was enacted. To recap, the essential effect of s. 1 of the latter Act was to provide that certain statutory provisions, such as Conveyancing Acts, 1881-1911 and the Registration of Title Act, 1964, would continue to apply to mortgages of a particular class, including those created prior to the coming into operation of the Land and Conveyancing Act, 2009 on 1st December 2009, notwithstanding the repeal and amendment of those statutory provisions by the Land and Conveyancing Law Reform Act 2009. This had the effect of reversing some provisions of the earlier 2009 Act with respect to all mortgages created before the 1st December, 2009. Section 1(1) of the 2013 Act provides: -

"(1) This section applies to a mortgage created prior to 1 December 2009.

(2) As respects a mortgage to which this section applies, the statutory provisions apply and may be invoked or exercised by any person as if those provisions had not been repealed by section 8(3) and Schedule 2 of the Act of 2009.

(3) As respects a mortgage to which this section applies the amended provisions apply and may be invoked or exercised by any person as if those provisions had not been amended by section 8(1) and Schedule 1 of the Act of 2009.

(4) Subsections (1) to (3) are without prejudice to any right or entitlement which a person may otherwise have to rely on the statutory provisions or the amended provisions.

(5) This section does not apply to proceedings initiated before the coming into operation of this section."

Subsection (6) notes that –

"…'statutory provisions' means sections 2 and 18 to 24 of the Conveyancing Act 1881, sections 3, 4 and 5 of the Conveyancing Act 1911 and section 62(3), (7) and (8) of the Act of 1964."

87. The latter provision became operative on or about the 24th July, 2013. Thus, it was in full force and effect on the date of execution of the Deed of Appointment of the receiver over 131D Slaney Road, being the 20th October, 2014.

88. I conclude for all the reasons stated above and in light of all the factors and provisions referred to above that the mortgagee did have power to appoint a receiver, contrary to the contention in Ground 5 of the Notice of Appeal. I am further satisfied that there was clear evidence before the High Court judge that the said power was validly exercised. The arguments directed to the Land and Conveyancing Law Reform Act, 2013 and the appeal in that behalf are not made out. The power of sale had validly arisen and the receiver was validly appointed as the High Court judge correctly found.

Ground 6

"*The judge erred in fact and law by finding that a decision of a judge can be indirect conflict with the words contained in a statute and same is in contravention of Article 15.2.10 of the Irish Constitution"*

89. This ground of appeal is unduly vague and was not made out by the appellant.

Ground 7 – An invalid demand

90. The appellant contends that the judge erred by finding against him in relation to the demand served prior to the appointment of the receiver and further that the judge had erred in finding that the appellant could not raise that issue as a defence. The trial judge engages with this issue, *inter alia*, at paras. 48-49 of his judgment.

91. Section 20 of the 1881 Act provided that the powers thereunder could not be exercised "unless and until" one of three alternative conditions was satisfied:

> *(i.) Notice requiring payment of the mortgage money has been served on the mortgagor… and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or*
>
> *(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or*
>
> *(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor…to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon."*

Condition (ii)

92. It is demonstrable in light of the decree obtained by AIB in October 2011 that at all material times thereafter, s.20(ii) was a condition it readily satisfied. I am satisfied that the

power to appoint a receiver was exercisable pursuant to s.24(1) of the Conveyancing Act, 1881 by virtue that at least one of the conditions to be found in s.20 of the said Act was met at the relevant date of appointment on the 20th October, 2014. The analysis at, *inter alia*, paras. 48/49 et seq. of the trial judge and his conclusions are not undermined by any ground or argument advanced in this appeal.

93. The outcome to this ground of appeal turns separately on whether the appellant had *locus standi* to pursue these issues or seek to impugn the appointment of the receiver in the first place. For the reasons stated elsewhere in this judgment in detail, I am satisfied that he did not. The formal demand was dated 14th October, 2014 and predated the appointment of the receiver. The demand was not invalid. The mortgagor never disputed its validity. .This ground of appeal fails.

