[2020] IEHC 677

THE HIGH COURT

[Record No. 2018/8210 P]

BETWEEN

KEN FENNELL

PLAINTIFF

AND

DENIS SLEVIN, DANNY MCMENAMIN AND SIOBHAN GALLAGHER

DEFENDANTS

JUDGMENT of Mr.Justice Mark Sanfey delivered on the 18th day of December, 2020

Introduction

1. This judgment concerns an application by the plaintiff ('the receiver') for the following orders: -

(1) An interlocutory order restraining the defendants, their servants or agents, or any other person having notice of the said order, from preventing, impeding and/or obstructing the plaintiff, his servants or agents, from taking possession of, getting in and collecting the properties described in schedule hereto (hereinafter 'the properties');

(2) an interlocutory order restraining the defendants, their servants or agents, or any other person having notice of the said order, from preventing, impeding and/or obstructing the plaintiff, his servants or agents from securing the properties;

(3) an interlocutory order restraining the defendants, their servants or agents, or any other person having notice of the said order, from preventing, impeding and/or obstructing the plaintiff, his servants or agents from collecting the rent or other income of the properties;

(4) an interlocutory order restraining the defendants, their servants or agents, or any other person having notice of the said order, from trespassing upon, entering upon or otherwise attending at the properties;

(5) an interlocutory order directing the defendants, their servants or agents, or any other person having notice of the said order, to deliver up to the plaintiff forthwith any keys, alarm codes, locks and any other security and access devices and equipment in respect of the properties;

(6) an interlocutory order directing the defendants, their servants or agents, or any other person having notice of the said order, to deliver up to the plaintiff forthwith all title documents, books and records held in relation to the properties;

(7) such further or other order as this honourable court shall deem fit;

(8) an order providing for the costs and incidental to this application.

2. The properties in question are comprised in Folios 8095F and 54840F of the Register of Freeholders, Co. Donegal, and are known as 33 and 34 Marian Villas, Donegal Town, Co. Donegal ('the properties'). Each of the properties is a residential investment property.

3. The application is resisted by the defendants, all three of whom executed a deed of mortgage and charge in respect of the property known as 34 Marian Villas on 30th July, 2004. The first and second named defendants executed a deed of mortgage and charge over the property known as 33 Marian Villas on 1st August, 2006. Each of these deeds was executed in favour of Ulster Bank (Ireland) Limited ('the bank').

4. The defendants were represented at the hearing of the application by the first and second named defendants in person. Submissions were made at the hearing using "*speaking notes*" which set out a number of technical points in detail, referring to legal arguments and cases. These notes were helpfully made available to the court at the conclusion of the hearing, and thus double as a detailed written submission on behalf of the defendants.

5. There was an extensive exchange of affidavits between the parties. There is not much dispute between the parties as to the facts of the matter, and much of the affidavits is taken up with what is in effect legal argument.

6. In order to understand the issues, it is necessary to set out the background to the matter in some detail.

Background

7. The present proceedings were initiated on 17th September, 2018, and the motion issued on 12th October, 2018, returnable for 12th November, 2018. The grounding affidavit was sworn by the receiver on 18th September, 2018, and sets out the background to the matter.

8. He refers to and exhibits the letters of loan sanction and the deeds of mortgage and charge referred to above, and refers to separate letters of demand of 10th July, 2013 by which it is alleged the bank demanded from the defendants repayment of the capital and interest pursuant to the letter of loan sanction of 6th June, 2004, and from the first and second named defendants repayment of the capital and interest pursuant to the letter of loan sanction 22nd February, 2006. It is asserted that no amounts were paid on foot of the said demands, and subsequently the bank appointed Seán Webb and David Brady as joint receivers in respect of the properties by deeds of appointment of receiver dated 23rd December, 2013.

9. It is alleged that the bank's interest in the letters of loan sanction and the associated security was transferred to Promontoria (Finn) Limited by way of loan sale deed of 23rd July, 2015 and deed of novation dated 14th September, 2015. It is asserted that the first and second named defendants were placed on notice of the said assignment by way of separate letters of 5th November, 2015.

10. By separate deeds of discharge of receiver dated 27th January, 2016, Promontoria (Finn) Limited ('PFL') discharged Mr. Webb and Mr. Brady as receivers of the properties, and by separate deeds of appointments of receiver of 27th January, 2016, appointed Mr. Fennell as receiver of the properties.

11. The receiver asserts that he sought to take steps to take possession of the properties with a view to realising the income thereof, but that the defendants did not cooperate with his endeavours in this regard, and he was compelled to issue proceedings against the defendants in this Court pursuant to record number 9534P of 2017 ('the 2017 proceedings'). The receiver subsequently issued an application seeking relief by way of interlocutory injunction returnable on 25th October, 2017. The first named defendant in these proceedings, Mr. Slevin, filed three affidavits in reply to this application together with written submissions. The defendants maintain that they were meticulous in dealing with their post and had never received nor seen the demand letters purportedly sent by Ulster Bank to them. The receiver avers that, having regard to the antiquity of the demands and to the fact that the bank had no role in the 2017 proceedings, the receiver concluded on foot of legal advice that he could not contest the defendants' assertion that they had not received the demand letter.

12. Accordingly, PFL issued separate letters of 4th July, 2018 (in the case of Mr. Slevin and Ms. Gallagher) and 28th June, 2018 (in the case of Mr. McMenamin) notifying them once more of the assignment to PFL of the bank's interest in the facility advanced on foot of the facility letters of 6th June, 2004, together with associated security, and demanding repayment of the full amount of principal and interest purportedly owed pursuant to the said facility. The receiver also issued further letters of 4th July, 2018 to Mr. Slevin and Mr. McMenamin of similar effect in relation to the facility letter of 22nd February, 2006.

13. The receiver avers that *"…having regard to the evidential issues arising in respect of the previous demand by Ulster Bank, I was discharged of my original appointment as receiver of both of the properties by way of deeds of discharge dated 9 July 2018…for the same reason, the proceedings against the defendants which I had issued pursuant to record number 2017/9434P were discontinued by way of notice of discontinuance dated 9 July 2018"* [paras. 22-23].

14. The receiver's solicitors then wrote to each of the defendants by way of letters of 10th July, 2018 serving a copy of the notice of discontinuance and explaining the basis upon which this notice had been filed and that Mr. Fennell had been discharged as receiver. The letter enclosed further copies of each of the letters of demand which had issued from PFL to the defendants, and the letters explain that, in the event that the demands were not met, Mr. Fennell would be reappointed as receiver over the properties and would take all necessary steps to realise the properties for the benefit of the receivership.

15. The receiver avers that the defendants failed to meet the demands set out above, and that PFL appointed him as receiver of the properties by way of a separate deed of appointment of receiver of 13th July, 2018. He asserts that his appointment as receiver entitles him to enter upon and take possession of the properties and collect the income of

the properties. Accordingly, he caused an agent, Mr. Damien Collins, to attend the properties with a view to establishing the position with regard to occupation of the properties. The receiver avers that the first named defendant spoke to Mr. Collins in aggressive terms and made clear that he would not cooperate with the receivership.

