THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 76

Record Number: 2019/006 COA

High Court Record No 2017/6626P

Edwards J.
Donnelly J.
Collins J.
BETWEEN/

KARL O'NEILL

RESPONDENT /PLAINTIFF

- AND -

AIDAN DAVEY

APPELLANT/ DEFENDANT

JUDGMENT delivered on the 26th day of March 2020 by Mr Justice Edwards

Introduction:

1. For convenience it is proposed that hereinafter Mr Aidan Davey will be referred to simply as "the appellant" and Mr Karl O'Neill will be referred to simply as "the respondent".

2. The respondent is a receiver appointed by Deed on the 17th of June 2016 by Start Mortgages Ltd, the current holder of the mortgagees' interest in a Mortgage and Charge (to include the Conditions attached thereto) dated the 26th of January 2004 between the appellant as mortgagor and The Governor and Company of the Bank of Scotland as mortgagees, in pursuance of the powers contained in the said Mortgage and Charge, and in respect of the property presently described (following the closure of a leasehold interest) as ALL THAT AND THOSE the dwelling house and hereditaments known as 23 Michael Collins Road, Mervue, Galway, in the parish of St Nicholas, Townland of Ballbanebeg and Barony and Borough of Galway, being more particularly the lands comprised in Folio No 84306F of the Register for the County of Galway.

3. These are proceedings brought by way of Plenary Summons and in which the respondent claims damages, various injunctions and other relief against the appellant arising out of alleged interference by the appellant with the respondent in the carrying out of his receivership, and with the property the subject matter of the receivership.

4. This judgment is concerned with two appeals in respect of orders made on interlocutory applications in these proceedings.

5. The first is the appellant's appeal against the judgment and Order of the High Court (Gilligan J) of the 8th of December 2017 granting certain interlocutory injunctions, and ancillary relief including costs, against the appellant, and in favour of the respondent, to include more particularly:

1. an order directing the appellant, his servants or agents, and all persons having notice of the making of the order to deliver up to the respondent forthwith the keys, alarm codes and other security and access devices in respect of the property known as 23 Michael Collins Road, Mervue, Co. Galway contained within GY 84306F;

2. an order restraining the appellant, his servants or agents, and all persons having notice of the making of the order from preventing, impeding and/or obstructing the respondent, his servants or agents, from entering into, taking possession of, getting in and securing the property;

3. an order restraining the appellant, his servants or agents, and all persons having notice of the making of the order from purporting to collect rents in respect of the property or holding himself out as a person entitled to rent the property or to collect rent in respect of same;

4. an order restraining the appellant, his servants or agents, and all persons having notice of the making of the order from interfering with the office or functions of the respondent as receiver of the property;

5. an order restraining the appellant, his servants or agents, and all persons having notice of the making of the order from preventing the respondent, his servants or agents, from marketing or selling or otherwise lawfully dealing with the property;

6. an order restraining the appellant, his servants or agents, and all persons having notice of the making of the order from trespassing on the property and/or otherwise interfering with the respondent's, his servants or agents, use and enjoyment of the property.

7. an order restraining the appellant, his servants or agents, and all persons having notice of the making of the order, from interfering with the office or functions of the respondent as receiver of the property.

6. The second is against the dismissal by the High Court (Gilligan J.), also on the 8th of December 2017, of a cross motion brought by the appellant seeking various orders, including:

(1) an order under Order 25 of the Rules of the Superior Courts directing the trial as a preliminary issue of whether the affidavit of the respondent grounding his application for an interlocutory injunction was properly constituted, in circumstances where the appellant was contending that:

a. the said affidavit was not authentic, was unlawful and constituted fraud and perjury, and
b. the said affidavit was not compliant with the Rules of the Superior Courts, and in particular Order 40, Rules 6 and 9.

(2) in the alternative, an order that the proceedings be dismissed with prejudice in their entirety, and with costs to the appellant, on the basis that the respondent's affidavit was neither lawful nor legally authentic.