Ground 8

Ground 8 contends *"the judge erred in fact and law by not addressing the issue that if the respondent was not a trustee, that he could not be entitled to possession of the properties, what type of possession the respondent was entitled to, if at all, and whether as a non-trustee he had any right to sell the properties."*

94. None of this was pleaded. Furthermore, it is misconceived. As the trial judge correctly noted at paras. 43, 44 *et seq.* of his judgment, Gilligan J. at the interlocutory stage held and ordered that the receiver was entitled to possession of both properties. This point was not raised at that interlocutory hearing. It is further noteworthy that the order of Gilligan J. was not appealed against or challenged in any way. This is a relevant factor.

95. A further significant element is that the mortgagor, on foot of whose mortgage agreement and instrument the receiver was appointed, never formally challenge the position,

including the appointment of the receiver or any subsequent step taken by the receiver in connection with the property.

96. I am satisfied that there was no legal difficulty in Mr. Fennell, as receiver, handing over possession to AIB as mortgagee in possession. AIB was entitled, quite independently of the receivership, to exercise its rights pursuant to the mortgage contract and the relevant statutory provisions outlined above to enter into possession itself as a mortgagee in possession and as such to require the receiver to give up possession. Mr. Fennell, as receiver, was agent for Mr. Noone, the mortgagor. Mr. Noone was contractually obliged to yield up and give possession of the property to the mortgagee under its terms. No issue can arise from the fact that Mr. Fennell did not sell the property but rather that the bank did so, the receiver having given up possession insofar as he held possession in that capacity, in favour of AIB to facilitate its exercise of its contractual and legal powers to sell as mortgagee in possession. The objections raised in regard to same are misconceived and erroneous.

97. Mr. Noone never raised any objection to any of these measures and steps being taken. He allowed the appellant, Mr. Gilroy, to occupy a portion of the property as licensee in circumstances which do not amount in law to the creation of any estate or interest in the property and which did not bind the mortgagee.

98. The trial judge's analysis and conclusions are correct. Thus Ground 8 of the Notice of Appeal is not made out.

Locus standi

99. With regard to *locus standi*, which is relevant to all of the grounds of appeal to varying extents, once a person in the position of Mr. Gilroy was furnished with the following information:

a) A copy of the Folio 6964F showing AIB registered as charge holder.

b) A copy of the deed of appointment of Mr. Ken Fennell as receiver.

c) A copy of the decree in proceedings 2011/1385S 20th October, 2011.

Same offered sufficient evidence, without more, as to the entitlement of the receiver to take steps in accordance with the tenor of his appointment in the relation to the property.

100. It is noteworthy that on the 25th November, 2014, Mr. Ken Fennell wrote to Mr. Gilroy, requesting, inter *alia*, that he provide details of his occupancy of the property and to identify the legal basis on which he claimed an entitlement to occupy it. No response was received to that correspondence until the 20th January, 2015 when the appellant wrote asserting that he was a tenant of the property and seeking copies of documents to show that the plaintiff had been validly appointed. He was provided with a copy of the deed of appointment under cover of a letter dated the 11th February, 2015. A further letter was sent to him on the 13th February, 2015 enclosing a copy of the deed of appointment.

101. It was demonstrable that the receiver was entitled to possession of the property and that Mr. Gilroy did not have any valid basis for refusing to yield up possession to him.

102. At all material times, Mr. Gilroy had erroneously contended that he was a tenant of the property. He demonstrably was not a tenant, as was correctly held by the High Court. The response of Mr. Gilroy on the 3rd March, 2015 referred to in the judgment of 20th April, 2016 of Mr. Justice Gilligan, wherein Mr. Gilroy asserted that neither he nor any of the other occupants were under any obligation to provide any information to the receiver regarding their status, was ill-judged. Further, it was always within in the knowledge of Mr. Gilroy that AIB had never consented to the creation of any lease or tenancy in his favour or to his occupation on any basis of the property.