16. In this regard, Mr. Collins swore an affidavit of 30th October, 2018, in which he averred to having attended at the properties on 20th July, 2018 in order to investigate the position as to occupation "*and to secure possession of same, if possible*". He avers that there was no answer at the door of 34 Marian Villas when he called. He says that a gentleman named "*Mohammed*" answered the door at 33 Marian Villas, and said that he would call his landlord, which was the first named defendant. Mr. Collins avers that "*Mohammed*" handed the phone to him, upon which he was "*told in no uncertain terms by Mr. Slevin to 'Get off my property before I come around'*". Mr. Collins avers that he "*quickly left the property so as to avoid a physical confrontation with Mr. Slevin*".

17. The receiver goes on to aver in his grounding affidavit that his solicitors received a letter of 10th August, 2018 from the first named defendant, which made it clear that the defendants did not intend to cooperate with the receivership and would defend any legal proceedings which might be issued by the receiver. In fact, the letter expressed an intention on the part of the defendants to issue legal proceedings themselves against the receiver in the event that settlement proposals were not made by PFL and the receiver. The letter complained of "*the disgraceful intrusion into our tenant Mr. Yabal's property by Damien Collins and Nick O Keeffe on Saturday 11th February 2018 while in fact and in law Damien Collins and Nick O Keeffe were being trespassers at that time without any identification and they entered the home of Mr. Yabal where his wife and four teenage girls were present and proceeded to take photographs*". The receiver exhibits a letter which was subsequently received from Mr. Yabal of 22nd August, 2018 in which Mr. Yabal complains about visits made to the property by Mr. Collins on 11th February, 2017 and the aforesaid visit of 20th July, 2018.

18. The receiver responded to Mr. Yabal's letter by way of letter of 10th September, 2018. It was denied that the receiver's agents forced their way into the property or took photographs of Ms. Yabal or her daughters as alleged in Mr. Yabal's letters, and asserts that the receiver's agents were themselves forced to call the Gardaí "*when they were approached a short time later by a gentleman who refused to identify himself and who threatened them in an extremely aggressive manner*". The letter maintained that it was the receiver's agents, and not Mr. Slevin, who were entitled to collect the rental income in respect of the properties, and the letter sought confirmation from Mr. Yabal in relation to the details of his own occupation of the property, and in particular whether there was a written lease or rental agreement and details of the rental payments which had been made by Mr. Yabal. As of the date of the grounding affidavit, the receiver avers that he had received no reply to this correspondence.

19. As a result of these interactions, the receiver considers that the present application is appropriate, and that the balance of convenience favours the granting of the reliefs sought.

The defendant's position

20. An application was made to this Court for an order for substituted service of the plenary summons, and an order was duly made on 19th November, 2018 that the service of all pleadings and proceedings and other documents be effected by serving a copy thereof at the defendants' home addresses, and that any such service be deemed good and sufficient service in respect of any documents requiring personal service upon the defendants.

21. By affidavit of 14th January, 2018, the first named defendant set out the defendants' position "*on behalf of and with the authority of the second and third named defendants*". I do not propose to set out in detail the averments of the first named defendant in this affidavit, as they comprise mainly technical points which were subsequently the subject of legal submissions with which I deal in some detail below.

22. By way of brief summary, the affidavit of the first named defendant made a number of complaints. It was said that the discharge of the taxed costs of the 2017 proceedings should be discharged by the plaintiff before he be permitted to proceed with the present proceedings. It was asserted that the application constituted an abuse of process, in that the defendants had repeatedly challenged the validity of the successive receiverships since the appointment of Mr. Webb and Mr. Brady by Ulster Bank, and that the validity of the appointment of those receivers including the present receiver had never been established. In particular, the first named defendant took issue with the assertion that valid demand letters had been served, and that "*no firm evidence has been supplied by Mr. Fennell*" in this regard. The affidavit makes reference to certain jurisprudence of this Court in relation to the necessity for receivers to observe formalities surrounding their appointment, notably the decision of Gilligan J. in *The Merrow Limited v. Bank of Scotland* [2013] IEHC 130 and the decision of Cregan J. in *McCleary v. McPhillips* [2015] IEHC 591.

23. Other points made by the first named defendant refer to what the defendants consider to be flaws in the process whereby loans and securities were transferred from the bank to PFL. This includes complaints in relation to the signatures on the documentation and whether they are sufficient to satisfy the legal requirements for transfer. It is suggested that the proceedings are statute barred, as "*the alleged loans fell into arrears on October 1st 2010".*

24. It is asserted that there is no evidence that the appropriate stamp duty has been paid on the alleged sale of facilities and securities from the bank to PFL, and that s.127(4) of the Stamp Duties Consolidation Act 1999 requires that proof that the stamp duty has been paid must be furnished, in default of which "*any items such as loan offer letters or security documents cannot be used as evidence by the plaintiff in this case*".

25. The first named defendant claims that the mortgages were impacted under the "*Tracker Review Process*" and that the Central Bank website stated that its policy was that "*repossessions are not to occur while individual cases are being assessed under the Examination to determine if they are affected*". The first named defendant asserted that the proceedings could not continue "until such time as the review is completed as potentially any overcharging that may have taken place might invalidate any alleged demand letters…" [para. 39]. The first named defendant also made complaint that all of the costs incurred by PFL had been added to the alleged amounts claimed in the demand letters. Complaint is also made of the fact that PFL "*did not register a charge in their own name over the properties, rather registering as 'owners' of the Ulster Bank Ireland Limited charge*" [para. 46]. Accordingly, the first named defendant asserts that PFL "*had no right to appoint receivers over our properties, as they are not registered charge holders over our properties, but have registered themselves as 'owners' of the Ulster Bank Limited charge, and therefore cannot recover possession, appoint receivers or sell our properties*". [Paragraph 47].

26. The first named defendant concludes by requesting this Court to dismiss the plaintiff's case in its entirety, or in the alternative to make an order preventing the receiver or his agents from contacting or attempting to contact or interact with the tenants in 33 and 34 Marian Villas "*until such time as the plenary hearing has concluded*…".

27. The receiver replied to this affidavit by an affidavit of 25th March, 2019. The first named defendant duly replied to this affidavit on 13th June, 2019. Further affidavits were sworn by the receiver and the first named defendant on 5th July, 2019 and 17th July, 2019 respectively. A statement of claim was subsequently delivered on 8th August, 2019. After an exchange of particulars, a defence and counterclaim was delivered by the defendants on 6th March, 2020. I am not informed that any Reply and Defence to Counterclaim has yet been delivered by the receiver. A final affidavit was sworn by the first named defendant on 12th March, 2020.

28. In coming to the judgment which I set out below, I should perhaps say that all of the arguments made to me, whether set out in affidavits or in the written "*speaking notes*" referred to above – there were no written submissions from the plaintiff – or in the oral submissions made to me have been taken into account, although I have not attempted to set out every detail or nuance of the arguments made by the respective parties in this judgment.