The Background to the Matter

7. The background to this matter is to be found in the pleadings and, more particularly, in the affidavit of the respondent sworn on the 19th of July 2017 to ground his application for interlocutory injunctive relief.

8. Before considering the contents of this affidavit it is necessary to consider the appellant's objections to it. It is said that it is not in conformity with the Rules of the Superior Courts and in particular Order 40, Rules 6 and 9 respectively.

9. Order 40, Rule 6 requires that:

> "Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit, or the acknowledgement of any deed, or recognisance, otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the Court; and every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office."

10. The appellant complains that the jurat to the respondent's affidavit does not comply with this rule because although the Commissioner for Oaths records the affidavit as having been sworn before him on "this 19th day of July 2017" he does not specify the time of day on which the affidavit was sworn. I am satisfied that this complaint is not one of any substance. The time is specified to the nearest day albeit not to the nearest hour, minute or second. I take judicial notice of the fact that courts routinely accept affidavits containing a jurat which merely specifies the date on which the affidavit was sworn rather than any more precise time. In my belief the respondent's affidavit does comply with Rule 6, and the High Court judge was correct to reject the complaint that it does not do so.

11. Moreover, I am reinforced in my view that this is a point of no substance in circumstances where, on at least two other occasions, namely in *Fennell v Ward* [2018] IECA 270 and also in *Danske Bank v Kirwan* [2016] IECA 99, differently constituted panels of this court have also rejected it as being of no substance when it was raised in other proceedings.

12. In the *Fennell* case, Peart J, having pointed to s.5(2)(b) of the Interpretation Act 2005, said:

> *"21. If the reference to "time" is simply to time in the sense of time of day, then the provisions of Ord. 40, r.6 simply do not reflect the plain intention of the drafters of the 1986 Rules. I think it plain that in using the word "time" they intended to have an appropriate record for court purposes of when the affidavit was taken before the Commissioner. In these circumstances, it is permissible, having regard to the provision of s. 5(2)(b) of the 2005 Act, to treat the word "time" as it appears*

in Ord. 40, r. 6 as referring not simply to the time of day, but as also embracing the date on which the affidavit was also taken.

22. In the present case, I am completely satisfied that the issues raised under Ord.40, rr. (6) and (9) by the appellant fall into the category of purely technical defects if they are defects at all. In fact, having regard to the fact that it is permissible to have regard to the provisions of s. 5(2)(b) of the 2005 Act, I do not consider them to constitute a breach of Ord.40."

13. In the same vein, in the *Danske Bank* case, Irvine J, stated:

"(12)(ii) I do not read Ord. 40, r. 6 of the Rules of the Superior Courts as requiring a commissioner who witnesses the signature of a deponent to insert the time of day upon which they did so. Indeed, I find it hard to recollect any occasion upon which I have ever seen such information included in an affidavit. I am satisfied that the requirement of the rule has been properly met insofar as the commissioner has inserted in the affidavit the date upon which he witnessed the deponent's signature."

14. However, even if a basis for asserting technical noncompliance existed, and I do not believe that it does, Order 40 Rule 15 provides that the court may receive an affidavit notwithstanding any defect, misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof. Accordingly, the High Court judge would have been entitled in any event to receive the affidavit under this Rule notwithstanding the alleged technical defect. Be that as it may, I am satisfied that there was in fact no basis for rejecting the respondent's affidavit simply because the exact time at which it was sworn, in terms of date, hour, minutes and seconds, was not specified. I consider that the court below was entirely justified in accepting it as having an adequate jurat.

15. The second aspect of noncompliance with the rules alleged by the appellant is that there was a failure to comply with Order 40, Rule 9. Rule 9 provides (to the extent relevant):

"Every affidavit shall state the description and true place of abode of the deponent".

16. The appellant complains that the respondent's affidavit which states "*I, Karl O'Neill, Insolvency Practitioner of KPMG, 1 Stokes Place, Saint Stephen's Green, Dublin 2, aged 18 years and upwards MAKE OATH and say as follows*", fails to comply with Rule 9 because it states the respondent's place of business rather than his true place of abode.