103. Amongst the documentation provided to Mr. Gilroy by the receiver at the interlocutory stage in 2016 were the following:

a) The facility letter of the 18th June 2009.

b) The deed of mortgage of 29th September 2009.

c) The 2006 Edition of the Bank's mortgage conditions.

d) The judgment in proceedings 2011/1385S.

e) The proceedings leading to the said judgment.

f) Correspondence between the parties.

g) Written formal confirmation including a letter of the 6th October, 2015, confirming what Mr. Gilroy must have already known, that AIB had never consented to any lease or tenancy being granted to him in respect of the property.

h) The board resolution of the 25th June 2014 authorising that, *inter alia*, Mr. Aidan Maher and Ms. Louise Cleary be authorised signatories so as to subscribe their names as part of the sealing process to any instrument to which the seal of the bank was to be affixed.

104. Once Mr. Gilroy had possession of a copy of the relevant mortgage, he was in a position to consider Clause 6.1 (j) in light of AIB's mortgage conditions of 2006 whereby Mr. Noone had covenanted *"not to convey transfer signed demise or let or part with possession of the mortgaged property or any part thereof or any interest therein without the express prior consent in writing of AIB."* Accordingly, with effect from November 2014 in circumstances where Mr. Gilroy had possession of a copy of, *inter alia*, the deed of appointment, he had evidence before him that there was a receiver appointed over the property with power *"to enter upon and take possession of the same and in the manner specified in the security document…"* An action was successfully brought by the receiver for possession against occupants whose occupancy was not binding on the bank. At no point throughout the process did the mortgagor raise any issue as to the right of the mortgagee to

enforcement of its entitlements under the mortgage, including its right to possession and sale.

105. In general, a borrower/mortgagor cannot confer upon another a greater right than he himself possesses or has power to grant. Accordingly, as the authorities and texts such as *Fisher and Lightwood's Law of Mortgages* (15th ed., Butterworths, 2019) make clear, in the absence of any express power to grant a lease or other interest over the mortgaged property where, after the execution of the mortgage, the mortgagor purports to grant a lease or create a tenancy or other interest over the property without the privity or prior consent of the mortgagee such a tenancy or interest will exist by estoppel solely between the mortgagor and the tenant and does not bind the mortgagee. This was so held in *Alchorne v. Gomme* (1824) 2 Bing. 54. Any such rights ceased when receiver recovered possession on foot of the High Court orders made in April 2016 whereupon the mortgagor's rights ended.

106. As *Wylie on Irish Land Law* observes, citing *inter alia*, *Roulston v. Caldwell* [1895] 2 Ir. R. 136, at para. 13.66:

> *"…The mortgagor could not fetter the mortgagee's right to take possession of the land or, if he so chose, of the rents and profits of the land. The mortgagee would be bound by the lease only if he joined in granting it or if he otherwise acknowledged it in such a way as to give rise to an estoppel as against him as well as the mortgagor."*

Upon the appointment of the receiver, therefore, once the mortgagor had yielded up his possession of the property and it is clear that he did so, without challenge to the rights of the receiver from and after the 20th October, 2014 the rights of a bare licensee or permissive occupant such as Mr. Gilroy to be in occupation were at an end. His rights subsisted by estoppel as against the mortgagor but in substance were wholly void as against the mortgagee. *Alchorne v. Gomme* (1824) 2 Bing. 54 held that if an agreement in the nature of the tenancy is made after the coming into operation of the mortgage, it is valid by way of

estoppel as between the mortgagor and the lessee/occupant, but it is void as against the mortgagee.

107. In *Keech v Hall* [1775-1802] All E.R. Rep 110, (1778) 1 Doug KB 21, Lord Mansfield C.J., delivering the judgment on the 16th November, 1778, observed:

> *"The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage…The question, therefore, for the court to decide is whether, by the agreement understood between mortgagors and mortgages, which is that the latter shall receive interest and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor and wrongdoer."*

He observed:

> *"On full consideration, we are all clearly of opinion that there is no inference of fraud or consent against the mortgagee to prevent him from considering the lessee as a wrongdoer. It is rightly admitted that, if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action, but here the question turns on the agreement between the mortgagor and the mortgagee.*
>
> *…*
>
> *The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If by implication the mortgagor had such a power, it must go to a great extent to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out of false appearance. It does not induce a belief that there is no mortgage, for it is the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure when he takes a lease should inquire after and examine the title deeds."*

The court unanimously ruled that the mortgagee was entitled to judgment against the tenant.