Issues

29. The application was originally listed for a priority hearing on 18th – 19th March 2020. In the event, due to the Covid-19 pandemic, the hearing of the motion did not take place until 21st July, 2020. The submissions in the matter were made over two days, after which I reserved judgment.

30. In advance of the hearing, the plaintiff's solicitors wrote to the defendants by letter of 14th March, 2020 setting out a summary of the issues which appeared to the plaintiff to arise from the affidavits in the application. The letter set out the points raised by the

defendants in the affidavits, together with brief responses from the plaintiff. This categorisation of the issues, which was relied upon by counsel for the plaintiff during his submissions, was helpful, and I will refer to it again below.

31. However, the first named defendant, who along with the second named defendant made submissions on behalf of all the defendants, began his submissions by raising a preliminary issue as to whether the plaintiff had made a *prima facie* case. The defendants challenged the evidential value of much of the evidence proffered on affidavit by the plaintiff, in particular alleging that the plaintiff's evidence consisted mostly of hearsay, and that the plaintiff was not entitled to the benefit of the Banker's Books Evidence Act 1879 (as amended). The defendants relied particularly on the decision of the Court of Appeal in *Promontoria (Aran) Limited v. Burns* [2020] IECA 87. In all the circumstances, the defendants argued that the plaintiff had not adduced appropriate or sufficient evidence in support of his application.

32. I propose to deal with this issue firstly, as if the defendants are successful in this regard, the receiver's application cannot succeed.

The defendants' preliminary issue on hearsay

33. The defendants made a number of points to support its position that the receiver has not adduced sufficient evidence not of a hearsay nature to be permitted to succeed in his application. In fact, Mr. Slevin expressed the view, set out in his speaking notes, that "all the evidence and exhibits relied on by the plaintiff in opening this case are hearsay". The defendants specifically invoke *Burns* in this regard.

34. The defendants say that the receiver is not an employee of the bank or PFL or their servicing agents. He does not aver to having control of the books or records of any of those entities. It is submitted that, where the receiver avers to a document or state of affairs prior to his appointment, he is simply saying "*in effect what someone else told him*…".

35. Among the records to which the plaintiff refers but which the defendants say are not under the control of the receiver, and to which he has no access "*to confirm they were factual*…", are the facility letters and mortgage deeds; the demand letters from the bank; the loan sale deed and deed of novation by which PFL acquired the facilities and security; the demand letters sent to the defendants by Capita, the service agent of PFL; and the demand letters sent in June and July 2018 by PFL to the defendants. It is also asserted that the receiver has no personal knowledge of the facilities referred to in these letters which PFL allege are in arrears, or indeed that the defendants are in arrears in respect of the facilities at all.

36. The defendants also make a number of criticisms of an affidavit sworn by Mr. Donal O'Sullivan on 10th October, 2018 in support of the application. Mr. O'Sullivan, who is a director of PFL, avers *inter alia*, that "*the matters that are set out [in the receiver's grounding affidavit] that relate to PFL (and the books, records and files of PFL, including*

its books, records and files relating to facilities and security transferred from [the bank to PFL]) are true and accurate to the best of my information and belief".

37. The defendants are particularly critical of this passage, noting that Mr. O'Sullivan "*fails to aver to specifically checking the information and documents relative to Promontoria Finn against the books and records and confirm they are true copies"*.

38. The defendants summarise by saying that "*there is no credible or acceptable evidence before this Honourable Court of any loan offers from Ulster Bank, of any accounts existing in the defendants' name with Ulster Bank or PFL*".

39. In response, Mr. Brian Conroy BL for the plaintiff referred to O.40, r.4 of the Rules of the Superior Courts which states that "…*affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted…"*. It was submitted that the receiver in the present case had adopted the usual approach, and that there had been no abuse of the principle that hearsay evidence may in some circumstances be permitted in an interlocutory application.

40. Counsel made the point that the defendants do not deny in their affidavits that the facilities were offered by the bank and accepted by the defendants, that the deeds of mortgage were executed, that monies were advanced by the bank to the defendants, and that the accounts of the defendants fell into arrears. The substantive points made in the earliest demands by the bank in 2013 have not been disputed. There is no suggestion by the defendants that they have discharged any monies in reduction of their indebtedness since those letters of demand. In response to a question from the court during submissions as to whether it was the defendants' position that they owed no money at all, the second named defendant somewhat carefully replied that "*we do not owe any monies to Prom Finn*".

41. The purpose of O.40, r.4 is clear. If it were the case that, for the purpose of an interlocutory injunction, the court had to insist on the same standards as to proof of facts as would be appropriate at a full plenary hearing, the result would be a proliferation of affidavits in relation to matters which might not truly be at issue between the parties for the purpose of the application. Such an approach would add greatly to the cost of the proceedings and the length of the hearing of the application. Some witnesses might not be available to swear affidavits at short notice. In the case of injunctions, which often have to be brought before the court as a matter of urgency, an insistence that each deponent swear only to matters of which she had personal knowledge might lead to a situation where the court did not have before it all the facts relevant to its consideration of the issues.

42. The principle set out in O.40, r.4 is therefore a practical accommodation, and is for the convenience of all parties to the application. The court will be astute to ensure that no

abuse results from the relaxation of the hearsay rule, and that it is not used as a means by which litigants can side-step awkward issues of genuine contention.

43. The defendants have referred to a number of authorities regarding the use of hearsay evidence, and rely in particular on the judgment of the Court of Appeal in Burns. In that case, which concerned an application for summary judgment, the appeal dealt with the admissibility of evidence adduced by the plaintiff in the summary proceedings, and whether it was sufficient to support the grant of judgment.

44. In the event, the court dismissed the appeal, holding that there was "*insufficient evidence of the type of business records carrying indications of reliability, nor evidence sufficient to establish a course of dealings…"* [para. 120, Baker J.]. In the course of her judgment, Baker J. reviewed the authorities dealing with hearsay evidence in the context of summary proceedings, noting particularly the difference of opinion in this regard among the members of the Supreme Court in the leading case of *Ulster Bank Ireland Limited v. O'Brien* [2015] IESC 96.

45. However, it should not be assumed that the jurisprudence relating to the use of evidence in summary proceedings and motions for liberty to enter final judgment in particular will govern the use of evidence in interlocutory applications for an injunction. Where a money judgment is obtained against a defendant in summary proceedings, that is a final determination by the court that the defendant owes a certain sum of money to the plaintiff, and that order may, subject to any stay ordered by the court, be subject to execution against the defendants' assets. It is for that reason that there are significant safeguards against judgment being ordered in circumstances other than where there is no fair or reasonable probability that the defendant has a real or *bona fide* defence.

46. An interlocutory application in which injunctive relief is sought pending the full hearing of the action is not a final determination of the issues between the parties. The court applies well established principles to such an application, typically considering whether there is a fair question to be tried, and "*how best the matter should be arranged pending the trial, which involves the consideration of the balance of convenience and the balance of justice*…" [O'Donnell J., para. 64 *Merck Sharp & Dohme Corporation v. Clonmel Health Care* [2019] IESC 65].

