[2019] IEHC 797

THE HIGH COURT

[Record No. 2017/3007 P.]

BETWEEN

TOM KAVANAGH

PLAINTIFF

AND

HARRY HILLIARD AND URSULA HILLIARD

DEFENDANTS

AND

DERMOT DUFFY AND MARY DUFFY

NOTICE PARTIES

JUDGMENT of Ms. Justice Pilkington delivered on the 14th day of November, 2019

1. On the 3rd April, 2017, the plaintiff issued a plenary summons seeking orders restraining the defendants, their servants or agents from interfering with the functions and office of the plaintiff "as receiver of the properties." Other reliefs include damages for trespass and loss of rental income together with the standard reliefs of interest, further or other order and costs.

2. On the same day (3rd April, 2017) a notice of motion issued on behalf of the plaintiff seeking essentially the same reliefs (although somewhat truncated) being:-

> "An order restraining the defendants and each of them, their servants or agents from interfering with the functions and office of the plaintiff as receiver of the properties."

The identity of "the properties" is not apparent on the face of the plenary summons or the notice of motion.

3. By Order of Coffey J. on 12th March 2018 (pursuant I understand to an *ex parte* application) the notice parties, Dermot and Mary Duffy were, on their own application, joined to these proceedings.

4. This judgment is linked to and was heard with a related case entitled "The High Court, Record No. 2018/4201 P., between Dermot Duffy and Mary Duffy, plaintiffs and Tom Kavanagh and Havbell Designated Activity Company, defendants" which relate to one aspect of these 2017 proceedings. I have delivered a separate judgment in respect of the 2018 proceedings. As all matters were heard together (and particularly, in respect of the notice parties, the full facts are to be found in considering both judgments). I shall refer to those proceedings as the 2018 proceedings and these proceedings as the 2017 proceedings.

5. Within the 2017 proceedings above, a number of affidavits have been filed. The grounding affidavit of Tom Kavanagh sworn on 23rd March, 2017 states that the properties in question comprise:-

   (a) 34 Glen Easton Lodge, Leixlip, Co. Co Kildare ("the Leixlip property")
   (b) 39 Herberton Road, Crumlin, Dublin 12 ("the Crumlin property"), and

(c) 2 Woodford Cottages, Palmerstown, Dublin 20 ("the Palmerstown property").

6. The entirety of the 2018 proceedings and the role of the notice parties within these 2017 proceedings relates solely to the Palmerstown property. It is comprised within folio 117421F in the Registry of Freeholders, County Dublin. The folio records that on the 23rd July, 2008, Dermot Duffy, Mary Duffy, Harry Hilliard and Ursula Hilliard were each registered as full owners as tenant in common of a one undivided one quarter share in the property. The Duffys are the parents and parents in law of the defendants Ursula and Harry Hilliard respectively. Both are persons of advanced years and have not enjoyed good health.

7. Initially, and for a considerable period of time, the defendants ("the Hilliards") were without legal representation. However, they subsequently retained solicitor and counsel for the hearing of this application. Dermot and Mary Duffy ("the Duffys") had legal representation throughout. An application was made that Mary Duffy proceed via the appointment of a next friend and I acceded to that application.

8. The grounding affidavit of the plaintiff sets out and exhibits the background facts and circumstances as follows;

9. Pursuant to an 'Instrument of Appointment of Receiver' dated 22nd February, 2016, the plaintiff was appointed receiver by Havbell Limited (the assignee of Permanent TSB P.L.C.).

10. That instrument of appointment, after reciting deeds of transfer dated 19th June, 2015 between Permanent TSB P.L.C. and Havbell Limited, a mortgage sale agreement between the same parties, originally dated 10th March, 2015 and then amended and restated on 17th June, 2015, the seller, Permanent TSB, agreed to sell and Havbell Limited agreed to buy, *inter ali,* "all estate a, right, title, interest, benefit and obligations (whether past, present or future) of the seller in, to and under the mortgages (as defined in the mortgage sale agreement)…"

The document continues:-

> "…which included the mortgage between Harry Hilliard and Ursula Hilliard (the "borrowers") and the seller (formerly Irish Life and Permanent PLC) dated 10th April, 2003, the mortgage between the borrowers and the seller (formerly Irish Life and Permanent PLC) dated 21st July, 2003, the mortgage between the borrowers and the seller (formerly Irish Life and Permanent PLC) dated 11th February, 2005, the mortgage between the borrowers and the seller (formerly Irish Life and Permanent P.L.C.) dated 4th April, 2007 (the "Hilliard mortgages") (the "deeds of transfer")."

