

THE HIGH COURT

[2022] IEHC 311
[2021/75 P]
[2021/76 P]
[2021/77P]
[2021/78 P]

BETWEEN

KEN TYRRELL AND EVERYDAY DESIGNATED ACTIVITY COMPANY

PLAINTIFFS

AND

MICHAEL MULLIGAN

DEFENDANT

JUDGMENT of Ms. Justice Nuala Butler delivered on the 25th day of May, 2022

Introduction

1. There is a certain sense of *déjà vu* regarding the facts of this case which are common to many cases appearing in the Chancery List. The defendant borrowed money for the purpose of purchasing residential investment property and is now in default in respect of these loans. The loans and the default are not, in principle, disputed, although the defendant disputes certain other matters including the amounts now outstanding. The lender appointed a receiver over the properties which were secured by various mortgages and then transferred the defendant's loans to another entity. In this case, the defendant's loans were transferred to the second plaintiff and the first plaintiff is the receiver appointed by the original lender. The properties are tenanted and the receiver has sought, unsuccessfully, to have the defendant direct the tenants to pay the rent directly to him in the course of the receivership. The plaintiffs have issued proceedings seeking permanent

injunctive relief to restrain the defendant and anyone having notice of the order from trespassing on or occupying the property or otherwise interfering with the receivership and directing the defendant to hand over to the first plaintiff all keys, alarm codes and other access devices to the property. Apart from damages, identical relief is now sought on an interlocutory basis.

2. Although these facts are similar to many such cases, there are, as always, some particular features of the cases at hand. Firstly, this judgment concerns four separate applications brought by the plaintiffs in respect of four different buy-to-let properties in respect of which the defendant has outstanding loans and the first plaintiff has been appointed receiver. For the most part, the terms of these loans are similar, if not identical, and any relevant differences will be identified in the course of this judgment. The applications brought by the plaintiffs are identical in all four cases as is the defendant's response.

3. Secondly, although the defendant admits the fact of the loans and the default, he has, over a considerable period of time, maintained that the original lender overcharged him on these loans. The original lender – whom I will refer to as AIB, although, as will be seen, there were in fact, a number of different AIB companies involved – instituted two sets of summary proceedings against the defendant in 2016. The defendant claims that, in his affidavits replying to the summary proceedings, he raised the issue of overcharging but rather than engage with him on this issue, the AIB purported to appoint the first plaintiff as receiver over his properties. As it transpires, AIB subsequently accepted that the initial appointment of the first plaintiff in 2016 was invalid, and a deed of discharge was executed immediately prior to the first plaintiffs' re-appointment as receiver by AIB in February, 2019. As I understand it, the 2016 proceedings are still extant and have not been progressed much since the initial purported appointment of a receiver.

4. Thirdly, the defendant also claims that documents signed by him in 2010 purporting to re-finance two loans taken out by him in 2005 were presented to him and signed by him as documents related to his life insurance in respect of the 2005 loans. Consequently, he raises the plea of *non est factum* in respect of the 2010 loans, the terms of which differ materially from the 2005 loans in certain respects. This issue was not canvassed extensively on this interlocutory application as the defendant accepted, correctly in my view, that the properties were mortgaged on an “*all sums due*” basis and consequently the relief sought by the plaintiff on an interlocutory basis could be sought by virtue of an entitlement to appoint a receiver under other loans in respect of the same properties. The defendant reserves the right to pursue this issue in the substantive proceedings.

5. The plaintiffs seek injunctions on the basis of the principles discussed by the Supreme Court in *Merck Sharp and Dohme v. Clonmel Healthcare Ltd* [2019] IESC 65. They contend that they have established a fair question to be tried and that the balance of justice must favor the plaintiffs in circumstances where, as the defendant has already defaulted on repayment of his loans, he will be unable to meet any award of damages that might be made in the plaintiffs’ favour. The defendant raises a number of grounds disputing the validity of the transfer of the loans to the second plaintiff and contending that the appointment of the first plaintiff as receiver was invalid.

6. The plaintiff argues that the grounds raised by the defendant are purely technical ones, to which no great weight should be afforded in circumstances where the loans and their default are admitted. Whilst it may be fair to characterise the defendant’s arguments as technical, I do not think that this should affect the approach of the court to them. The relationship between the parties is one founded on contracts originally entered into between the defendant and AIB. Insofar as the plaintiffs now claim to be entitled to relief pursuant to those contracts, they must firstly establish this entitlement as a matter of law, and secondly, show that they have complied with the relevant

terms of the contracts as a matter of fact in order to be able to rely on whatever such entitlement exists. Throughout this application, the defendant has expressly placed the plaintiffs on strict proof save to the limited extent that matters are admitted in the defendant's affidavit. In my view, the defendant is entitled to adopt this approach and the onus is on the plaintiffs to satisfy the court of their entitlement to the relief they now seek. I should also acknowledge that in addition to not pursuing the *non est factum* argument at the interlocutory hearing, the defendant did not pursue certain extremely technical pleading points which had been raised in his affidavits.