47. In my view, O.40, r.4 envisages a situation where the court can have regard to evidence which might not be admissible in a trial where the full rigours of the hearsay rule might apply. That such evidence "*may be admitted*", makes it clear that it will be a matter for the court, where objection is taken to such evidence, to decide whether in all the circumstances the evidence should be permitted. Where the evidence is of such importance or centrality to the matters at issue in the application that the opposing party would be placed at a significant disadvantage by admission of the evidence, the court can refuse to have regard to it. The court will balance the interests of both parties in all the circumstances of the application in coming to its decision.

48. In fairness to the defendants, they did address the applicability or otherwise of O.40, r.4 both in their speaking notes and in the oral submissions to me at the hearing. It was stated that the receiver did not, as is required by O.40, r.4, state the grounds for his beliefs in his affidavits. However, as I interpret the rule, this requirement is to prevent a situation where a deponent makes a statement which is clearly hearsay, but offers no basis upon which the court can assess the credibility of the claim. In the present case, the receiver has set out all of the documentation which forms the basis for his application. The grounds upon which he makes the application are perfectly clear. There is no suggestion that the receiver has omitted or supressed documentation from the defendants which would have been helpful to their case. It is not suggested that the application is tainted by an absence of full disclosure or lack of candour of the type specified by Clarke J. (as he then was) in *Bambrick v. Cobley* [2005] IEHC 43.

49. The approach taken by the defendants as regards hearsay in this application calls to mind the approach stereotypically adopted by the defence in Road Traffic Act prosecutions – that if any element of the evidence relied upon by the plaintiff can be ruled inadmissible, however technical the grounds, the entire edifice of the plaintiff's case must crumble. For the reasons set out above, I do not accept that this is an appropriate way for the court to deal with an interlocutory application for an injunction.

50. The defendants have substantive points to make about the plaintiffs' application, and I deal with these below. However, I am not disposed to decide a preliminary issue in the defendants' favour on the basis that the receiver's application is tainted with excessive use of hearsay.

The substantive issues

51. The letter of 14th March, 2020 from the receiver's solicitors to the defendants, in advance of the hearing date of 18th March, 2020, sets out eight issues canvassed in the affidavits by the defendants, with brief responses. The defendants did not demur from or object to this classification of their objections. Accordingly, I will deal with each of those objections as they appear in the letter.

Issue No. 1: Failure of receiver to discharge costs of 2017 proceedings

52. The defendants complain that the plaintiff, having given an undertaking as to damages in the context of the injunction application in the 2017 proceedings, did not discharge to the defendants a sum in excess of €30,000 in respect of costs and outlay demanded by the defendants in a letter of the first named defendant to the plaintiff's solicitors of 29th November, 2018. Although the letter of 14th March, 2020 refers to those proceedings as "*not discontinued*", the receiver has in fact sworn at para. 23 of his grounding affidavit that they were indeed discontinued, and he refers to a notice of discontinuance of 9th July, 2018 "*when produced*".

53. The first named defendant argues at para. 9 of his first affidavit that the defendants are "*entitled to have our costs taxed and paid before the Plaintiff proceeds with this case*", and requests a stay of the present proceedings under O.26 of the Rules of the Superior Courts in this regard. Rule 4 of O.26 is as follows:

> *"If any subsequent action shall be brought before payment of the costs of a discontinued action, for the same, or substantially the same, cause of action, the court may order a stay of such subsequent action, until such costs shall have been paid".*

54. The undertaking as to damages furnished by the receiver in the 2017 proceedings in relation to an application which ultimately did not proceed has no relevance to the question of costs. The undertaking relates to damages which a court might find to be due on taking an account in the event that it became apparent on a full hearing of the proceedings that relief ordered on an interlocutory basis should not have been granted. The liability as to costs in a discontinued action is an entirely separate issue.

55. The bill for costs proffered by the first named defendant amounts to €31,004.00. Of this amount, €24,405.00 represents "*charge for time loss of earnings*" and €6,599.00 relates to "*outlays*". The receiver argues that the defendants are entitled only to outlay, and that most of the sum claimed for outlay is not in fact outlay at all. It is further argued that the matter could have been referred by the defendants to taxation if the defendants wished to resolve definitively the issue of what the receiver owed in respect of costs.

56. If it were the case that I considered that the receiver was wilfully ignoring a clear and established claim for costs or outlay from the defendants in respect of the previous proceedings, I would certainly look favourably on an application for a stay of the present proceedings. However, the defendants' claim is utterly disputed, at least as regards quantum, and it seems to me that the receiver has substantial grounds to refuse to pay the sum sought. In those circumstances, I am not disposed to stay the present proceedings until the alleged costs have been paid.

Issue No. 2 – Invalidity of demands

57. The defendants assert that demands made by the plaintiff or PFL are invalid, and that this is fatal to the application herein. In particular, the defendants argue that demand letters issued by PFL to the defendants on 28th June and 4th July, 2018 demanding repayment of principal and interest are invalid on a number of grounds. Reference is made to the concept of "*demand*" in the mortgage. Clause 2 recites that the demise of the hereditaments and premises to the bank under the mortgage is to be "*as a continuing security to the Bank for the discharge on demand of… [various liabilities present and future of the mortgagor including repayment of the monies lent in respect of the scheduled property]"*. Although the wording of the mortgage is not a model of clarity, it seems tolerably clear that the mortgagee must demand payment of the liabilities set out in that clause.

58. Clause 8 of the mortgage reads as follows:

> *"Sections 17 and 20 of the Conveyancing Act 1881 shall not apply to this Mortgage and the statutory power of sale, and other powers shall be exercisable at any time after demand."*

59. Clause 11 of the mortgage provides that: -

> *"At any time after the power of sale has become exercisable the Bank or any Receiver appointed hereunder may enter and manage the Mortgaged Property or any part thereof and provide such services and carry out such repairs and works of improvement reconstruction additions or completion (including the provision of plant equipment and furnishings) as deemed expedient. All expenditure so incurred shall be immediately repayable by the Mortgagor with interest at the rate aforesaid and shall be a liability charged on the Mortgaged Property. Neither the bank or any receiver shall be liable to the Mortgagor as mortgagee in possession or otherwise for any loss howsoever occurring in the exercise of such powers."*

60. It appears, then, that a demand must be made by the mortgagee for repayment, after which any receiver appointed by the mortgagee is empowered to take possession of the property. Clause 12 of the mortgage has the usual clause deeming the receiver to be the agent of the mortgagor.

61. The defendants claim that the demand letters do not stipulate a date by which payment should be made, and that consequently there is "*no default*", which they assert is a prerequisite under Clause 8 of the mortgage.

62. I should say firstly that it is not clear to me that default is strictly necessary under Clause 8. The clause refers to the power of sale being exercisable *"at any time after demand*", which wording does not suggest that it is necessary that there be a response to the demand.