Thereafter:-

"We, Havbell Limited, do hereby appoint Tom Kavanagh of… to be receiver (hereinafter referred to as "Receiver") of all the property and assets referred to and comprised

in and charged by the Hilliard mortgages, to enter upon and take possession of the same in the manner as specified in the Hilliard mortgages."

11. The document has been signed on behalf of Havbell Limited by its duly authorised signatory. Issue is taken, by the defendants, as to the (proper) authorisation of the person who signed in that capacity and I will revert to this point.

12. Thereafter, the deed of transfer between Permanent TSB P.L.C. and Havbell Limited dated 19th June, 2015 discloses what is described as a mortgage sale agreement whereby Havbell Limited purchased the security interest and contractual rights of Permanent TSB under the financial documents set out in schedule one and all of the estate, right, title and interest in the properties listed at schedule two. Schedule one (the document is partially redacted, in what is now recognised as the usual form, to protect the confidentiality of other entities) discloses the six loan facilities extended to the defendants and collectively described as the Harry Hilliard Connection. Schedule one, part B sets out the various mortgages again under the heading "Harry Hilliard connection" which includes, amongst others, the properties at Leixlip, Crumlin and Palmerstown. On the same date there is also a similar deed of conveyance and assignment of the same date in respect of Registry of Deeds properties, which includes the Crumlin property.

13. As set out above the instrument of appointment of receiver recites four mortgages (collectively referred to as "the Hilliard mortgages") within the document to ground the appointment of the plaintiff receiver – however, two of those mortgages, dated 10th April, 2003 and 21st July, 2003, which both appear to relate to the property known as 145 Emmett Road, Inchicore, County Dublin have not been exhibited – they appear within schedule two of the deed of transfer as part of the mortgage documentation held in respect of the Harry Hilliard connection as defined within that document. The only mortgages specifically exhibited in respect of this application are those of 4th April, 2007 which appears to deal with the properties at Leixlip and Crumlin and the mortgage of 11th February, 2005 relating to the Palmerstown property.

14. By letter dated 23rd June, 2015, Capita Asset Services wrote to the defendants informing them that they have been appointed by Havbell Limited to provide various loan and management administration services. New account details are furnished. No such letters are sent to the notice parties.

15. In respect of the documentation approving the provision of loan facilities to the defendant, the first is the documentation constituting the loan approval from Irish Life and Permanent P.L.C. In respect of each loan offer, there is a document entitled "acceptance of loan offer" where both parties sign a document which states, amongst other matters, that the entirety of the loan offer is being accepted by the defendants on the terms and conditions set out in (a) letter of approval, (b) the general mortgage loan approval conditions, and (c) the Irish Permanent Mortgage Conditions. Within the documentation relied upon and exhibited by the plaintiff (c) is not exhibited to any of the mortgages or at all.

16. The premises at Leixlip and Crumlin are part of the security furnished in respect of a letter of approval from Permanent TSB commercial division in respect of a credit advance in excess of €1.1 million. At para. 13 of the loan approval, security for the facility requiring a first legal charge over in four named properties including Crumlin and Leixlip. This document was signed by the Hilliards on the 20th February, 2007.

17. In respect of the Leixlip and Crumlin properties, the charge is dated 4th April, 2007 and executed by the Hilliards. This document states at clause 7:-

> "This indenture incorporates the clauses set out in Permanent TSB Mortgage Conditions 2002 (herein called "the mortgage conditions") and the mortgagor and guarantor (if any) ACKNOWLEDGE RECEIPT of the mortgage conditions which they have read and understood and they covenant with Permanent TSB to observe and be bound by the mortgage conditions."

No 2002 Permanent TSB Mortgage Conditions have been exhibited by the plaintiff (or any mortgage conditions). There is a document of the same name exhibited to the affidavit sworn by Harry Hilliard. The mortgage and charge is, as with the letter of loan approval, in respect of four named properties – the Leixlip property appears to be comprised within folio 5364L of the register of leaseholders county of Kildare. The Crumlin property appears to be unregistered and is described as:-

> "All that plot or parcel being part of the lower commons of Kilmainham on which the house and premises formerly known as No. 1 Springfield Terrace but now known as No. 39 Herberton Road, Rialto in the city of Dublin together with a right of way…."