7. However, I do not accept an argument made by counsel for the defendant that because in moving the application counsel for the plaintiff did not open the affidavits in full (or indeed at all), then no evidence had been proffered by the plaintiffs to the court to discharge the onus of proof which lies on them. Both sides in this case were represented by experienced counsel who would have been aware that the case was assigned to me as trial judge some days prior to the hearing and that the papers lodged in court are also provided to me in advance of the hearing. In those circumstances, the normal practice is for the court to have read the papers and written submissions before the case is opened. Certainly, if I have not had a chance of doing so, I let the parties know and expressly invite the opening of the papers to the extent that I have not already read them. I do not equate the defendant putting the plaintiffs on full proof of their claim with the imposition on them of an obligation to formally open all affidavits and to read those affidavits and their exhibits into the record. This evidence is all before the court. It was, as the plaintiff stated, a more efficient use of the court's time to allow the parties to make their arguments on the correct assumption that I was already familiar with the pleadings and affidavits.

8. The balance of this judgment deals with the various issues raised by the defendant in response to the plaintiffs' applications. As will become apparent, the conclusions I have reached on one of the main issues raised means that my views on the other issues are essentially *obiter*.

Applicable Test

9. At the outset, the parties disagreed as to whether the applicable threshold test which the plaintiff must meet is the standard *Campus Oil v. Minister for Energy* one of a "fair question to be tried" or the higher *Maha Lingham* test applicable when mandatory relief is sought on an interlocutory basis. The higher test requires the plaintiffs to establish a "strong case". The notice of motion seeks four injunctive reliefs, two of which are expressed in prohibitory terms (i.e. they seek orders restraining the defendant and others from doing certain things) and two of which are expressed in mandatory terms (i.e. they seek orders directing the defendant to deliver up or to provide certain things). It is, however, probably fair to regard the first two reliefs, which are expressed in prohibitory terms, as going to the core of the plaintiffs' application. The other two are really ancillary to the first two and are unlikely to be granted (or even useful) unless the first two are also granted.

10. The defendant argues that the fact relief is expressed in prohibitory terms is not determinative of whether it is mandatory or prohibitory. The test is one of substance and not of form. The court must look to the effect of the relief sought to determine whether it is truly prohibitory in nature. As the same relief can often be framed in both prohibitory and mandatory terms, the distinction is not always easy to draw. It is nonetheless an important distinction as courts are generally reluctant to grant mandatory interlocutory relief requiring the enjoined party to take positive steps before his liability to do so has been determined by a court following a full hearing

of all of the evidence. Consequently, as Fennelly J. put it in *Maha Lingham v. HSE* [2006] 17 ELR 137, in order for a court to grant mandatory interlocutory relief, it is necessary to show “*a strong case that [they are] likely to succeed at the hearing of the action*”.

11. The defendant also argues that where the grant of relief would materially alter the *status quo*, then it should be treated as a mandatory application. Here, the plaintiffs have not taken possession of the properties and the defendant contends that the grant of the relief sought would operate so as to effect a transfer of possession from the defendant to the plaintiffs. I note that, in *McCarthy v. Moroney* [2018] IEHC 379, where somewhat similar interlocutory injunctive relief was sought to restrain the defendants from impeding a receiver from taking possession of property, McDonald J. regarded counsel for the defendants as having been “*undoubtedly correct*” in conceding that the relief was in substance mandatory such that the higher threshold applied. Although similar, that case is not exactly on all fours with this. The defendants in *McCarthy* were not just in possession of, but also in occupation of, the lands in issue. The relief sought expressly referred to the defendants being restrained from impeding the receiver taking possession of the property. Thus, the grant of the relief requiring those defendants not to interfere with the receiver taking possession of the property necessarily meant that they would have to leave the premises of which they were in occupation.

12. Here the properties are currently occupied by tenants. Whilst legally possession and occupation are distinct concepts, on a very basic level restraining the defendant from interfering with the receiver would not necessarily result in any alteration in the occupation of the premises. However, the relief is directed not only at the defendant but also seeks to restrain “*anyone acting in concert with him or anyone having notice of the order*” from trespassing on or occupying the properties. Although the notice of motion does not expressly refer to the first plaintiff taking

possession of the property, it is implicit in the way in which the relief is framed that this is what is envisaged. If there were any doubt, it is dispelled by the averments of the first plaintiff to the effect that the balance of convenience favours the grant of relief as it “*will ultimately facilitate the sale of the property*”.

13. Although the effect of the orders, if granted, would require the tenants currently in occupation to vacate the properties, the tenants were not put on notice of these applications. Counsel for the plaintiffs, rather delicately, indicated that this was something of which the court would have to take account in making the orders. In his reply, the concession went further and counsel acknowledged that the court would have to limit any relief granted so as to exclude the occupants of the properties. Given that the defendant is not in occupation of any of the properties, this concession renders the first relief largely moot. However, it would seem that the concession was made due to the fact that the tenants were not on notice of the application rather than being due to an acceptance that the relief as originally framed was mandatory in nature.

14. In response to the defendant’s argument on the appropriate test, the plaintiffs emphasise that the reliefs seek to restrain the defendant from interfering with the receivership or receiving rents from the tenants. Although perhaps implicit, the latter is not actually mentioned at all in the reliefs as framed. The plaintiffs did not accept the proposition that an alteration in the *status quo* was indicative that relief which would effect such an alteration was mandatory in nature. Further, they disputed whether such an alteration would in fact occur where the defendant, as landlord, is not actually in possession of the properties. Finally, the plaintiffs argued that even if the relief was mandatory, such that the higher threshold test applies, if the court were to accept that their proofs are in order, then they would in any event have made out a strong case and, thus, have met that threshold.