17. Once again, this is not the first time that this particular point has been ventilated before this Court. It was previously canvassed, and rejected I hasten to add, both in *Fennell v. Ward* (cited above), and in *Kearney v. Bank of Scotland plc and Horkan* [2015] IECA 32.

18. In the *Fennell* case Peart J rejected the point stating:

23. As to the address of the deponents being stated as their workplace address and not their place of abode in the sense of their home, the phrase "place of abode"

must be given a sensible meaning in line with its clear purpose. I appreciate that if one seeks a dictionary meaning for the word "abode" it will state dwelling or some such to indicate a place were a person lives. But given the perfectly obvious purpose of the requirement to state an address for a deponent, the context of litigation must enable that word to include the address at which the deponent works, and hence where he may be found should that be necessary for any particular purpose. I do not consider the insertion of a workplace address to breach Ord. 40, r. (6). But even if it did it is certainly a purely technical breach well capable of being disregarded by any court for the purpose of allowing the affidavit to be used.

19. In the *Kearney* case, Kelly J demonstrated by reference to authorities going as far back as the beginning of the 19th century that the point at issue was misconceived. He said:

> *"9. In Haslope v. Thorne [1813] 1 M & S 102, Lord Ellenborough C.J. is reported in relation to this form of objection as follows:- ". . . the words 'place of abode' did not necessarily mean the place where the deponent sleeps, that the object of the rule was to ascertain the place where the deponent was most usually to be found, which in the present case was the office at which he is employed during the greater part of the day and not the place where he would retire for the purpose of rest". So there, as far back as 1813, one finds a common sense approach being taken to the interpretation of the rule. The court asked itself "what is the purpose of this rule"? The purpose of the rule is to apprise the reader of the affidavit as to where the deponent of the affidavit may be found. For most people in business life, they are much more likely to be found at their place of business during ordinary business hours than they are at their homes.*
>
> *10. Again one finds the topic being considered by Lord Campbell C.J. in Blackwell v. England [1857] 8 EL & BL 540. He said in the course of that decision:*
>
> > *"I am of opinion that in this Act also the object of the legislature is better attained by giving as a description of the residence of the solicitor's clerk the office where he attends all day then if it gave the place where he passes the night. The object of the legislature was to secure means of identifying and tracing the attesting witness, this is the description which best fulfils that object and such I think is the object of the legislature when it requires a statement of his residence and occupation."*
>
> *Again a purposive approach was taken to a similar statutory requirement.*
>
> *11. Coming then to the Irish authorities, my attention has been drawn to the decision in Harte v McCullagh IR 5 CL 537. That is authority for the proposition that an affidavit made in an action by one of the parties who was described in the affidavit as plaintiff or defendant need not contain the residence of the deponent. In that case the affidavit described the deponent as "the defendant in this action" but did not give his address. Chief Baron Pigot determined that to be sufficient. So,*

there is a line of authority going back to over many, many years indicating that although the rule speaks of a "place of abode", it is not be taken literally as meaning the place where one resides. It can be one's place of business.

12. In this case, Mr. Horkan, who is a defendant in the proceedings, swore the affidavit giving his place of business as his "place of abode". That, to my mind, conforms completely with what is required under the rules. It did so under the pre 1986 rules, where the same expression "place of abode" was used and does so under the current rules of court."

20. Returning to the present case, I am also satisfied that the objection based on alleged non-compliance with Order 40, Rule 9 ought not to be upheld. I do not consider the point to be well founded for the reasons elaborated on by Peart J and by Kelly J in the cases just cited. Moreover, in both those cases the learned judges concerned went on to opine that even if there was technical noncompliance with Order 40, Rule 9 it was capable of being legitimately overlooked in reliance on Order 40, Rule 15, on the basis that it is a matter of no substance in the circumstances of the case. I would adopt the same approach in this case and consider that in the event that there has been technical non-compliance, and I reiterate that I do not believe that there has been, it was capable of being legitimately overlooked in reliance on Order 40, Rule 15. The respondent is clearly identified both with respect to the capacity in which he swears the affidavit and in terms of where he may be contacted within the State for the purpose of serving documents upon him.