63. In any event, it seems to me that the letters of 28th June and 4th July, 2018 issued to the defendants by PFL as referred to at para. 12 above were clearly demands for the purpose of Clause 8 of the mortgage. The letters made unequivocal demands for repayment of the monies outstanding, and set out the amounts due. The letters were "*of a peremptory character and unconditional*", as Nourse J. put it in his judgment in *Re A Company* [1985] BCLC 333 in addressing the question of what constituted a demand, which dicta were approved in this jurisdiction by Dunne J. in *GE Capital Woodchester Home Loans Limited v. Madden* [2013] IEHC 540.

64. I might also add that the PFL demands were also sent to the defendants with the letters of 10th July, 2018 from the receiver's solicitors. Although these letters were sent between the discharge of the receiver and his subsequent reappointment, the letters clearly intimated that, if the demands for repayment were not met, Mr. Fennell would be reappointed and would take all steps necessary to realise the properties for the benefit of the receivership.

65. I am satisfied in all the circumstances that sufficient "*demand*" has been made by PFL under Clause 8 in all the circumstances, assuming that PFL has validly succeeded to the interest of the bank. The fact that certain costs have been added to the sums sought does not invalidate the demand, given that Clause 2 of the mortgage entitles the charge

holder to demand "*all costs charges and expenses howsoever incurred by the Bank in relation to this mortgage and such indebtedness and/or liabilities on a full indemnity basis"* [Clause 2(iii) of the mortgage/charge].

66. A number of submissions were made by the second named defendant in particular, with a view to establishing that the receiver has not demonstrated PFL's entitlement to the charge pursuant to the Loan Sale Deed of 23rd July, 2015 and the Deed of Novation of 14th September, 2015. While there were numerous points made by the defendants of varying degrees of relevance to what this Court has to decide, I will set out in the succeeding paragraphs the main thrust of the defendants' submissions.

67. Firstly, the defendants made extensive reference to the published accounts of PFL for the period 21st December, 2015. They noted that the accounts suggest that PFL enjoys a "*tax designation*" under s.110 of the Taxes Consolidation Act 1997, and acknowledge the acquisition by PFL from Promontoria BV, its parent company, of "*non-performing real estate loans secured on property and development land in Northern Ireland and the Republic of Ireland*", by means of the Deed of Novation of 14th September, 2015 referred to at para. 9 above.

68. The defendants complain that the level of redactions in the sale deed of 23rd July, 2015 and the Deed of Novation of 14th November, 2015 *"…make it impossible for this Court to determine if this is a sham sale or not…*". They go on to refer to a charge of 29th September, 2015 by PFL in favour of U.S. Bank Trustees Limited, which the defendants allege effected an "*absolute assignment*" of a range of assets but which clearly includes the loans and securities the subject of this action.

69. It is submitted that this charge is a device for ensuring that PFL, which "*cannot hold any real estate assets, or any assets that derive their income from real estate*…", does not risk losing its s.110 tax status. They submit in their speaking notes that "…*if we are to believe that they still hold the benefits and receivables from these property related assets, then Prom Finn are making false submissions to the Revenue and are not entitled to their Section 110 status".*

70. The defendants go on to allege that the registration by PFL of ownership of the charges in these circumstances was done dishonestly and "*should be considered to be fraud*". They argue that, accordingly, any reliance placed by the receiver on s.31 of the Registration of Title Act 1964 is inapplicable given the provisions of s.30(2) of that Act, which provides that "*any entry, erasure or alteration in the register made by fraud shall be void as between all parties or privies to the fraud*".

71. The receiver relies squarely on the fact that PFL is the registered owner of the charge on the properties. He exhibits the folios to his affidavit of 5th July, 2019 which show that this is the case. In such circumstances, the receiver relies on s.31(1) of the Registration of Title Act 1964, which is as follows: -

"31.(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

72. As the Court of Appeal has found, a court "*may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration".* [Baker J., para. 67, *Tanager DAC v. Kane* [2018] IECA 352].

73. As s.31 makes clear, the court may make an order directing the register to be rectified on the grounds of "*actual fraud or mistake*". No such application has been made to me, nor is any such issue disclosed on the pleadings in the case. The nebulous assertion that the registration in the present case is based on "*actual fraud*" is no more than speculation based on a perusal of PFL's accounts, and a suggestion that what may or may not be a securitisation agreement – which neither the defendants nor the court has seen - has deprived PFL of any interest in the charge on which the receiver relies. This in turn is based on an inference that PFL is wrongly claiming a tax designation to which it is not entitled.

74. This Court is not concerned on this application with whether PFL, which is not a party to these proceedings, complies with the requirements of s.110 of the Taxes Consolidation Act 1997. The issue which does concern the court is whether the receiver is entitled to make the present application. If it were the case that it was clear that PFL was not entitled to the benefit of the charge under which the receiver was appointed, this might cause the court to question whether the receiver was properly appointed as such. However, the registration of PFL as owner of the charge is conclusive evidence of the title of PFL pursuant to s.31 of the Registration of Title Act 1964, and this Court must accept that the register is correct. If it were intended that the ownership of PFL were to be impugned by reason of "*actual fraud or mistake*", this would have to be the subject of a separate application in separate proceedings, to which PFL would be the respondent. The defendants cannot launch a collateral attack against the ownership of the charge by means of these proceedings, to which PFL is not a party.

75. Given that the registration of the charge is conclusive proof of PFL's ownership, I am satisfied that it was entitled to appoint Mr. Fennell as receiver. I do not consider that I require to have regard to redacted portions of the charge to come to this conclusion.

Issue 4 – Is the plaintiff's claim statute barred?

76. At para. 33 of his affidavit of 14th January, 2019, the first named defendant asserts that the proceedings are statute barred. It is asserted that the "*alleged loans*" fell into arrears

on October 1st, 2010, and that "*as the loans have not been acknowledged by payment since that date, they exceed the six-year time limit for simple contracts and any action is statute barred*".

77. This point is entirely without merit. Leaving aside the fact that the defendants have not pleaded the Statute of Limitations in their defence and counterclaim, the plaintiff is not suing for a simple contract debt. The receiver relies on the powers given to him pursuant to the charge over the properties, of which charge – as we have seen – PFL is the incontrovertible owner. Even if the proceedings were to recover a contract debt, s.36 of the Statute of Limitations provides that a twelve-year period applies to actions to recover "*a principal sum of money secured by a mortgage or charge…from the date when the right to receive the money accrued*".

78. In all the circumstances, the argument that the plaintiff's claim is statute barred is misconceived.

Issue 5 – No evidence that stamp duty was paid on charge

79. At para. 34 of his affidavit of 14th January, 2019, the first named defendant asserted that "*there is no evidence before the Honourable Court that the appropriate stamp duty has been paid on the alleged sale [of the loans and security by the banks to PFL], and therefore under Section 127(4) of the Stamp Duty Consolidation Act 1999 without such proof before the court that stamp duty on the sale has been satisfied with the Revenue Commissioners, any items such as loan offer letters or security documents cannot be used as evidence by the plaintiff in this case*". The first named defendant goes on to assert that, under S.I. No. 234 of 2012, all requests for exemption from stamp duty must be made within 30 days of the creation of the instrument. The defendants contend that the plaintiff must produce documentary evidence of either payment of the appropriate stamp duty, or an exemption from doing so.