15. As a matter of principle, an interlocutory order which restrains interference with a receivership is not generally mandatory in nature. If the intended effect of the relief is to prevent a defendant from interfering with the relationship between the receiver and those in occupation of the properties and to ensure that rent paid by the tenants is collected by the receiver, then such relief is properly characterised as prohibitory. However, if the effect of an interlocutory order is to impose on a defendant a fundamental change in the title to, or ownership of, a secured property, then it does represent a significant alteration in the *status quo* and in my view can fairly be considered as being mandatory. These are not absolute rules and much will depend on the particular circumstances of each case as the effect of the orders sought has to be assessed by reference to their likely effect in those particular circumstances. For example, where the making of an interlocutory order will either transfer or facilitate the transfer of possession of property, then it is properly characterised as mandatory (see *McCarthy v. Moroney* above). The matter is less clear cut where, as here, neither the defendant nor the plaintiffs are in actual possession of the property during the currency of the occupation by the tenants. The defendant, as landlord, has a right to possession of the properties subject to the leases on foot of which the tenants are currently in occupation. Those leases are not before the court. The second plaintiff claims that the mortgage deeds give it a right to possession of the properties in the circumstances which have occurred, although the same deeds do not give the first plaintiff, as receiver, such a right. The orders sought against the tenants are clearly mandatory but, as noted above, without actually seeking to amend the relief sought, the plaintiffs effectively concede that it cannot be granted as against the tenants.

16. In these circumstances, it is difficult to determine whether the relief sought in this case is properly characterised as mandatory or prohibitory. Were it not for two significant factors, I would have tended towards concluding that it was prohibitory but, in light of those factors, I am minded

to treat it as mandatory. The two factors are, firstly, the admission by the first plaintiff in discussing the balance of convenience that the intended effect of granting the orders is to facilitate the sale of the properties. Whatever about the competing rights to possession of the second plaintiff and the defendant, the intended sale of the property by the plaintiffs should an interlocutory order be granted is undoubtedly transformative and would completely remove any claimed right to possession for the defendant.

17. Secondly, and related to this, counsel for the plaintiff points out that receiver injunctions, if granted on an interlocutory basis, rarely proceed to a full trial. One of the factors identified by the Supreme Court in *Merck Sharp and Dohme* (above) as being relevant when the court is considering whether there is a fair question to be tried is a consideration of whether the case will probably go to trial. Although the judgment does not expressly establish a direct correlation between the threshold standard to be applied and the likelihood of the matter going to full trial, the caution urged where the grant of an injunction means that a case is unlikely to proceed to full trial would be consistent with the imposition of a more exacting test on the party seeking the injunction.

18. As it happens, for the reasons set out in the following section of this judgment, the foregoing discussion is largely *obiter*. The default argument made on behalf of the plaintiffs was that, if the proofs were in order, then the case they make will meet either the fair question or the strong case test. As I have not found the plaintiffs' proofs to be in order, it follows that they have not satisfied either test.

Proof of Ownership of Loans and Mortgages

19. Having placed the plaintiffs on strict proof of all matters, the defendant contends that the plaintiffs have not proved the transfer to them of the mortgages and of the underlying loans to which those mortgages relate.

20. The proof offered by the plaintiff is extracts from a redacted version of a global deed of transfer dated 14th June, 2019 between various AIB companies as sellers and the second plaintiff as the buyer. The effect of that deed was to convey, assign or transfer certain properties of which the sellers were the legal and beneficial owners to the second plaintiff. Although much of the agreement as exhibited is redacted, it is clear that the properties comprised, at least, certain mortgages and charges entered into between the sellers and their customers. However, none of these terms appears to be defined for the purposes of the agreement and therefore it is difficult, especially when presented only with redacted extracts, to be precise about what was actually being transferred. The exhibit includes extracts from a schedule identified along the bottom of the page as “*Deed of Conveyance and Assignment – Mortgages – Batch 3*” in which the properties the subject of three of these applications are listed. (Rather oddly in one of these three applications the exhibit shows the same three properties in a different sequence, but the document is described as “*Deed of Conveyance and Assignment – Mortgages – Batch 4*”. It is unclear if the properties the subject of these three applications were included twice in the global transfer or if there is some other explanation for this anomaly. However, as the matter was not raised or discussed at the hearing I do not propose to ascribe any importance to it). The details included in the schedule are the loan security ID, the property address, the county and the Registry of Deeds serial number. In the other application (Record No. 2021/77P) the notation is similar except that in this case the

schedule from which the extract is exhibited is “*Deed of Conveyance and Assignment - Mortgages -Batch 5*”.