21. A further objection to the respondent's affidavit is that its contents are untrue and that they represent fraud and perjury. In that regard the first thing to be said is that no notice to cross-examine the respondent with respect to his affidavit was served. Secondly, the claims of untruth, fraud and perjury are nothing more than bald assertion. Although the appellant filed an affidavit sworn by him on the 23rd of November 2017 in reply to the respondent's grounding affidavit of the 19th of July 2017, it totally fails to engage with any specific claim or averment made by the respondent in his said affidavit. It does not seek to traverse or contradict a single line of it. Rather the appellant confines himself to complaining that the respondent's affidavit fails to comply with Order 40, Rules 6 and 9 of the Rules of the Superior Courts, and to making the bald and wholly non-specific assertion that the affidavit of the respondent represents "*fraud and perjury before the Court*".

22. For good measure, the appellant threatens in his affidavit that if the court fails to address to his complete satisfaction what he characterises as "*the said POINTS OF LAW*", and should the court or presiding judge purport and/or attempt to proceed "*it will be taken that the court … is not lawfully constituted and and the said judge involved/presiding is facilitating fraud and/or perjury before the court, and by facilitating same and/or progressing with the same in any manner whatsoever would and deems the said judge involved/presiding to have vacated his/her office, under Article 34.6.4 of the Constitution of Ireland and by law.*" (emphasis as in original). Further, he contends, should the court

fail to address the points that he has raised to his complete satisfaction "*this court has absolutely NO JURISDICTION to proceed in any context whatsoever*" (emphasis as in original).

23. It is clear from a perusal of these documents that the High Court was not faced with any actual conflict of fact on the affidavits. There was simply no engagement by the appellant with the respondent's grounding affidavit and the High Court judge was entitled to consider the respondent's grounding affidavit and to take the view that it provided prima facie evidence of the matters deposed to therein, particularly in circumstances where most of the essential averments deposed to by the respondent were evidenced by documentary exhibits. There was not a scintilla of evidence, as opposed to unsubstantiated assertion (and wild hyperbole), to suggest fraud or perjury. Moreover, the alleged breaches of the rules did not merit the taking of any action by the court. It seems to me therefore that the appeal in respect of the High Court's refusal to grant relief to the appellant on his cross-motion can be dismissed *in limine*.

24. Accordingly, there is no inhibition to this court also proceeding to have regard to the grounding affidavit of the respondent and the documents exhibited therein on the hearing on this appeal.

The substantive contents of the parties' respective affidavits

25. It is appropriate at this point to consider and summarize the contents of the affidavit of the respondent sworn on the 19th of July 2017 to ground his application for interlocutory injunctive relief.

26. The respondent identifies himself as an insolvency practitioner duly appointed by Start Mortgages Limited as receiver over certain assets charged by the appellant in favour of Start Mortgages Limited as security for a loan. He says that he makes his affidavit on his own behalf and with the knowledge and consent of Start Mortgages DAC. At paragraph 5 of his affidavit deposes that by letter of loan offer dated 13 November 2003, which he exhibits, the Governor and Company of the Bank of Scotland (GCBS) offered the defendant a mortgage loan facility in the amount of €150,000 in respect of the property described as 23 Michael Collins Road, Mervue, Co. Galway, and more particularly described in the schedule to the plenary summons in these proceedings (the property). He goes on to aver that on 26 November 2003 the appellant accepted the said loan offer on the terms set out in the letter of offer and those contained in a terms and conditions leaflet dated 27 August 1999 enclosed therewith (and which the respondent also exhibits) by appending his signature thereto in the presence of his solicitor.

27. The respondent states that GCBS advanced the loan monies to the appellant through his solicitor on the 16th of December 2003. The relevant Indenture of Mortgage and Charge, which is dated 26th of January 2004, is referred to with particularity in paragraph 8 of the respondent's affidavit, and a copy is also exhibited.