80. An identical argument relying on s.127(4) of the Stamp Duty (Consolidation) Act 1999 was made in respect of transfer documentation from the bank to another Promontoria entity in *Healy v. Ulster Bank Ireland Limited and Promontoria (Aran) Limited* [2018] IEHC 12. In dealing with the argument, Barrett J. said as follows: -

> *"…it appears to the court that the ostensible difficulty which presents for Promontoria in this regard is met by s.90(2) of the Act of 1999 which provides that stamp duty is not chargeable on a 'debt factoring agreement' (defined in s.90(1) as 'an agreement for the sale, or a transfer on sale of a debt or part of a debt where such sale occurs in the ordinary course of the business of the vendor or the purchaser' which would appear to cover arrangements of the type in issue, i.e. the Ulster Bank to Promontoria transfer documentation. For the sake of completeness, the court notes that although s.90(1) refers to 'debt' in the singular, s.18(a) of the Interpretation Act 2005 has the effect that, inter alia, '[a] word importing the singular shall be read as also importing the plural', so an assignment of a plurality of debts is also covered by s.90 of the Act of 1999."* [at para. 68]

81. These dicta, with which I agree, seem to be of equal application to the present case. The necessity to demonstrate payment or exemption does not arise, as stamp duty is not chargeable on the type of sale in issue in these proceedings.

Issue 6 – Possible breach of s.198 Companies Act, 2014?

82. At para. 18 of his affidavit of 13th June, 2019, the first named defendant suggests that a resolution effected by the Board of Directors of PFL on November 5th, 2015 to which the receiver refers in his second affidavit, the effect of which was to permit a single director to sign various documents, was invalid as there was no compliance with s.198 of the Companies Act 2014, in that the resolution of the board meeting had not been notified to the Registrar of Companies within 15 days after the passing or making of it.

83. Two points are made by the receiver in this regard. Firstly, the authority granted to a single director to sign various documents by virtue of resolutions of the Board of Directors on 5th November, 2015 did not, as the defendants suggest, involve an amendment of the constitution of PFL. Having perused the resolutions in question, it does not seem to me that there is any suggestion that PFL's constitution was purported to be amended by this resolution. I also note that there was a separate proposal "*that the Company approve and ratify all Documents entered into by it prior to the date of these minutes*". The "Documents" are very widely defined in the minutes, and appear to apply to all of the documentation relating to the sale, including the documentation exhibited by the receiver. This proposal was also adopted and passed by resolution.

84. Secondly, the receiver makes the point that s.198 is a regulatory requirement, and failure to comply with it is an offence, but the section does not invalidate an amendment to the constitution, even if the resolutions could be interpreted as such.

85. These points made by the receiver appear to me to be correct, and I do not consider that s.198 has any bearing on the issues before the court. The point is in any event based on speculation that a change in PFL's constitution was intended due to what the defendants consider may be contained in that constitution. Speculation in relation to the constitution of a body which is not a party to this action cannot constitute a ground for objecting to the present application.

Issue 7 – Authority of signatories

86. The defendants allege that it is legitimate for them to challenge the authority of signatories "*where no evidential proof has been provided of their authority to sign the documents in question*" [para. 17, affidavit of first named defendant, 17th July, 2019]. It is submitted that the onus is on the plaintiff to "*substantiate his claim with the necessary proofs*".

87. It was submitted on behalf of the receiver that it was not incumbent on him to rebut an unspecified allegation of lack of authority of this kind, and he relied on the decision of Costello J. in *O'Donnell v. Lehane & Bank of Ireland* [2015] IEHC 228 in this regard. In that case, it was argued that evidence of authorisation of Bank of Ireland's deponent, who was an employee of the bank, to swear affidavits on its behalf would have to be produced

before his affidavits could be deemed admissible. Costello J. held that this submission was "*clearly incorrect*", and noted that no authority for this proposition was advanced.

88. It has always been permissible for a party to point out a lack of authority on the part of a deponent or the author of a crucial document, if that lack of authority has a bearing on the issues before the court. What is not permissible is that a party purports to insist, without adducing any evidence that there is any specific infirmity in the capacity or authorisation of a deponent or author of a document, that such deponent or author produce evidence of his authorisation as a precondition of the admissibility of the document in question. As Costello J. rightly points out, there is no authority for such a proposition.

89. Specific objection is made by the defendants to the fact that the Deed of Appointment of the receiver is signed by one director only, and the defendants rely on the decision of Stewart J. in *McGarry v. O'Brien* [2017] IEHC 740, in which the court found that there was a fair question to be tried as to whether a receiver had been validly appointed in circumstances where a sole director of the appointing company had signed the Deed of Appointment, and no evidence had been put before the court that the Board of the Directors had approved the appointment.

90. However, in the present case, there is evidence before the court that PFL approved and ratified the documents defined in the minutes of the meeting of the Board of Directors of 5th November, 2015, and further agreed that any one director acting alone be empowered and authorised to enter into those documents "*from time to time*". The "*documents*" as defined include "*Deeds of Appointment", "Deeds of Conveyance* and Assignment" and "*Deeds of Novation*".

91. Perhaps conscious of this, the defendants complain that reliance on the resolutions by the receiver constitutes an unacceptable use of hearsay evidence. However, I am of the view that it is permissible for the receiver to exhibit the Board minutes of PFL in the context of an interlocutory application, as there were no grounds advanced by the defendants which I considered sufficient that the minutes are not an authentic document which reflects the resolutions passed by the Board of Directors of PFL on 5th November, 2015.

Issue 8 – Effect of assignment on PFL's interest

92. I have already referred above to the assertion of the defendants that the plaintiff is not entitled to the benefit of the charge by virtue of its alleged assignment to U.S. Bank Trustees Limited. As the first named defendant puts it at para. 13 of his affidavit of 17th July, 2019, "*…any alleged appointment by PFL of Mr. Fennell as a valid receiver over our properties is clearly doomed to fail as PFL no longer hold any interest, right, title or benefit, because on 29th September 2015 they assigned absolutely all its present and future rights, title, benefit and interest in its loan assets and the proceeds thereof to U.S. Bank Trustees Limited*". The first named defendant exhibits the C1 form "*Registration of a Charge*" relating to the creation of a charge by PFL in favour of U.S. Bank Trustees Limited, described in the form as "*the Security Agent*". The details suggest that the charge extends to "loan assets" which may include the loans to the defendants.