21. The defendant argues that there is no evidence before the court on which the court can be satisfied that the mortgages and the underlying loans to which the mortgages relate were transferred from AIB to the second plaintiff. Neither the word “*Properties*” or the word “*Mortgages*” which are used in the global deed (and both of which appear in the deed with initial capital letters) are defined. The word “*loan*” does not appear in the extracts from the deeds or the schedules which have been exhibited. The purpose of the schedules is not stated in the exhibited parts of the deeds. Although the “*hello*” letter sent by the second plaintiff to the defendant on 28th June, 2019 subsequent to the transfer lists eight loan accounts formerly held by him with AIB companies to which new account numbers have been assigned by the second plaintiff, neither the old nor the new numbers (all of which begin with the figure “7”) match the loan security ID numbers listed in respect of the plaintiffs’ properties in the global deed.

22. On the basis of these gaps, the defendant argues that the exhibited documents do not refer at all to the transfer of the loan agreements, they do not define the properties that are listed in the schedules and the schedules are not linked to the deed in consequence of which the plaintiff has not proved the transfer to it nor its ownership of the loans or the mortgages. Consequently, the defendant argues that the plaintiffs have not established a *prima facie* case, much less a strong case.

23. In response, the plaintiffs argue that the properties are clearly set out in the schedule and listed by address such that they are readily identifiable and the only logical inference is that these properties are to be transferred pursuant to the global deed. It is perhaps telling that the plaintiffs require an inference to be drawn that these properties were to be transferred. Further, the Registry

of Deeds serial numbers listed in the schedules in respect of the mortgages can be reviewed as a matter of public record. Although I would be reluctant to accept a Registry of Deeds serial number as sufficient proof of the deed to which it refers simply because it is a public record without the deed itself being exhibited, the exhibited material does make a case in respect of the transfer of the mortgages. On balance I would just about accept that the exhibited information in respect of the mortgages raises a fair question to be tried as to the plaintiffs' ownership of the mortgages. It would not however meet the threshold of establishing a strong case likely to succeed at trial. However, that is not the end of the matter as there is nothing in the exhibited material which evidences the transfer of the underlying loans. The plaintiffs argue that the transfer of the mortgage/security would be worthless without the transfer of the underlying loan. I accept that this is correct, but it does not of itself prove the transfer of the underlying loan.

24. At this point in the hearing, i.e. during plaintiffs' reply, counsel for the plaintiffs sought to introduce what he called the "*loans transfer*" into evidence on the basis that all relevant evidence should be before the court in order for the issue to be fairly determined. Other than the fact that the plaintiffs wanted, belatedly, to introduce this material, no explanation was given for its omission nor any specific reason advanced for why they should be permitted to do so at this late stage. Counsel for the defendant objected. He made the point that, from the outset, the defendant had put the plaintiffs on strict proof and the plaintiffs should not be permitted to introduce new evidence on reply, the defendant having identified a deficit in the plaintiffs' case. I refused to allow the plaintiffs introduce additional evidence at that stage of the hearing. The material in question (which was never actually produced) was presumably documentation executed at the same time as or, any rate, in connection with the global deed of transfer. Consequently, it was most likely material which had been available to the plaintiffs from the time at which they issued these

applications. It did not comprise new material of which the plaintiffs were previously unaware or which had been previously unavailable to them.

25. In the circumstances, it seems to me that the plaintiffs have not established a fundamental element of the case they need to make in order to be entitled to the relief they seek. Under the terms of the mortgages, the entitlement to appoint a receiver and to exercise the power of sale which the first plaintiff intends to exercise depends on the monies the subject of the loans being outstanding and having become due and payable by the defendant. As the plaintiffs have not established the transfer of the loans, they are not in a position to establish the defendant's default under those loans nor, crucially, their own entitlement to act consequent to that default. In the absence of proof of the transfer of the loans to it, the second plaintiff cannot establish an entitlement to exercise either of the rights under the mortgage even if the court were to accept that the transfer of the mortgages to the second plaintiff had been established by reference to the "*fair question*" threshold. Consequently, it seems to me that the plaintiffs' applications for interlocutory relief must be refused.

26. As will be appreciated, my decision in this regard is essentially an evidential one. The plaintiffs have failed to adduce the necessary proof in order to establish their entitlement to the relief they seek. But, to paraphrase Clarke J. in *AIB v. Diamond* [2012] 3 IR 549, it may be that the evidence which will be available at the substantive trial will be sufficient to allow a court to be satisfied of the plaintiffs' entitlements in this regard. I am, however, confined to the evidence before me and I am not satisfied that enough evidence has been adduced to establish the plaintiffs' entitlement to exercise the powers in respect of which the orders are sought. That conclusion is sufficient to dispose of the entire of this application. However, because a number of arguments

were raised and dealt with in detail by the parties, I will indicate, in outline, my views on the other issues. Naturally, these views in the subsequent sections of this judgment are *obiter*.

Transfer of Loans and Mortgages as between AIB Companies

27. In addition to this fundamental issue of proof, the defendant makes a number of other arguments regarding the transfer and ownership of his loans as between the AIB companies prior to their alleged transfer to the second plaintiff. Three of the four loans were drawn down on foot of agreements entered into between the defendant and AIB Finance Limited (AIBFL). The fourth was entered into between the defendant and AIB Mortgage Bank (AIBMB). Although a number of AIB companies were party to the global deed of transfer to the second plaintiff, including AIB plc and AIBMB, AIBFL is not one of the companies which was party to that deed. Thus, it was not a “*seller*” of its loans to the second plaintiff. Consequently, there is an onus on the plaintiffs, which the defendant contends has not been discharged, to establish the transfer of the loans taken out by the defendant from AIBFL such that they were in the possession of one of the sellers at the date of the global transfer agreement on 14th June, 2019.