18. In respect of the Leixlip premises, the affidavit of Elaine McNalley sworn on the 31st October, 2018 exhibits a complete copy of that document disclosing the registration of the Hilliard's as full owners on 13th July, 2006 and the registration of the charge in favour of Irish Life and Permanent P.L.C. on the 17th day of October, 2007.

19. In respect of the Crumlin property, the charge has been stamped as being registered in the Registry of Deeds on 8th June, 2007.

20. With regard to the Crumlin property, very little is specifically deposed to in respect of it. There is the averment of the plaintiff that Chartered Assets Property Asset Management attended the property and exhibits a property status report date 3rd March, 2016 (almost a year prior to the swearing of the plaintiff's grounding affidavit). In any event, the document essentially states the property to be occupied by the defendants' son and any evidence with regard to any tenancy or payment of rent and other matters is simply marked as "unknown". Apparently, the defendants' son advised that the subject property was his family home and it is no longer in receivership and is being rectified via his barristers and solicitors. Apparently, thereafter, he contacted the office and advised that he would not be cooperating with Chartered Assets or the receivership.

21. The only other matter is an affidavit which was handed into court after the hearing of this application, being a supplemental affidavit of the plaintiff sworn on the 18th day of January, 2019. That affidavit avers that the plaintiff receiver receives no rental income whatsoever from the Crumlin premises or the Palmerstown premises (no explanation of an entitlement of this plaintiff to receive the entirety of rental income from this property is dealt with). However, in respect of the Leixlip property, the plaintiff has received €38,775.00 in rental income from Kildare County Council. This is consistent with the averments of the first named defendant in his sixth affidavit sworn on 6th November 2018 where he assets that the plaintiff is in receipt of the rent from a lease to a private tenant under the R.A.S. scheme administered by South Dublin County Council. Why the correct position could not be confirmed by the plaintiff at the hearing and not subsequently is unknown.

22. Accordingly, it appears that the Crumlin property may or may not be tenanted, may or may not still have the defendants' son residing within it. It appears to be a non-income generating asset and nor has there been any cooperation by the defendants in respect of this property vis-à-vis the plaintiff receiver.

23. The first named defendant, on behalf of himself and his spouse, has sworn a myriad of affidavits within these proceedings, a number before he obtained legal representation. He specifically takes issue with various matters surrounding the appointment of the plaintiff receiver. Some have, correctly in my view, not been relied upon by his counsel in this application.

24. With regard to the Palmerstown property, para. 15 of the plaintiff's grounding affidavit states the following:-

> "On or about the 23rd day of July, 2008, the defendants were registered as full owners as tenants in common of one undivided one quarter share of… in folio 117421F of the register of freehold interest, county Dublin. The bank's charge was registered on 23rd July, 2008. The owners registered at entry 2 and 3, being the tenants in common holding the balance of the undivided shares in the property, <u>were also indebted to the plaintiff herein.</u> Your deponent was appointed receiver over their interest in the property on January 20th, 2017. The plaintiff seeks no orders <u>at this time</u> as against the owners registered at entry 2 and 3 of folio 117421F" (my emphasis).

The folio entry at 2 and 3 in folio 117421F are the notice parties, the Duffys. No evidence of their indebtedness to the plaintiff is exhibited, indeed the documentary evidence suggests that no such indebtedness exists. Beyond a clear assertion by the plaintiff's counsel that no orders are being sought against the notice parties, no further clarification has been forthcoming. The appointment of the receiver referred to above on 20th January 2017 is not exhibited within these proceedings but is exhibited and dealt with within the 2018 proceedings.

25. Folio 117421F discloses the registration on 23rd July, 2008 of the defendants and the notice parties as tenants in common of one undivided one quarter share respectively and the entry by charge in favour of Irish Life and Permanent P.L.C. dated 23rd July, 2008 (in respect of the Hilliards only) and a further charge on 18th February, 2009 again in favour of Irish Life and Permanent P.L.C. in respect of the Duffys only. In respect of the entry of the charge in favour of the Duffys of 18th February, 2009, on 15th July, 2015, there are two entries on the folio by Havbell Limited stating that it is the owner of the charge registered at entries 2 and 3 respectively (the registration of the respective notice parties herein).

26. In respect of the Palmerstown property, the documentation discloses:-

(a) A letter of offer of 1st February, 2005 whereby the defendants accepted a loan of €250,000.00.