28. The affidavit points out that in addition to the contractual repayment obligations arising under the said loan agreement, the appellant contracted with GCBS under the charge *"to*

repay to the Bank the Debt in accordance with the provisions of the Facility Letter but in the absence of a Facility Letter the Borrower will repay to the Bank the debt when the Bank lawfully demands in writing that the borrower does so and fully in accordance with any such demand. The Debt shall immediately become due and payable on demand to the Bank on the occurrence of any of the following events that is to say:

(i) on the happening of any event of default; or …".

29. Clause 9 of the mortgage conditions lists the potential events of default which included a failure by the borrower "*to pay any sum on the due date for payment as outlined in the Facility Letter or any other sum due and payable to the Bank.*"

30. The respondent's affidavit specifically references a term in the loan agreement and charge in which the appellant irrevocably and unconditionally consented to GCBS (including its transferees, successors and assigns) at any time transferring assigning or disposing of the benefit of the charge to any third person or body. This is relevant in the context of GCBS subsequently exiting the Irish market and assigning its portfolio of domestic mortgages, including the appellant's mortgage to Bank of Scotland (Ireland) Limited (BOSI), the renaming of GCBS as Bank of Scotland Plc (BOS), the cross- border merger on foot of which all assets and liabilities of BOSI were transferred to BOS, the acquisition by Start Mortgages Limited of the aforementioned loans to the appellant from BOS as part of a loan book sale, and the re-constitution of Start Mortgages Limited as Start Mortgages DAC (Start), all of which transactions are described in detail by the respondent in his said affidavit to the extent that they are relevant to this case.

31. The respondent's affidavit further draws attention to a term in the loan agreement in which the appellant contracted with his lender not to lease or otherwise dispose of all or any part of the property without the prior written consent of the lender.

32. The affidavit further deals *inter alia* with the closure of a leasehold interest affecting the property and resulting in the merger of that leasehold interest with the freehold so that there is now a single relevant folio, namely folio GY84306F, copy of which he exhibits. It further goes on to record that Start is now the registered owner of the subject matter charge for present and future advances repayable with interest over the appellant's interest in the property contained in folio GY84306F.

33. The affidavit goes on to relate how, following GCBS's exiting of the Irish market, BOSI had offered the appellant further finance on his existing home loan in the amount of €45,000. This was by letter of loan offer dated the 6th of September 2005, which was accepted by the appellant on the terms set out in the said letter, and the terms and conditions leaflet dated June 2005 which accompanied it, by signing that letter of loan offer on the 12th of August 2005 in the presence of his solicitor. Both the letter of loan offer of the 6th of September 2005 and the terms and conditions leaflet are exhibited.

34. Again, by agreeing to the terms of this further loan facility the appellant irrevocably and unconditionally consented (per clause 8(1) of the terms and conditions leaflet) to BOSI

(including its transferees, successors and assigns) at any time transferring assigning or disposing of the benefit of the charge to any third person or body.

35. The respondent avers that the additional €45,000 loan facility was drawn down on the 6th of September 2005.

36. The respondent goes on to aver that he has been advised by Start that in breach of the loan agreements in charge, the appellant failed to make sufficient payments in respect of the monthly instalments on the due dates in accordance with his contractual repayment obligations and that arrears developed. These were events of default entitling Start to make formal demands for the repayment of the loan monies. The last repayment made by the appellant to his loan account was on 17 June 2013, more than 6 ½ years ago. A statement of account is exhibited by the deponent.

37. Repayment of arrears was demanded by Start in writing on 9th of February 2016, to no avail; and repayment of the loan balance within seven days was then similarly demanded on the 22nd of March 2016. Moreover, the respondent has deposed that the appellant was further informed in the material part of the demand for repayment of the loan balance that in the event of a receiver being appointed the role of the receiver would be to manage the mortgage property, collect rent and/or arrange for the sale of the mortgage property. Both letters of demand are exhibited with the affidavit.