28. The plaintiffs rely on two statutory transfers of business as between certain AIB companies which ultimately resulted in all of the residential loans held by AIBFL being transferred via AIB plc to AIBMB. Both of these transfers were subject to a statutory requirement for approval which is reflected in the making of Ministerial Orders. The first of these was a scheme of transfer under the Central Bank Act, 1971 which was effected through the making of a Ministerial Order following consultation with the Central Bank. The transfer took effect on 31st October, 2007 pursuant to SI 557/2006 and authorised the transfer of all of the loans of AIBFL save those listed in a schedule as “*excluded property*” to AIB plc. The second of the transfers was authorized under

a different regulatory scheme in which the necessary approval is contained in SI 60/2006, Asset Covered Securities Act 2001 (Approval of Transfers between AIB plc and AIBMB) Order 2006. This took effect on 25th February 2011 and authorised the transfer of AIB plc's residential loans (which by then included loans which had been transferred to AIB plc from AIBFL) to AIBMB.

29. In terms of proof, I think that the production of the Statutory Instruments on foot of which the schemes authorizing the relevant transfers were approved is sufficient for the plaintiffs to establish either a fair question or a strong case that the defendant's loans were owned by either AIB plc or AIBMB, both of which were "*sellers*" at the time the global deed of transfer was executed in 2019. As the schemes, which were subject to significant regulatory oversight, reflected the wholesale transfer of certain types of business as between related companies, the position is materially different to the transfer of individual loans and mortgages from AIB to the second plaintiff pursuant to the global deed of transfer. The latter is structured to individually identify and list each of the loans, securities and mortgages the subject of the transfer such that proof referable to the defendant's specific loans is required, and as I have held, was not adduced on this application.

30. The defendant raises a further issue with a bearing on the transfer of the loans as between the AIB companies. In his replying affidavit, the defendant exhibits an inter-lender agreement dated 29th December, 2005 between AIB plc and AIBFL regarding the defendant's loans. The purpose of that agreement seems to have been to clarify the priorities in respect of the securities provided by the defendant for his indebtedness as between the AIB companies. However, the agreement also contains a provision at clause 4(a) which confirms the entitlement of either party to exercise their rights under the mortgages, including by way of appointment of a receiver, subject to the proviso that no such appointment would be made by either party "*without wherever possible*

giving reasonable notice to the other lender of its intention to do so". The defendant states that no such notice was given, or perhaps more accurately, there is no proof that any such notice was given.

31. In reply, the plaintiffs point out that all of the defendant's loans, whether originally taken out with AIBFL or with AIB plc had been transferred to AIBMB prior to the appointment of the receiver. Consequently, the issue regarding the priority of the securities held by different AIB entities over the defendant's properties which is the subject of the inter-lender agreement have become moot. According to the plaintiffs, implementation of the agreement would require either that AIBMB notify itself of its intention to appoint a receiver, which would be illogical, or notify AIB plc of its intention, which would serve no useful purpose as AIB plc no longer held any interest in the loan or the security at the time the receiver was appointed.

32. In general, I accept that this is the case. However, the problem is even more complex in respect of one of the loans which differs in a number of respects from the other three. The loan in question is the subject of proceedings bearing record number 2021/77P. In that case, the monies were lent by AIBMB rather than by AIBFL. They were lent pursuant to a letter of offer dated 1st May, 2009 and secured over 3 Irvine Cottages by a mortgage dated 9th July, 2009. That mortgage was entered into a number of years after the other three and reflects what are stated to be the "*Mortgage Conditions (2006 edition)*" for AIBMB and AIB plc. Significantly, clause 5.2 of the mortgage provides that "*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 prior written consent of AIB Mortgage Bank*". This clause imposes a different and more onerous obligation than that reflected in the inter-lender agreement in that it requires not simply that notice be given of an intention to

appoint a receiver but that the prior written consent of AIBMB be provided in advance of AIB taking any steps to enforce the mortgage. The defendant argues that this clause has not been complied with. The deed appointing the receiver in respect of 3 Irvine Cottages is dated 28th August, 2018 (and accepted by the first plaintiff on 10th September, 2018) and names, as the parties, AIBMB and AIB plc as well as the first plaintiff. Counsel for the plaintiffs was unable to explain why the instrument of appointment of the receiver was executed jointly by AIBMB and AIB plc in circumstances where AIB plc had transferred all of its interest in the loan to AIBMB prior to the appointment of the receiver. It may be that the joint execution was intended to ensure compliance with clause 5.2 of the mortgage agreement, although, if that were the intention, it might have been simpler to simply provide prior written consent in conformity with the clause.

33. Again, the plaintiffs argue that the underlying loan which appears to have been one entered into jointly by AIBMB and AIB plc had been transferred to AIBMB prior to the appointment of the receiver. In any event, the plaintiffs point to the fact that the deed of appointment is executed jointly by AIBMB and AIB plc and, thus, implicitly provides the necessary consent. Whilst technically the joint execution of a deed by two parties does not constitute “*prior written consent*”, I accept the thrust of the plaintiffs’ argument on this point also. This clause in the mortgage does not appear to have been inserted for the benefit of the borrower, but is intended to protect the rights of the lenders *inter se*. Consequently, I would not regard this issue as undermining a “*strong case*” were it otherwise to have been established by the plaintiffs.