The acceptance of loan offer (dated 7th February 2005) in respect of the Palmerstown property states that it comprises (a) letter of approval, (b) the general mortgage loan approval conditions, and (c) the Irish Permanent Mortgage Conditions. Interestingly, the Hilliards in executing the loan offer, which within clause 2 states as follows:-

> "We hereby state that no third party (whether a person or persons or body or bodies) has or claims any financial, equitable or beneficial estate or interest in the property…"

That is incorrect, but it is clearly signed by the Hilliards (and appears to be witnessed by their solicitor who also acted for the Duffys).

(b) It appears that the same firm of solicitors acted throughout for the Hilliards and the Duffys. This letter of offer is clear in that the amount of the loan is set out at €250,000.00 in a property having an estimated value of €315,000.00. Nowhere in the acceptance of loan offer signed by the Hilliards do they refer to the interest of the Duffys in this property.

27. The charge dated 11th February 2015 in respect of folio 117421F executed by the defendant is in turn referable to the Permanent TSB Mortgage Conditions 2002 which are not exhibited. Clause 2 states:-

> "The mortgagor, the registered owner as beneficial owner hereby charges the property described in the Second Schedule…"

The second schedule clearly states that the entirety of the Palmerstown property is mortgaged upon an advance of €250,000.00. The document is executed by the defendants and witnessed by their solicitors.

28. The next document, undated, is an indenture of confirmation executed by the Duffys and again witnessed by their solicitors. It is stated to be supplemental to the indenture of mortgage and one of the recitals states that it is apprehended that the beneficiary

(unnamed but signed by the Duffys as beneficiaries) may have some beneficial estate, right, title or interest in the property and at recital C states as follows:-

> "The beneficiary at the request of the mortgagor has agreed to execute there presents for the purpose of confirming the within Indenture of Mortgage and further assuring the property to Permanent TSB as security for the present and future advances and other monies secured by the Mortgage."

The indenture states:-

> "The beneficiary as to all (if any) of his beneficial estate, right, title and interest therein as beneficial owner HEREBY GRANTS, CONVEYS AND CONFIRMS unto Permanent TSB ALL THAT AND THOSE so much of the property (save any part of the ownership whereof is registered in the Land Registry) as is of freehold tenure TO HOLD the same unto Permanent TSB in fee simple subject to the proviso for the redemption contained in the within indenture of mortgage."

The deed continues:-

> "The beneficiary as to all (if any) of his beneficial estate, right, title and interest therein as beneficial owner HEREBY CONFIRMS THE CHARGE created by the within indenture of mortgage on so much of the property the ownership whereof in the case of freehold property is registered with the Land Registry and in the case of leasehold property the leasehold interest whereof is registered in the Land Registry as security for the monies secured by the mortgage."

Thereafter:-

> "The Beneficiary hereby further acknowledges that all powers, remedies and rights of Permanent TSB under the provisions of the within indenture of mortgage or implied by statute in the within indenture of mortgage shall be exercisable by Permanent TSB without notice to the beneficiary and notwithstanding anything contained in these presents, the Beneficiary shall not be deemed to have any rights of a mortgagor in respect of the property."

29. As set out above, the plaintiff, having been appointed receiver on 22nd February, 2016, by letter dated 14th March, 2017, solicitors on his behalf wrote to the defendants seeking possession of the three properties set out above (possession of the entirety of Palmerstown is sought). The letter clearly states that should they fail to do so, injunctive relief will be sought.

30. It was arising from these matters that the Duffys sought (somewhat unusually) to be joined independently on an *ex parte* application as notice parties. They did so upon the basis that orders might be made against them in circumstances where they had a beneficial interest in the Palmerstown property.

31. I have set out above the documentation exhibited by the receiver in respect of the Palmerstown property and the various issues that arise in relation to it. However, that is not the complete picture. Within the affidavit grounding the *ex parte* application to be joined by the Duffys and indeed within their 2018 proceedings, additional documentation has been exhibited which has not been exhibited by the plaintiff, nor dealt with by him, within these proceedings.

32. I have already dealt with the mortgage executed by the Hilliards on 11th February, 2005 and the indenture of confirmation executed by the Duffys on the same date. However, on the 11th February, 2005, the Duffys executed one further document, specifically a charge in identical terms to that executed by the Hilliards. I reiterate that they executed a charge (not a guarantee and not any other documentation). The mortgage is clear in its terms. Clause 1 states:-

> "The sum initially advanced on foot of the this security is set out in the first schedule, the receipt thereof is hereby acknowledged by the mortgagor."