38. The affidavit goes on to assert that despite the demands made the appellant failed to repay the sums due and owing by him to Start, and that as of 24 March 2017 he owed a balance to Start of €214,091.03.

39. The respondent draws the court's attention to the conditions incorporated into the charge which provide for the appointment of a receiver, namely those in clause 8.1 of the conditions. He avers that pursuant to the powers contained in the charge and under statute or otherwise he was duly appointed by Start as receiver of the property by a Deed of Appointment of Receiver executed on 17 June 2016 at 3.00 PM by two authorised signatories on behalf of Start. He has exhibited a copy of the said Deed of Appointment of Receiver and has confirmed that he accepted his said appointment and commenced upon his receivership at 11 am on the 8th of July 2016.

40. The respondent has averred he wrote to the appellant informing him of his appointment as receiver and advising him that he was not entitled to sell, transfer, convey, lease, mortgage, charge or deal in any way whatsoever with the secured property and his interest therein. He states that he also engaged a management agent for the property and wrote to the tenants in situ to advise them of his receivership. They were advised inter alia that the previous landlord's authority had ceased and that all rent from the date of the receiver's appointment was payable to the receiver and payment to any other party was not recognized as a legitimate discharge of rental commitments. The respondent further relates how the appellant had attempted to contact him and exhibits correspondence received from the appellant asking him (the respondent) "*to advise 'my client' to desist from further engagement in criminal activity*". According to the

respondent he then instructed a firm of solicitors to correspond with the appellant to reiterate the circumstances of the respondent's appointment and to call upon him, inter alia, to desist from taking any unlawful action. Correspondence between the said solicitors and the appellant, in the appellant's correspondence in response thereto, is exhibited.

41. The appellant has asserted in his responding correspondence (which he has copied to numerous other parties), *inter alia*, that he does not recognize the respondent as having any legal/lawful authority in any context whatsoever and that the respondent would be treated as nothing more than unlawful trespasser. Further, the correspondence makes various threats and allegations of deceit, fraud and professional misconduct which the respondent contends are groundless.

42. The respondent further relates that he was advised by the management agent engaged by him that while the tenants in situ had agreed to pay rent due on the property directly to the said agent they were coming under pressure from the appellant to pay the rent to him and he was threatening to evict them if they did not pay the rent directly to him. Moreover, it had been reported to him by the management agent that on the 7th November 2016 the appellant had attempted to evict the tenants in question, prompting them to bring a case against the appellant before the Residential Tenancies Board. The management agent was subsequently informed by the said tenants on the 22nd of November 2016 that they intended vacating the property on the 18th of December 2016.

43. In response to these developments the management agent visited the property on agent the 19th of December 2016 and confirmed that the tenants had vacated same. The agent changed the locks and installed steel shuttering in order to secure the property and put the receiver in physical possession and control of the property. Notwithstanding this it was discovered on 30 December 2016 that the steel shuttering had been removed. Steps were taken to reinstall it and to change the locks yet again. However, on or about the 9th of January 2017 the locks were interfered with and changed by an unauthorized person or persons, believed to be the appellant and/or persons acting under his control an/or direction.

44. The respondent has averred that the appellant has impeded and obstructed the conduct of his receivership to date and has interfered with his office and function as receiver of the property. It is asserted that this constituted trespass and the respondent expresses the belief that the appellant would continue to impede and obstruct him unless restrained from doing so by court order.

45. Finally, the respondent's affidavit asserts that damages would not be an adequate remedy in the circumstances of the case, confirms his willingness to give an undertaking as to damages, and further asserts that the balance of convenience favoured the granting of an interlocutory injunction.

46. There was a shorter supplementary affidavit also filed in support of the application for an injunction by the respondent, which was sworn by him on the 31st of October 2017 and which deals with the occupation of the property at one point by two persons, Oisìn Conti

and Kiera Coughlin, to whom the appellant had purported to let the premises after he had been notified of the receivership, and notwithstanding that fact, and who were briefly joined to the proceedings as second and third named defendants, respectively, but against whom the claim has since been discontinued. In the circumstances it is not necessary to review this affidavit in any further detail in this judgment. It is sufficient having regard to the discontinuance to acknowledge awareness of the contents of the supplemental affidavit but to say that, at this point, beyond providing evidence of yet further interference with the receivership by the appellant in the manner just summarised, the supplemental affidavit is not otherwise of central relevance.