Validity of Appointment of the Receiver

34. The other major issues raised by the defendant concerns the validity of the appointment of the receiver pursuant to the mortgages as a result of his alleged breach of the loan agreements.

Two points are made: firstly, that the appointment is invalid because the deeds purport to appoint the first plaintiff as receiver over the properties when in fact the mortgagee only had power to appoint a receiver under statute and, thus, over the income of the properties rather than the properties themselves. I have described the receiver as having been appointed by the mortgagee because, in fact, the appointments which occurred on various dates in 2018 and 2019 were made by AIBMB (or, in the case of 3 Irvine Cottages, AIBMB and AIB plc jointly) rather than by the second plaintiff. The second issue raised by the defendant is that a purported novation of the appointment of the receiver by AIBMB to the second plaintiff is flawed and consequently invalid.

35. The first point is a variation of an argument that has been dealt with in a number of judgments, most recently by the Court of Appeal in *Fennell v. Corrigan* [2021] IECA 248 in which judgment was delivered just prior to the hearing of this application. It is common case that in the event of a default on the loans, the 1998 mortgages allowed the mortgagee to appoint a receiver pursuant to the powers conferred by the Conveyancing Act, 1881. The power to appoint a receiver under s. 19(1)(iii) of the 1881 Act is narrowly framed as being the appointment of receiver “*of the income of the mortgaged property, or of any part thereof*”. A receiver appointed under s. 19(1)(iii) does not have a right to possession of the mortgaged property or, more generally, to manage the mortgaged property, save as regards the receipt of rental or other income. Consequently, it is common for a mortgage deed to contain provisions allowing the receiver appointed by the mortgagee to exercise broader powers than those provided for under s. 19. Alternatively, a mortgage deed might provide for the appointment of a “*receiver and manager*”, a term which acknowledges that the person so appointed will not be limited to the exercise of the statutory powers under s. 19 but will have broader power to manage the mortgaged property in order to secure the mortgagee’s interests until the loan has been repaid. The plaintiffs were careful to point

out that they were not suggesting at this stage that the receiver has a power of sale and were only standing over the appointment of the first plaintiff as a statutory receiver to receive the rental income from the properties. As against this, the defendant appeared to accept that, in certain circumstances, for a receiver to fulfil the role of receiver over the income of a property, he may, by necessary implication, have to have the power to enter into possession of the property. This is not, however, the subject of the dispute in this case.

36. Instead, the defendant's argument focused on the technical distinction between the appointment of a receiver over the properties and the appointment of a receiver over the income of those properties. To a certain extent, the arguments made by the defendant covered well-trodden territory in which the case law has veered between a requirement for strict adherence to the terms of a mortgage, especially as regards the procedural aspects of the appointment of a receiver (per Gilligan J. in *The Merrow v. Bank of Scotland* [2013] IEHC 130), and an acknowledgement that once validly appointed under s. 19, the powers of a receiver can be extended by the terms of the mortgage itself (per Baker J. in *Woods v. Ulster Bank* [2017] IEHC 155). Particular reliance was placed by the defendant on the decision of McDonald J. in *McCarthy v. Moroney* (above) in which it was held that, where a mortgage allowed for the appointment of a receiver and manager and conferred extensive additional powers on the person so appointed, the appointment of a receiver *simpliciter* did not carry with it the broader suite of powers under the mortgage and the person so appointed was confined to the exercise of the statutory powers under s. 19(1)(iii).

37. The plaintiffs contended that, insofar as there had been some divergence in judicial views on this issue, the matter was now definitively settled by the judgment of Murray J. in the Court of Appeal in *Fennell v. Corrigan* (above). This is also a receiver/ receiver and manager case, but the judgment goes to some lengths to analyse the underlying rationale for the distinctions drawn by

various judgments which included variations in the threshold to be met at interlocutory stage and the fact that certain judgments (e.g. that of Allen J. in *McCarthy v. Langan* [2019] IEHC 651) were delivered at the conclusion of a substantive trial rather than an interlocutory hearing. Ultimately, Murray J. regarded the issue as one dependent on the proper construction of the mortgage deed and the deed of appointment in each case. The approach to be taken to the construction of such contractual documents was described by Clarke C.J. in *Jackie Greene Construction Ltd v Irish Nationwide Building Society* [2019] IESC 2 as “*text in context*”. This was summarized by Murray J. as requiring a court to “*approach the document being interpreted on the basis that governing legal rights and obligations should be interpreted as they would be understood by a reasonable and informed member of the public who is cognisant of the purpose and intent of, and background to, the documents in question*” (see para. 30). In the context of a dispute as to whether a deed appointing somebody to act as a “*receiver*” was effective to confer on that person the powers of a “*receiver and manager*”, Murray J. noted that the starting point should be “*that language used in that deed was intended by the parties to carry the same meaning as it bears in the mortgage agreement on foot of which the appointment was made*”. Thus, whilst it might have been more prudent for the deed of appointment to have described the appointee as a “*receiver and manager*”, given that a receiver and manager is a receiver with powers of management, the appointment of a personal *qua* receiver by an instrument which properly construed had the effect of conferring on him powers of management achieved the same end (see para. 43). All of this led Murray J. to the conclusion that the authorities to the effect that the terms of a mortgage relating to the appointment of a receiver must be strictly complied with “*were concerned with the point when, or the manner in which, the deed was executed*” and not concerned “*with the terms in which the appointment was expressed*”.