The sum set out in the first schedule is €250,000.00.

33. Clause 2 states:-

> "The mortgagor, the registered owner as beneficial owner, hereby charges the property described in the second schedule hereto with the payment to Permanent TSB of all present and future advances payable by the mortgagor to Permanent TSB under the mortgage conditions, and the mortgagor hereby assents to the registration of the said charge as a burden on the property hereby charged...."

Clause 7 of the document again references the Permanent TSB Mortgage Conditions 2002 and they are not exhibited.

34. The only difficulty is that Dermot Duffy and Mary Duffy, who had solicitors acting for them throughout this conveyancing process, never appear to have borrowed any funds from Permanent TSB. It is quite clear on the basis of the documentation contained within the various affidavits that Permanent TSB extended one loan facility of €250,000.00. They did not extend €250,000.00 to the Hilliards and €250,000.00 to the Duffys. Thus, we have an extraordinary situation where the Duffys executed a mortgage acknowledging a borrowing of €250,000.00 in their name. The factual position appears to be at variance with this document.

35. Thus, on the 11th February, 2005, the Duffys signed two documents:-

(a) The indenture of confirmation as annexure to the mortgage executed by the Hilliards – the indenture of confirmation does not appear within the Duffys' documentation but it is clearly exhibited by the plaintiff receiver within his documentation, and

(b) On the same, they executed a mortgage acknowledging receipt of a mortgage in the sum of €250,000.00.

36. No submissions were advanced as to how these documents might be reconciled.

37. Whilst the plaintiff receiver sets out that he was appointed receiver over the Duffys' interests, pursuant to the registration of charge by them in favour of Permanent TSB, in a deed of appointment of 20th January, 2017, the document is only to be found within the 2018 proceedings. Within the recitals, it states that under the security documents within this instrument that a power to appoint a receiver had become exercisable and that in pursuance of the powers concerned within the security documents, Havbell appointed Tom Kavanagh to that position. The security documentation or schedule sets out the mortgage and charge dated 11th February, 2005 between Dermot Duffy and Mary Duffy of the one part and Irish Life and Permanent P.L.C. of the other part in respect of the premises within folio 117421F of the Register of Freeholders, County of Dublin.

38. Again, we have an inherent contradiction. In the initial appointment of receiver dated 22nd February, 2016, the mortgage to the Hilliards in respect of Palmerstown is referenced, but without any qualification. Those acting for the plaintiff have been emphatic throughout in extending a measure of sympathy to the Duffys and equally emphatic in emphasising that they are seeking no reliefs against them.

39. However, in respect of Palmerstown, the plaintiff is now on notice as I set out above, that the Duffys executed a number of documents on the same day. The legal implications of this documentation remains to properly explained. In particular this, in my view, raises issues (and it may be at the hearing of this matter that all matters can be properly clarified) as to how the plaintiff's reliance upon an indenture of confirmation is to be 'squared' with what appears to be a simultaneous execution of a deed of mortgage by the Duffys (on foot of which charges were registered against Palmerstown). In short this plaintiff will have to satisfy a court as to its legal entitlements over Palmerstown in light of the totality of documents held, as disclosed by the Duffys in this and the 2018 proceedings. Also the averment of this plaintiff that the Duffys owe monies (paragraph 15 of the grounding affidavit) must clarified.

40. Whilst, as set out above, the Hilliards (through Mr. Hilliard), prior to their obtaining legal representation, filed a number of affidavits in respect of this matter. A number of the issues that they raised within those affidavits (some of which were replied to in detail by the plaintiff in his second affidavit) were not proceeded with at the hearing of this application. Two points, however, were pressed strongly. The first, being the authority of entitlement for the appointment of the plaintiff as receiver and particular emphasis is placed on the case of *McGarry & anor v. O'Brien* [2017] IEHC 740 and also as to the entitlement or more accurately authority of the signatory to the deed of appointment as receiver, Ms Aisling McNicholas as the duly authorised signatory of the deed of appointment.

41. Regarding the capacity of Ms. McNicholas, the affidavit of Karl Smith sworn on the 11th January, 2018 states Ms. McNicholas signed the deed of the appointment of the plaintiff as receiver and that "she did so with the full authority and consent of Havbell DAC as its authorised signatory."