108. In the instant case, the arrangement concluded between the mortgagor and Mr. Gilroy was neither a lease nor a tenancy and was entered into in clear breach of an express covenant in the mortgage instrument itself. The arrangement concluded, be it a license or otherwise, was void as against the mortgagee bank and the receiver.

Ground 9 – lack of standing

109. This has been considered above in detail, in the context of *locus standi* and whether Mr. Gilroy was constituted a tenant *quo ad* the mortgagee. I make the following further observations. Mr. Gilroy never had any estate or interest in the Slaney Road property - nor indeed on the evidence did he have such in relation to the Lagan Road property either. It is not necessary for present purposes to determine the precise nature of his occupancy, though it does appear to be in the nature of a licence, being with the permission of the mortgagor. A clear feature is that no rent or return for the purposes of Deasy's Act, 1860 was ever payable or paid at any time. Furthermore, the prior written consent of the mortgagor, AIB Bank, plc, to the arrangement was never obtained.

110. Despite his contentions to the contrary in the interlocutory proceedings in 2016, Mr. Gilroy did not establish at trial that he had any interest in the property and failed to establish that the relationship of landlord and tenant existed between himself and Mr. Noone. Neither did he establish that the bank had given its consent to the arrangement entered into between himself and Mr. Noone.

111. Folio 6964F demonstrated that as and from the 22nd August, 2011, Allied Irish Banks, plc was the sole owner of the charge. Since Mr. Gilroy's occupation predated the appointment of the receiver, he was entitled to evidence of the appointment of the receiver

over the property on the 20th October, 2014. As outlined above he received comprehensive evidence of same.

112. As regards ownership of the mortgage and its validity, s. 31 of the Registration of Title Act, 1964, more fully recited at para. 82 *ante* provides: -

(1) "The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon;"

113. The judgment obtained by the bank in proceedings 2011/1385S on 20th October, 2011 against Mr. Noone for €2,181,120.95 was in respect of the latter's indebtedness to AIB for monies advanced in 2009 for the acquisition of the Slaney Road and Lagan Road properties. The evidence before the High Court made three factors clear in this context. Firstly, Mr. Gilroy was allowed into possession of part of the properties with Mr. Noone's consent. This excludes the possibility that Mr. Gilroy was initially a trespasser. Secondly, the relationship of landlord and tenant never came into existence between them. Thirdly, the bank never consented to Mr Gilroy's occupation of the property on any basis. Hence Mr. Gilroy was conferred with no estate, right, title or interest in the properties.

114. At its height, Mr. Noone's evidence is consistent only with him having given a personal permission to Mr. Gilroy to enter the properties otherwise than for consideration and as such, Mr. Gilroy was then constituted a bare licensee. This came about at some unspecified date prior to the 20th October, 2014. The 2011 proceedings resulted therefore in a binding and conclusive judgment for the aforesaid sum against Mr. Noone. That judgment has stood for in excess of ten years and may not now be challenged on any basis. Neither has Mr. Noone advanced any interest in so doing. It is as such a money judgment which remains unassailable. It is clear from his evidence before the High Court that Mr. Noone was well-aware of the judgment and further that no step was ever taken by him to discharge

same or any part of same. The route for enforcement of that judgment elected for by the mortgagee in the first instance was the appointment of a receiver.

Mortgagee's Remedies and the Conveyancing Acts 1881-1911

115. Section 19(1) of the 1881 Act is applicable in the instant case and further was incorporated by reference into the mortgage. It provides:-

> *"A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further…"*

The Slaney Road mortgage was created by deed, the definition of same being derived from *Blennerhasset v. Day* [1813] Beat. 468 at p.470 *per* Lord Manners L.C., since at common law all that was required for a deed was sealing and delivery. Mr. Noone as mortgagor executed the mortgage deed and thus was bound by its terms and its covenants. Further, the said charge is deemed to be created under deed *"…within the meaning of the Conveyancing Acts…"* by virtue of s.62(6) of the Registration of Title Act, 1964, as amended.