38. Applying that rationale to this case, it seems to me that the plaintiffs are correct in saying that as long as the formal requirements for the appointment of a receiver have been complied with, the fact that the precise wording of the deed of appointment diverges somewhat from the mortgage does not undermine the validity of the appointment. The use of language which nominally appoints the receiver over the properties in circumstances where the mortgages confer upon the receiver only the statutory power over the income of those properties does not have the effect of extending the receiver's powers in a manner contrary to the agreement between the parties. I do not think that the terms of the deed of appointment create any confusion in this regard and certainly should not be construed in a manner which gives rise to confusion when, as read by a reasonable and informed member of the public with some background knowledge, they would not do so.

39. The second of the two issues raised by the defendant concerning the validity of the receiver's appointment is more difficult. In each of the four cases, the receiver was appointed prior to the transfer of the mortgage to the second plaintiff. In my experience, a variety of different approaches have been adopted in similar circumstances. In some instances where a mortgage in respect of which a receiver has been appointed is transferred, the appointment of the receiver by the original mortgagee is discharged and a fresh appointment made by the transferee of the mortgage. In others, the prior appointment of a receiver is expressly approved or adopted by the transferee after the transfer has concluded. Neither of these approaches were chosen in this case. Instead, AIB as the transferor, the second plaintiff as the transferee and the first plaintiff as the receiver entered into a deed of novation on the same date (i.e. 14th June, 2019) as the global transfer under which the receiver consented to the substitution of the transferee (i.e. the second plaintiff) for the transferors (i.e. AIB) in what are termed the receiver agreements. The receiver agreements are defined in the deed of novation by reference to all deeds of appointment etc. entered into

between AIB and the first plaintiff (who is titled the “continuing party”) in relation to the assets that are the subject of the transfer “*as listed in Schedule 1 to this Deed*”.

40. The difficulty arises from the fact that the exhibited extracts of the novation deed contains a schedule, in which the receiver agreements the subject of the novation, are set out. In the case of the defendant’s properties, the date on which the receiver was appointed is identified in each case as being 18th November, 2016. That is not the date of the relevant appointment in respect of any of the properties. To be precise, a receiver was appointed on 18th November, 2016 over a property at 11 Abercorn Road (which is the subject of proceedings bearing reference number 2021/75P) but, following correspondence from the defendant’s solicitor, it appears to have been accepted by AIB that that appointment was invalid. Consequently, a deed of discharge was executed on 31st January, 2019 and the receiver was re-appointed on the same date. I note that the defendant contends that the deed of discharge is of no legal effect in circumstances where the appointment was not valid to start with. Either way, by the time the deed of novation was executed in June, 2019, the 2016 appointment of the receiver was no longer operative either because that appointment had been discharged or because it was never valid to start with. The relevant date of appointment is instead 31st January, 2019. In respect of the other mortgages, the relevant dates of appointment are 17th July, 2018 (in respect property at a 4 Church Place, the subject of proceedings bearing record number 2021/76P); 10th September, 2018 (in respect of the property at 3 Irvine Cottages, the subject of proceedings bearing record number 2021/77P); and 17th July, 2018 (in respect of property at 10 Blessington Lane, the subject of proceedings bearing record number 2021/78P).

41. What then is the legal effect of a deed of novation which purports to novate receiverships which either never existed or were no longer in existence at the date of novation and which does

not purport to novate the receiverships which were actually in existence at the material time? This must depend to a considerable extent on what effect the transfer would have on the receivership in the absence of the novation or some equivalent mechanism. The parties take diametrically opposed positions as to the effect of a transfer on an existing receivership. The defendant takes the view that if a transfer takes place, then the receivership automatically expires and, on the particular facts, the receiver's appointment terminated as the deed of novation was invalid and ineffective. The plaintiffs, on the other hand, argue that the deed of novation, much like the inter-lender agreement, is of no real concern to the defendant who is not a party to it. Instead, the plaintiffs argue that it affects the relationship between the charge holder and the receiver. At the same time, they acknowledged that it was common to novate a receivership as one contract needed to end and another one to come into being. They pointed out that, once appointed, the receiver is the agent of the mortgagor (i.e. the defendant) albeit that his responsibility is to realise the defendant's assets in order to disperse them to meet the defendant's liabilities to the mortgagee or charge holder. Counsel argued that the receivership did not end with the transfer of the charge as otherwise it would require novation at the same precise moment as that transfer. This argument might carry more weight if, in fact, the purported novation of the receivership had not taken place on the same date as the global deed of transfer which suggests that it was clearly considered by the parties to the novation to be part of the same suite of documents and, thus, inextricably linked to the transfer itself.