93. In reply, the plaintiff relied on the judgment of the High Court in *Pepper Finance Corporation DAC v. Jenkins* [2018] IEHC 485, which involved a similar issue, which Binchy J. summarised as follows: -

> *"… may the owner of a loan and related security, who has divested itself of the entire beneficial interest in that loan and related security, and whose interest in the same is no more than that of a bare trustee, issue proceedings in its sole name against the borrowers for recovery of the debt and/or possession of the property secured in respect of that debt, and without making any reference at all in the proceedings to its status as trustee on behalf of a third party?"*

94. Binchy J. went on to address the question of how a debtor, who runs the risk of possibly facing claims from the original creditor who has assigned its debt, and the entity to whom that debt has been assigned, may approach such a situation:

> *"28. The second issue which has clearly influenced the courts in their consideration of these matters is that of notice… The reason for this is obvious. If a debtor has received notice of the assignment and, more particularly, has been directed to make payments to the assignee, then it is obviously imperative that the assignee should be a party to the proceedings, because in those circumstances the debtor would otherwise be exposed to a risk of separate proceedings being brought by the assignee. But where no such notice has been given, as in this case it seems to me that the same considerations do not arise. In these circumstances, the debtor (in this case, the defendants) not having been put on notice of the arrangements made between the plaintiff and Windmill, is not just entitled to but is obliged to continue making repayments of the loan to the plaintiff. As long as the defendants have not been put on notice of the assignment, the assignee, Windmill, cannot make any claim against the defendants…"*

95. The importance of notice in the context of an assignment may be seen in s.28(6) of the Supreme Court of Judicature Ireland Act 1877:

> *"(6) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, lie shall be entitled, if he think fit, to call upon the several persons making*

claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

96. It is submitted on behalf of the plaintiff that, in circumstances where the defendants have not been given express notice in writing of any assignment, their obligations to the owner of the charge remain in place, as the alleged assignee cannot enforce any such rights. It is not suggested by the defendants that they have ever received any such express notice.

97. I should say that the only documentation presented to me in respect of the transfer to U.S. Bank Trustees Limited is the form C1 registering the charge, which gives "*short particulars of the property charged*", but not much else. I am unaware of the terms of any such transfer, or what if any interest remains in PFL in the property charged. In such circumstances, I do not consider that I am in a position to form any judgment as to the division of rights and interests between PFL and its assignee.

98. It does seem clear however that, in the absence of express notification of the assignment to the defendants, their obligation is to comply with the terms of the loans and securities which remain enforceable only by the owner of the charge. As PFL is the registered owner of the charge, it is entitled to enforce those terms, and any securitisation agreement – if that is what the agreement with the U.S. Bank Trustees Limited is – does not affect the defendants' obligations in this regard.

Other arguments

99. The first named defendant avers at para. 37 of his first affidavit that, on November 9th, 2018, he "*was informed (by phone) by Ulster Bank that Mortgage No 1037355 was impacted under the Tracker Review Process and that full details when completed would be provided in writing".* He refers to the Central Bank website which states its policy that "*repossessions are not to occur while individual cases are being assessed under the Examination to determine if they are affected*".

100. The receiver's response to this is to be found at paras. 31-35 of his affidavit of 25th March, 2019. He pointed out the lack of documentation supporting the defendants' assertions, and the fact that both PFL and he were strangers to any such a review. It was submitted that any overcharge of interest – if there were such – did not undermine the validity of his appointment "*particularly in circumstances where the defendants, by their own admission, had made no payments against the relevant loans since at least 2010*".

101. Evidence was in fact adduced by the defendants as to the outcome of the review in respect of the account for one of the properties. In a letter of 27th March, 2019, Ulster Bank wrote to the first and second-named defendants, informing them of the review of the account relating to the property known as 33 Marian Villas. The bank set out the steps it was taking to ensure that an overcharge was being rectified. The total amount stated to be payable in respect of the overcharge on this amount was €4,402.83, and the letter stated "*compensation payment has been provided in the accompanying cheque that is made payable to all parties to the mortgage for the full amount*".

102. In any event, it is clear that a letter of demand which overstates the amount due is still a valid demand. In this regard, see the dicta of Cregan J. in *Flynn v. National Asset Loan Management Limited* [2014] IEHC 408, paras. 231-237, and the decision in *Vivier Mortgages Limited v. Lehane* [2017] IEHC 605, in which Baker J., at para. 16 of her judgment, endorses the view of Cregan J. in this regard.

103. The defendants can hardly impugn the appointment of the receiver on this ground with any credibility, given that they have not made a payment against the original loans in over ten years. In fairness, the defendants did not press this ground in their oral submissions.

The appropriate test

104. Essentially, most of the arguments to which I have referred above were made for the purpose of submitting that the receiver was not properly appointed by PFL, and in accordance with the terms of the mortgage. The defendants rely particularly on the decision of Gilligan J. in *The Merrow Limited v. Bank of Scotland* [2013] IEHC 130, and the decision of Cregan J. in *McCleary v. McPhillips* [2015] IEHC 591.

105. In the former case, Gilligan J. stressed the necessity to follow strictly the terms of the debenture when appointing a receiver and that failure to seal the Deed of Appointment – which was specifically required under the debenture in that case, but not in the present case – was fatal to the purported appointment of the receiver.

106. In *McCleary v. McPhillips*, Cregan J. provided a summary of the applicable principles in considering the appointment of a receiver: -

> *"1. The receiver's authority to act is derived from the contracts, or mortgages, or deeds of charge, entered into between the Bank and the borrower.*
>
> *2. The receiver is to be appointed according to the terms of the contract between the parties.*
>
> *3. Because a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument.*
>
> *4. The consequences of non-compliance with the formalities for the appointment of a receiver, in accordance with the terms of the instrument, is that the appointment is void.*
>
> *5. If the instrument provides that the appointment is required to be by deed, or under seal, that formality must be observed.*
>
> *6. If the instrument requires that the appointment is to be made in writing under hand, that formality must also be observed.*
>
> *7. An invalidly appointed receiver may be a trespasser on company property.*

8. *Considerations of basic fairness and contractual interpretation mean that the Bank should be obliged to comply with the terms it chooses to impose in the instrument involved."* [at para. 131].

107. These principles were quoted with approval by McDonald J. in *McCarthy v. Moroney* [2018] IEHC 379, an authority relied upon by the plaintiff in the present case.

108. In considering whether or not to grant the reliefs sought by the receiver, it is appropriate to have regard to the dicta of Clarke C.J. in *Charleton v. Scriven* [2019] IESC 28, a case which involves an appeal against the grant of an injunction to receivers, primarily on the basis that the receivers were not validly appointed in accordance with the mortgages in question. Clarke C.J. held that the court should: -

"6.10 distinguish between the reliefs sought which simply seek to retain the position that the Receivers are entitled to collect the rent, on the one hand, from any relief which might designed to allow the Receivers to move on to selling the property on the other."