47. No affidavit was sworn and filed by the appellant seeking to engage with any of the issues raised in either of the said affidavits sworn and filed by the respondent in support of his motion. As alluded to earlier in this judgment an affidavit was filed by the appellant on the 23rd of November 2017, but that simply raises the objections already described at paragraphs 8 to 14 inclusive of this judgment.

The Judgment Appealed Against

48. This court has been provided with a full transcript of the hearing which took place on 8 December 2017. Judgment was delivered *ex tempore* and is contained within the said transcript. As it is relatively short it is convenient to quote it in full:

> *"All right. The situation that arises here is that effectively Mr. Aidan Davey, the defendant, took out two loans, the latter one being in or about 2005. The loans appear to have fallen into arrears. There is an allegation, which is not counted, that there is been no payment on the mortgage since 2013. The receiver has been appointed. I don't pick up that the actual appointment is in dispute. It's appropriate to state that Mr. Davey hasn't filed any replying affidavit other than the grounding affidavit which he's read into the record, which doesn't erase any points in that regard but I'll come back to that affidavit in due course. It appears that the premises was let. It appears that the premises was repossessed by the receiver who changed the locks and who put up steel shutters on the property. It appears that those steel shutters were removed, the locks were changed and a new set of tenants entered into the property. The allegation is that Mr. Davey was involved in allowing them in. He doesn't counter that proposition. So, effectively, insofar as this Court is concerned there doesn't appear to be any challenge to the receiver and it does appear that Mr. Davey has been interfering with the receiver. This is solely an application for an injunction. It's not an application to decide either the facts or the law on the case. In making the application for the injunction, the receiver has to raise an issue to be tried. At the trial of the action he has to satisfy the Court that damages may not be an adequate remedy and the balance of convenience has to favor the granting of the order. Just in relation to Mr. Davey's affidavit, which he's opened in full before the Court, I don't see that there is any significant point raised in that affidavit. I dealt with this separately on a motion that was before the court I think two days ago. Mr. Daly seemed dissatisfied with the view that I took. I've explained to him repeatedly that he is perfectly entitled to appeal that order to the*

Court of Appeal; however, he wishes to read the affidavit into the record. I've done that but perhaps the most significant point is that the issues as regards abode and the position of KPMG and certain time elements that are involved, they, in my view, would not wholly or substantially resolve the issues between the parties. In so far as Mr. Davey regards the issues of law, then he can raise them at the trial of the action, but it does appear to me insofar as the relevant criteria that I have already set out has (sic) to be met that it is met by Mr. O'Neill and in those circumstances I propose to grant the reliefs set out in paragraphs 1, 2, 3, 4 and 5 of the notice of motion."

[Some debate then follows as to the appropriate paragraphs to be included in the order, and the form of the intended order, but nothing turns on it.]

The Notice of Appeal

49. The grounds of appeal as pleaded (and which in the Notice of Appeal are capitalized throughout, presumably for emphasis) are as follows:

(a) Pursuant to the Rules of the Superior Courts Order 25 parts 1 & 2 the Defendant's Notice of Motion was not satisfactorily dealt with wherein it was clearly demonstrated to the court that the said alleged affidavit of the plaintiff is/was not **lawfully constituted** in full accord with the Rules of the Superior Court, wherein the affidavit of the plaintiff is not authentic, is unlawful and invalid, and is fraud and perjury before the court, under statutory instrument 15 of 1986 Order 40, Rules 1 to 33

(b) The plaintiff swears in his affidavit that he took possession of the property in December 2016 which is in direct violation of **section 97 of the Land and Conveyancing Reform Act**.