42. I struggle to see how it can be said, certainly to the extent required to establish a strong case, that the contractual relationship between the receiver and the charge holder has no material effect on the receivership. Put simply, in the context of the facts of this case if the deed of novation was ineffective to transfer the receivership from AIB to the second plaintiff, it means that AIB

continues to have a receiver appointed over property in respect of which it no longer holds a mortgage or security and that the second plaintiff holds the mortgage and security over property in respect of which it has not appointed a receiver. I note, for example, that in accepting the original deed of appointment in respect of Abercorn Road in 2016, and again in accepting his re-appointment in 2019 the first plaintiff undertook, *inter alia*, to regularly account to the bank (i.e. AIB) for the monies received by him as a receiver. If the receivership has not been validly novated, then the first plaintiff remains under an obligation to account to AIB in respect of monies received from the receivership and, technically, the defendant will not benefit from those monies being applied towards his outstanding indebtedness to the second plaintiff. Whilst this may not be what the plaintiffs intend will happen in practice, it is what is legally required on foot of the exhibited documents. Therefore, I do not think that the issues raised concerning the deed of novation can be treated in the same manner as those concerning the inter-lender agreement. Were I not to have already taken the view that the plaintiffs have failed to establish their interest in the loans underlying the mortgages the subject of the proceedings, I would be inclined to take the view that the plaintiffs had not established the continuing validity of the receivership subsequent to the transfer of those loans to the second plaintiff.

Balance of Convenience/Balance of Justice

43. By reason of these conclusions, it is technically unnecessary for me to proceed to consider where the balance of justice lies as between the parties. Were that to be necessary, I would, as in other cases, have considerable difficulty in doing this due to the dearth of evidence before the court to support the arguments made by both parties. The defendant's position is that there is a *bona fide* dispute between himself and AIB as to whether he was overcharged on these loans which will have

a material bearing on the extent of his indebtedness although the nature of that dispute nor the effect a resolution of it in the defendant's favour would have on the amounts outstanding has not been described to the court. Coupled with this, he claims that he is the owner of other assets which, along with the mortgaged properties, mean that the defendant is not at any real risk of being unable to recover damages in the event that an injunction is not granted and the plaintiffs succeed at trial. The defendant has not put any evidence before the court as to the existence or the value of the other assets to which he refers. I do not place any particular weight on the defendant's stated fondness for the properties nor his amicable relations with his long-term tenants. Indeed, I note that the defendant states that, as a result of these relationships, he is charging the tenants significantly less than the market rate for the properties, something to which legitimate objection might be taken by the plaintiffs to whom the defendant is still indebted

44. The plaintiffs argue that damages are necessarily an inadequate remedy as the defendant has been unable to make the repayments on his loans over a considerable period of time. However, it seems that the defendant's loans were ones which were initially serviced by him and it was only in the latter stages of their original terms (i.e. post-2013) that he fell into arrears. Consequently, it is not entirely clear the extent to which the available security is sufficient or insufficient having regard to the defendant's current level of indebtedness. For example, in respect of the property the subject of the proceedings bearing Reference No.2021/75P (11 Abercorn Road), the plaintiffs claim that the defendant's indebtedness at the time the first plaintiff swore his affidavit was some €290,000 whereas the value of the property immediately prior to the issuing of the application was approximately €280,000. This does not represent a particularly large deficit, especially in a strong property market. I accept that the mortgages were ultimately "*all sums due*" mortgages which allow the mortgagee to have recourse to the property in respect of all outstanding debts of the

borrower and not just the debt on the particular loan for which the property was offered as security, but without a clearer breakdown of the defendant's indebtedness relative to the value of the secured properties, it is difficult to assess whether the plaintiffs are at real risk if the injunction were not to be granted.

45. As against that, if the injunction were limited to allowing the receiver to exercise the statutory power in respect of the rents and other income from the properties, the fairest approach might be to restrain the defendant from interfering with the receivership to that extent. To achieve this, it would be necessary to modify the orders sought so that they did not bind nor affect the sitting tenants and also to ensure that the first plaintiff did not proceed to exercise a power of sale (as envisaged in his grounding affidavit) prior to the determination of the proceedings. I note that whilst the defendant clearly has property rights to which due protection must be afforded, he has himself limited those rights through the agreements he has entered into with AIB and, of course, his subsequent default on those agreements.

46. In light of the conclusions reached by me earlier in this judgment, it is not necessary for me to also reach a conclusion on the balance of justice issue. Were it so necessary, I would, yet again, find myself in difficulty in circumstances where basic information on this issue upon which the parties apparently rely on has not been placed before the court. Fortunately, for the reasons already expressed, I do need to address this matter further.

Conclusions

47. In conclusion, I am not satisfied that the plaintiffs have discharged the onus of proof that lies upon them to show ownership of the loans underlying the mortgages on which they purport to rely. Additionally, the extent to which it can be said that the plaintiffs have met the onus on them

to establish ownership of the mortgages is open to question. In those circumstances, the plaintiffs have not met the necessary threshold for the grant of an interlocutory injunction, whether that threshold is a fair question to be tried or a strong case. I also have serious concerns as to whether the plaintiffs have met the onus upon them as regards the transfer of the receivership in circumstances where the deed of novation of the receivership does not appear to relate to the receiverships which are the subject of this application for an injunction. Consequently, the plaintiffs have failed to establish a strong case under this heading also. In those circumstances, I refuse the plaintiffs' application for interlocutory relief.