42. It is noteworthy that the instrument of appointment of receiver itself, dated 22nd February, 2016 in fact is an appointment by Havbell Limited, not Havbell DAC. Mr. Smith avers that as a director of Havbell DAC, he was the charge holder who appointed the plaintiff as receiver of the subject properties. It is not clear to me and there is no evidence before the court of when Havbell Limited became Havbell DAC.

43. The case upon which the defendants rely as set out above in which Stewart J. finds as a fact that:-

> "In his affidavit of 31st May, 2017, Mr. Smith averred that Havbell Ltd converted to Havbell DAC on 16th September, 2016…. The defendant was appointed on 23rd September and the conversion occurred on 29th September. Therefore, it is the constitution of Havbell Ltd that was in force at the time Mr. Smith executed the deed of appointment."

44. Whilst, Mr. Smith correctly, as a director of Havbell, states that he is deposing on affidavit to clarify matters solely with the knowledge of Havbell DAC as opposed to the plaintiff states clearly at para. 4:-

> "To that end I say and believe that when Aisling McNicholas signed the deed of appointment of the plaintiff as receiver over the properties of the defendants, she did so with the full authority and consent of Havbell DAC as its authorised signatory."

45. Mr. Smith in his affidavit does not clarify and I cannot find documents which assist me as to when Havbell Limited "became" Havbell DAC, but relying upon the matters in the judgment of Stewart J. and noting that there is no doubt but that the instrument of appointment of the plaintiff receiver is dated 22nd February, 2016, there would appear to be a difficulty in the designated authorisation of Mr. Smith. If I am correct in the matters set out above, then the duly authorised signatory would have to be authorised by Havbell Limited prior to it becoming Havbell DAC. I have no doubt that that position can be readily clarified but until that has occurred, it would be unwise, particularly given the specific averments of Mr. Smith, to assume the authorisation of Ms. McNicholas given that there appears to be some confusion as to the entity who would have so authorised it.

46. In the case of *McGarry*, as cited above, being an application by plaintiffs seeking interlocutory relief against a defendant receiver. Within that case the plaintiffs submit that the receiver's powers are set out within the Conveyancing Act, 1881 – 1911, save where they are modified by the 2002 Mortgage Conditions. They argue that taking these matters in concert that there is insufficient to empower a duly appointed receiver to take possession, sell or dispose of the property. The defendant for his part relies upon the Clause 6 of the mortgage documentation and also on the decision of Laffoy J. in *Kavanagh & anor. v. Lynch & anor.* [2011] IEHC 348. As I construe that case, in essence, Stewart J. had an issue as to the board approval by Mr. Smith in the appointment of the receiver. In the view of Stewart J., the decision of Laffoy J. in *Kavanagh* by virtue of different documentation raised a fair question to be tried with regard to the validity of the

appointment of the defendant. In my view, the facts of this case are more analogous to the decision of Laffoy J. in Kavanagh in that, in my view, one must construe the terms of the mortgage documentation coupled with the express provisions of the Conveyancing Act, dating 1881 – 1911 which encompasses the facts and arguments contended for within this case.

47. However, for the reasons I am about to set out, I do not believe it appropriate for me to issue a concluded view or decision in that regard. Within the pleadings, it is very clear that this matter proceeds by notice of motion in the terms that I have set out at paragraph 2 above. That notice of motion specifically references the grounding affidavit of the plaintiff sworn on the 23rd March, 2017. Within the submissions advanced by the plaintiff, the form of relief sought is drafted differently. However, I am proceeding upon the notice of motion opened to me.

48. One point is striking. The motion issued the same day as the plenary summons and, in my view, is an effort, perhaps in part only, to ensure that the matter proceed to some form of summary judgement in respect of the properties. On the facts of this case and the issues that have arisen that is regrettable.

49. In my view had the plenary proceedings proceeded, many of the matters (particularly with regard to Palmerstown) could have been clarified and distinguished at an earlier stage, had there been a proper exchange of pleadings between the parties. Thereafter, discovery would, in my view, have served to further served to clarify the position. In this case after the issue of a plenary summons there was an exchange of extensive affidavits and the position remains, in my view, to be properly clarified.