109. Clarke C.J. went on to state as follows: -

"6.12 having regard to the underlying principle of attempting to fashion an order which runs the least risk of injustice, there may very well be a very important distinction to be made in receivership cases between situations where the receivers concerned simply intend to maintain the situation pending a trial and ones where the substance of the interlocutory order sought is one designed to, in practice, bring the proceedings to an end. There is considerable logic in the view that, for example, a receiver who wished to obtain possession of residential property or a family farm so that it could be sold would need to make out a strong arguable case for it to be appropriate, having regard to the greatest risk of injustice test, to allow such an order to be made. On the other hand, where the matters are essentially financial or where there are strong grounds for believing that a receiver is necessary to ensure the property is properly managed and maintained pending a trial, very different considerations may apply."

110. In the present case, there is no doubt that the relief sought by the plaintiff is essentially mandatory in nature, in the sense that it requires the defendants and anyone having notice of the order to vacate the properties, thus enabling the plaintiff to take possession of them. In these circumstances, the plaintiff must show more than that there is a fair question to be tried. He must show that he has a strong case likely to succeed at trial. The principle that a plaintiff seeking a mandatory order should be held to a higher standard that the normal *Campus Oil* standard was confirmed by the Supreme Court in *Okunade v. Minister for Justice* [2012] 3 IR 152 and *Maha Lingam v. Health Service Executive* [2005] IESC 89, and has been accepted and applied by this Court in several subsequent decisions, notably the decision in *McCarthy v. Moroney*, on which the plaintiff relies.

111. For the reasons I have set out above, it seems to me that the receiver has established that he has a strong arguable case. While a myriad of technical points has been made by the defendants, it is not apparent, on the material put before me and the submissions made, that any of these points is likely to succeed. I wish to emphasise that this is not to say that the defendants cannot succeed ultimately at trial, or that there may not be factors or submissions which would cause the trial judge to come to a different conclusion. However, having considered all the evidence before me and the careful and diligent submissions by both sides, I am satisfied that the receiver has satisfied the first element of the test for a mandatory interlocutory injunction.

112. The court must then consider "*how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice…The most important element in that balance is, in most cases, the question of adequacy of damages…*" [O'Donnell J., para. 64(3)–(4), *Merck Sharp and Dohme Corporation v. Clonmel Health Care* [2019] IESC 65.]

The balance of convenience

113. The plaintiff wishes to secure possession of the properties with a view to realising the assets and receiving any income therefrom. The defendants appear to accept that no repayments of the loans have been made since October, 2010. The demand letters from PFL of 28th June and 4th July, 2018 indicated that the balances outstanding at that time were €216,918.62 and €270,656.98 respectively. Those balances have presumably increased in the meantime. I do not have any information as to the value of the properties, but it is not suggested by the defendants that they would have any equity remaining in the properties if the loans were to be discharged from the sale proceeds of the properties.

114. Attempts have been made by the receiver to establish through agents whether the properties are occupied, and if so by whom and on what terms. There is controversy between the parties as to those attempts, the defendants and Mr. Yabal contending that the receiver's investigations have been overly intrusive, and Mr. Collins on behalf of the receiver averring that his attempts to investigate were rebuffed with a level of verbal aggression.

115. The current position is that the receiver does not know who the current occupiers (if any) of the premises are, the physical state of the premises or the terms upon which any such persons may be in occupation. The receiver by letter of 10th September, 2018 sought from Mr. Yabal details of his occupation, and requested that all future rental payments be made to his agents. There was no reply to this letter.

116. The defendants appear determined to resist the receiver's attempts to obtain possession of the properties. The receiver argues that damages are not an adequate remedy. There is in fact no evidence before me in relation to the means of the defendants, and the receiver avers in his grounding affidavit that "*…the Defendants may well not be able to account to me for any damages sustained in the receivership arising out of the matters*

referred to above as they do not dispute that they are seriously indebted to PFL…" [para. 36].

117. This last averment is not strictly accurate. As the exchange between the court and the second named defendant referred to at para. 40 above makes clear, the defendants' position is that they owe no monies to PFL, as they do not accept that PFL has succeeded to the bank's charge. While it is accepted by the defendants that they have not discharged arrears on the original loans since October, 2010, at no stage of these proceedings has there been any acknowledgement that they owe monies to any particular party, much less any proposals to discharge the loans by means of which they acquired the properties.

118. It must be emphasised that the loans were originally made to allow the defendants to enter into "*buy-to-let*" investments. The properties are not the family homes of the defendants. It can be assumed that the defendants have been renting out these properties to tenants since the properties were acquired – the original loans were advanced in 2006 – and that the defendants have no intention of using this income to discharge the loans.

119. In all the circumstances, it seems to me that the balance of convenience heavily favours the grant of the interlocutory reliefs sought. I am conscious of the fact that, for all the reasons set out in the plaintiff's affidavits, it has taken an inordinate amount of time since the default in repayment commenced in 2010 to bring about a situation whereby effective procedures were adopted by means of the appointment of a receiver to recover possession of the properties. The receiver in fact, as we have seen, initiated proceedings in 2017 with similar intent to the present proceedings, and for the reasons set out at paras. 17-19 of Mr. Fennell's grounding affidavit, withdrew these proceedings.

120. However, I do not consider that the length of time taken to get to this point would justify a view that things should remain as they are pending the trial. The plaintiff in my view is likely to succeed at the trial of the action. The defendants have made no proposals in relation to the discharge of the loans, or even to place funds in escrow pending the court's determination as to whether or not PFL validly succeeded to the bank's charge. In this latter regard, the defendants have made no application to the Property Registration Authority for rectification of the Register of the County of Donegal, to which PFL would be the appropriate respondent. It would seem that the defendants are quite happy to fend off PFL's attempts to regain possession of the secured assets for as long as they can, all the while deriving rental income from the properties and refusing to make repayments of the loans.

121. I do not have any indication as to the defendants' means, and as they collectively appear to owe in the region of half a million Euro in respect of the loans, I consider that damages would not be an adequate remedy. Also relevant to this consideration is the fact that the condition and occupation of the properties are unknown to the receiver. He is entitled to secure the assets and ensure that they are protected and maintained.

122. In the event that the trial judge ultimately concludes that the receiver has not made out his case and holds for the defendants, they will have the benefit of the receiver's undertaking as to damages. As the secured assets are investment properties, any damage suffered by the defendants is readily remediable in damages.

123. I will make an order in the terms of para. 1-6 of the notice of motion as set out at para. 1 above. I am however conscious that there may be tenants in the properties who are paying rent to the defendants in good faith and who may be entirely unaware of the present proceedings.

124. I will therefore direct the plaintiff to write to the occupants at the addresses of the properties explaining the situation to them, and enclosing copies of the order of this Court and this judgment. I would expect the receiver to make contact with any such occupants so that, if at all possible, the position of any *bona fide* tenants can be regularised, perhaps with payment of rent to the receiver pending the trial of the action.

125. As this judgment will be delivered electronically, I will give the parties until Wednesday 6th January, 2021 to make brief written submissions in relation to the question of costs, and as to whether a stay to facilitate any bona fide tenants in the properties may be appropriate, and if so, on what terms. I will finalise the terms of the order on receipt of those submissions, and the parties will be notified forthwith.

126. I will give the parties liberty to apply in the event of any unforeseen difficulty.