116. Thus, the powers under the Conveyancing Act 1881 and in particular, sections 19-24 inclusive, together with the 1911 Act, vested in the mortgagees upon its execution by Mr. Noone on the 29th September, 2009, and same became exercisable when the mortgage monies became due. It can scarcely be argued that the mortgage monies had become due within the meaning of s. 19(1)(i) and (iii) at the latest when judgment was marked in the Central Office of the High Court on the 20th October, 2011.

117. Section 24(1) of the 1881 Act provides:-

> *"A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the*

power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver."

118. The fact that AIB instituted proceedings against the mortgagor, Mr. Noone, and proceeded to obtain judgment against him for a sum in excess of €2.118 million which continues to remain unsatisfied and which said judgment was never challenged or appealed is a material fact and the institution and the service of the said proceedings upon him were sufficient in the circumstances to constitute *a "notice requiring payment of the mortgage money"* within s.20(1) of the 1881 Act. Further the procuring of judgment, which remains unchallenged and unappealed, against the mortgagor, Mr. Noone, in October 2020 constituted evidence that a "default" had been made in payment of the mortgage money. The failure to satisfy the judgment on the part of Mr. Noone for a period of at least three months after service of the proceedings upon him, coupled with the judgment obtained and the fact that it remained unsatisfied as of October 2014 rendered, in the circumstances of this case, the mortgagee entitled to exercise its entitlement to appoint a receiver and entitled to assert, not alone that there was compliance with Condition 2 of s.20, but also in the alternative, compliance with Condition 1 of s.20 and that the said powers of appointment of a receiver were vested in AIB on the 20th October, 2014 and were exercisable on either alternative bases.

119. With regard to the statutory power of sale vested in AIB by virtue of s. 20 of the Conveyancing Act, 1881, it is noteworthy that a significant modification in favour of the mortgagee was included in the mortgage instrument at Clause 7.2.(b) which provided:

"Each Lender shall have the statutory powers conferred on mortgagees by the Conveyancing Acts as varied and extended by the Mortgage and in particular subject to the following variations and extensions that is to say:

(a) ...

(b) the power of sale shall be exercisable without the restrictions on its exercise imposed by Section 20 of the Act of 1881."

120. Mr. Gilroy lacks *locus standi* to challenge the appointment in circumstances where notwithstanding his contentions it was established before the High Court that he had no estate or interest in the mortgaged property. Mr Gilroy did not hold under any lease or tenancy for the reasons stated above. Even if he did it would not avail him. A lease granted by a mortgagor after a mortgage has been entered into without express power or the consent of the mortgagee is void as between mortgagee and the tenant and there is clear Irish authority for that principle since at least the decision in *Hassard v Fowler* [1892] 32 L.R. Ir. 49. Mr Gilroy has failed to identify any basis on which that finding could be reversed. The relationship of landlord and tenant never subsisted between him and the mortgagor. Neither did the mortgagee ever assent to his taking up occupation or going into possession and no written consent to a tenancy ever came into existence nor indeed, apparently was it ever sought.

Exercise of power of sale

121. It is noteworthy also that the mortgagor did not challenge the mode of sale of the property either. Section19(1)(i) of the 1881 Act conferred a wide discretion on the mortgagee regarding the manner in which the mortgage property was sold.

122. The evidence before the High Court suggested that the receiver did not sell the property but rather the bank sold as mortgagee in possession. The bank is not a party to these proceedings and at no time whatsoever did the mortgagor challenge the bank's exercise of its contractual and statutory powers.

123. Section 21(1) of the 1881 Act provides:-

> *"A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; …"*

124. At the risk of repetition, it appears to be common case that the appellant went into possession after the creation of the mortgage and at an unspecified date prior to the 20th October, 2014. It was thereby open to AIB as mortgagee to exercise the power of sale conferred by the Conveyancing Act, 1881 and the effect of doing so empowered it to convey the property freed and discharged from any rights over which AIB had priority. Mr. Gilroy had no estate and no interest in the property. Any rights he might have had were permissive in nature, as *Wylie on Irish Land Law* (6th ed., Bloomsbury Professional, 2020) observed at para. 14.64:

> *"This meant that a sale under the statutory power would 'overreach' any incumbrances on the mortgaged land created after the mortgage, such as judgment mortgages registered by creditors of the mortgagor, and the purchaser would get a good title unaffected by them."*

Citing *Lord Waring v. London & Manchester Assurance Co. Limited* [1935] Ch. 310 and *Property & Bloodstock Limited v. Emerton* [1968] Ch. 94, Wylie further observes at para. 14.65:

> *"It has been held that the statutory power is exercised once the mortgagee enters into a contract to sell the property. Once the contract comes into existence, the mortgagor loses his right to redeem the mortgage and cannot prevent the sale going through by tendering the money due under the mortgage."*

125. There is quite extensive protection given to a mortgagee who proceeds to effect a sale of mortgaged property pursuant to statute and the position is succinctly outlined in *Wylie supra* at para. 14.57, where he references the Conveyancing Acts and in particular, s.21(6) of the 1881 Act as amended by s.5(2) of the 1911 Act:

> *"The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith or of any power or provision contained in the mortgage deed."*

No Agency

126. In the course of presentation of this appeal, it appeared that Mr. Gilroy had taken on a challenge to the receivership and the exercise of powers under the mortgage, at least to some extent, for and on behalf of Mr. Noone, the mortgagor. The law does not admit of such a course of action by proxy. Mr. Gilroy appears to be acting, impermissibly, as some kind of proxy for the defaulting mortgagor who acquiesced in the 2011 Judgment and in the appointment of the receiver and the sale of the subject property by the mortgagee for the purposes of enforcement of the unsatisfied judgment obtained on 20th October, 2011 in the sum of €2,181,120.95.

127. The receiver was validly appointed. Mr. Gilroy is not an agent for Mr. Noone. Although appointed by the bank AIB as mortgagee in carrying out his functions, the respondent receiver is deemed to be the agent of the mortgagor, Mr. Noone. This is a clear statutory provision - s.24(2) of the Conveyancing Act, 1881 - and is further replicated in the mortgage instrument itself the subsection provides:-

"The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides."

128. For the above reasons, I am satisfied that the provisions of s.20 of the 1881 Act were complied with in the circumstances. The letter of the 14th October, 2014 was, strictly speaking, in the circumstances of this case superfluous as of that date the bank had an unsatisfied decree in its possession which it had held since the 21st October, 2011.

129. Accordingly, the appellant had no *locus standi* to contest any aspect of the receivership or the validity of the underlying mortgage security in circumstances where the mortgagor had acquiesced in the sale by the mortgagee. Mr Gilroy was further precluded from taking any step as he sought to do to contest the powers of the receiver. He was entitled, however, in all the circumstances to a reasonable notice or "packing up" period of a few days to vacate the premises which he clearly was afforded. Thereafter he becomes a trespasser - *O'Keeffe v Irish Motor Inns* [1978] I.R. 85 at 94 (*per* O'Higgins C.J.) and 100 (*per* Kenny J). Upon the determination of that time the receiver was entitled to an order for possession against him. Mr. Gilroy was a mere volunteer who subsequently became a trespasser who had no ground to resist the injunctive relief sought or to prevent the mortgagee requiring him to leave. He has no answer to the respondent's claims against him.

Conclusion

130. The trial judge was entirely correct in his evaluation of the relevant facts and the application of the material legal principles to same. Mr. Gilroy had no standing to defend the proceedings. I am satisfied that there was no infirmity or frailty in connection with the appointments of the receiver over the security properties. Separately, no ground or argument

advanced in this appeal has any validity. Accordingly, the appeal falls to be dismissed on all grounds.

Costs

131. The respondent having been entirely successful in resisting this appeal and no ground of appeal having succeeded, my provisional view is that the respondent is entitled to his costs of same when taxed and ascertained. If the appellant contends for a different order, written submissions identifying the basis for any alternative order and no longer than 2,000 words should be submitted within 21 days of delivery of this judgment. The respondent shall be entitled to respond on like terms thereafter. In default of such submissions being received, an order in the terms proposed will be made.

132. Murray and Noonan JJ. have indicated their agreement with the within judgment.