50. I appreciate that counsel for the plaintiff in his submission suggested that the plaintiff receiver was acutely aware of the position of the Duffys and suggested that the plaintiff receiver would not do anything to their detriment without firstly seeking a court order. There was even a suggestion that the rental monies would continue to be paid to them pending resolution of all of the issues with regard to their interest in Palmerstown.

51. This, amongst other matters, is the reason why, in my view, it would be inappropriate on the very specific and unusual facts of this case, to grant the form of interim/interlocutory reliefs sought. If any form of summary type judgement is to be sought, then, in my view, it is incumbent upon the plaintiff to ensure that all of the documentary evidence is properly before the court. In this case, a number of the mortgages cited in the indenture of appointment of receiver were not exhibited nor clarified. I appreciate that that clarification may be straightforward but, in my view, all of the matters must be set out in full. More importantly, the 2002 Mortgage Conditions upon which this plaintiff must, in my view, rely for his appointment as it is within those conditions that the entitlement to appoint the receiver resides was not exhibited by the plaintiff. The mortgage conditions were, it appears, exhibited by the first named defendant but, as a minimum, I would require confirmation from the plaintiff that these constitute the documentation upon which they rely.

52. Moreover, the indenture of appointment of receiver appears to have been executed on behalf of Havbell Limited – the document on its face is entirely clear in that regard. Mr. Karl Smith, in his averments seeking to deal with the question raised by the defendants as to the status of the duly authorised signatory Ms. McNicholas, states that she did so with the authority of Havbell DAC. I appreciate that Mr. Smith was swearing the affidavit on behalf of that entity, but his averment that Havbell DAC sanctioned the entitlement or authorisation of Ms. McNicholas to execute the documentation does, I would suggest, require clarification. Again, that may be a straightforward matter, but I again reiterate that it is incumbent upon any plaintiff who issues plenary proceedings and then moves to immediately seek substantial summary type relief to, within the affidavits and exhibits, to set out all matters with great clarity and specificity. In my view, that has not occurred in respect of certain aspects of this case.

53. I appreciate the averments of the plaintiff and the submissions of his counsel that they recognise the difficulty and special position of the Duffys. However, in my view, they have insufficiently examined the matters of which they are now on notice with regard to the Duffys and have dealt with this in more detail in my judgment with regard to the proceedings issued by the Duffys (the 2018 proceedings). The solicitors for the plaintiff did issue a letter seeking possession of the subject premises and did not, within that letter, in any way seek to differentiate or clarify the position with regard to Palmerstown. Nor was any separate correspondence issued to the Duffys in that regard. In short, the plaintiff has failed to satisfy this Court as to his entitlement to proceed against the Hilliard's moiety interest in the Palmerstown property, again in the unique and special circumstances of this case. The reason is not because of that moiety interest but rather that the plaintiff (through Havbell DAC) are now on notice of matters which, in my view, require clarification before this plaintiff can proceed. In short, there are significant unique matters that arise with regard to Palmerstown which remain outstanding.

54. If it is the position, as counsel for the plaintiff has helpfully outlined, that it is envisaged that the Duffys would retain their rental monies until the plaintiff had ascertained the position further then, in my view, there can be no loss to that plaintiff in not granting the interlocutory reliefs pending a trial of this matter which will enable and afford him time to properly clarify the position with regard to that property. With regard to the Leixlip property, the rent is, as was belatedly confirmed by the plaintiff, being received by him, then again for the moment I do not think his position is prejudiced in that regard. With regard to the Crumlin property, it appears that the defendants have not been cooperating with the plaintiff receiver, that is regrettable, and they would have to proceed with caution. That of course is a matter for their advisors but their attitude to date has been noted.

55. In my view within this application, for the reasons set out above, the plaintiff has not dealt comprehensively with all matters. In my view that militates against this Court awarding what is in essence a form of summary judgment within plenary proceedings. I am especially reluctant to do so where the notice of motion issued on the same day as the plenary summons. There was no time afforded for any exchange of pleadings before

the notice of motion issued. As I say, in my view, on the facts of this case, the plenary procedure could well have been of significant assistance in seeking to clarify the matters prior to expending significant resources in seeking interlocutory relief in circumstances where significant matters remain outstanding and still require clarification.

56. The plaintiff's notice of motion is refused for the reasons as set out above. I would welcome submissions by the parties as to a timetable for an expedited hearing of this matter, once the parties have had time to consider their respective positions. Accordingly, I will hear the parties as to any subsequent orders that might be made on the facts of this case including any orders as to costs.