(c) Judge Gilligan stated that he gave an order striking out the defendant's motion and to date it appears that there is no such order available to the defendant. The judge also states, that he does not pick up that the actual appointment of receiver is in dispute and he also states that thankfully as far as the court is concerned there doesn't appear to be any challenge to the receiver … We also wish to contest the order given by justice Gilligan on Oct 23rd in allowing substituted service to go ahead.

(d) We believe that the case was rushed to judgment by the plaintiff's **barrister/judge ...** At this point we would like to submit **Article 47 of the EU Charter of Fundamental Rights** (right to effective remedy and fair trial) … Also at this point we would like to make it known that there is a Garda Siochána investigation of fraud into the plaintiff's solicitor's under Garda pulse ID No …… wherein the actions of the plaintiff solicitors, the plaintiff, the plaintiff's agents are under investigation.

50. In both oral and written submissions to the court the appellant has attempted to expand on the grounds of appeal pleaded in his Notice of Appeal, and in particular to ventilate complaints that the respondent, and/or his clients, has/have breached various provisions of the General Data Protection Regulation in the course of the receivership and/or the conduct of these proceedings. In the absence of a motion having been brought to amend the Notice of Appeal I am not disposed to allow the appellant to rely on these additional matters. In any case their possible relevance to the matters at issue on this appeal is not apparent. Even if the appellant were to be regarded as attempting to make a case that in some way the respondent had come before the court below seeking equitable relief "without clean hands" (to use the characterisation to be found in many textbooks on the law of Equity), any such claim cannot be advanced in this appeal (a) in circumstances where it was not raised before the court below, and (b) where the contention is utterly misconceived in any event as the GDPR was not in force at the material time.

Discussion and Decision

51. I am satisfied that none of the criticisms or complaints pleaded in the appellant's Notice of Appeal could serve in any way to impugn the validity of the judgment and order of Gilligan J. granting injunctive relief to the respondent in these proceedings. Insofar as matters of law are raised or, more correctly, alleged procedural irregularities, none of these issues, even if technically correct (and I consider for the reasons stated earlier that they are not) could have any implications for the correctness of the substantial decision rendered.

52. Moreover, insofar as the notice of appeal makes assertions of fraud, perjury, a rush to judgment and so forth; no evidence whatever has been offered to support such assertions and I would reject them *in limine*.

53. Further, the allegation of non-compliance with s. 97 of the Land and Conveyancing Reform Act 2009 (the Act of 2009) was not raised in the Court below. There is no reference to it in the transcript of the hearing, nor is that complaint made in the appellant's affidavit sworn on the 23rd of November 2017. It is of course the case that affidavits should strictly speaking be confined to addressing issues of fact and that matters of law should be separately addressed in written and oral legal submissions. Not infrequently, however, lay litigants use their affidavits as a platform to address issues both of fact and of law, and courts will sometimes indulge them in that regard notwithstanding the breach of procedure, and that has been true here. However, although other matters of law are contained in the appellant's said affidavit, tellingly, the allegation of non-compliance with s. 97 of the Act of 2009 is not raised there. In circumstances where the point was not raised in the court below, and no explanation for the failure to do so has been offered, I do not consider that this Court should now be prepared to entertain it. In any event, the point would appear to be misconceived because, as the respondent has pointed out in written submissions filed on this appeal, s. 97 of the Act of 2009 (even if applicable in the case of a receivership, which the respondent does not concede) only applies to a mortgage created by deed after the commencement of Chapter 3 of the Act of 2009. Chapter 3 was commenced on the 1st of September 2009, whereas the

appellant's mortgage long pre-dates that. The initial loan was in 2003 resulting in an Indenture of Mortgage and Charge dated 26th of January 2004, covering the initial loan and any future borrowings including the top up loan or further advance taken out in 2005.

54. It is clear to me that the trial judge identified the correct legal principles applicable to the granting of interlocutory injunctions. Moreover, the evidence before him, which was not controverted in any essential detail, clearly justified the granting of injunctive relief on an interlocutory basis. I can find no error of principle.

55. Accordingly, I would dismiss this appeal.