[2020] IEHC 79

THE HIGH COURT

2014/6750P

BETWEEN

KEN FENNELL (AS RECEIVER OF CERTAIN ASSETS OF HUGH CORRIGAN)

PLAINTIFF

AND

HUGH CORRIGAN

DEFENDANT

JUDGMENT of Ms. Justice Pilkington delivered on the 18th day of February, 2020

1. This case considers the entitlement of the plaintiff receiver to possession of certain properties.

2. This matter has been extensively litigated before the courts. The numerous folders of documentation disclose some 34 court orders, arising from over 60 court applications in this and other proceedings arising out of the background facts and circumstances of this case. Even a brief perusal of the documentation shows it to be a vexed and difficult matter.

3. This hearing before this court lasted five days. The defendant appeared as a litigant in person with a McKenzie friend and called only one witness, a valuer and assessor Mr. Geaney.

Chronology

The background chronology is lengthy but, in my view, it is necessary to recite it in some detail.

4. In December 2006 IIB Bank plc advanced €2.17m to the defendant. Two properties owned by the defendant were furnished as security for the borrowings.

5. The deed of mortgage is dated 28th May 2007 between the defendant of the one part and IIB Bank plc of the other ('the 2007 mortgage').

6. The third schedule to that mortgage sets out the formal identification of the mortgaged properties. They comprise two properties; one at Kilmuckridge *("the Kilmuckridge property"*) and the other at Oulart ("*the Oulart property*"), both in County Wexford.

7. Mr. Bannon, the chartered surveyor called by the plaintiff, confirmed that the Oulart property comprises an established convenience store, a takeaway (imaginatively titled "O My Cod") and two first floor residential apartments. The Kilmuckridge property comprises a convenience store (now vacant) together with a first floor restaurant.

8. The loan facility was extended and restructured from time to time but, in any event, by letter of demand dated 16th May 2014 KBC Bank Ireland plc demanded the sum of €2,381,345.20 from the defendant.

9. Thereafter on 21st July 2014 the plaintiff was appointed receiver over the above properties.

10. The defendant takes issue with a significant number of matters, particularly with regard to the plaintiff's status as a receiver/manager, in light of the terms of the 2007 mortgage and his deed of appointment, whether KBC Bank Ireland plc (formerly IIB Bank plc) has been properly legally identified, plus issues with regard to alleged leases over both properties and a counterclaim for damages.

11. On the same day as the plaintiff's appointment as receiver, Mark Degnan (an accountant with Kavanagh Fennell, (now Deloittes) and working with the plaintiff on this receivership, attended at the Kilmuckridge property with a security firm (K-tech). It is clear that, from then on, matters did not proceed smoothly, which is to considerably understate the position. When Mr. Degnan attended the property, amongst other matters, he was handed a typed document dated 21st July 2014 headed "Notice" and set out in full below.

FAO Mark Degnan

Re: Attempt to trespass at the above property today (21st July 2014).

Notice to agent is notice to principle (sic) and notice to principle is notice to agent. (The letter is addressed from Hugh Corrigan, Main Street, Kilmuckridge, Gorey, Co. Wexford and phone and fax number are affixed to it). The letter reads as follows:

> *"Dear Mr. Degnan*
>
> *I wish to confirm that under no circumstances do I consent to you or any other member of employees or agents entering my property.*
>
> *As you have already been informed, there is an ongoing legal case since last October last with regard to a title problem. There is a question as to whether KBC have any right to appoint you or any other third party in this matter.*
>
> *You are strongly advised to do your due diligence and check with the Bank's legal representatives, as to the validity of your appointment.*
>
> *If you do enter our premises again, you will be liable for Commercial Penalty both on your company and you personally and your employees in the amount of €2m (two million euros) per entry.*
>
> *Yours sincerely,*
>
> *Hugh Corrigan*
>
> *Signed: Hugh Corrigan*
>
> *Dated: 21st July 2014"*
>
> Witnessed hand over by Simon Kavanagh and a signature is appended thereafter.

12. A number of persons whom I understand to be known as "*The Land League"* attended, with others, to assist the defendant together with Mr. Simon Kavanagh (the individual who signed the letter above as witness). The Gardaí, when called, said it was a civil matter and in the circumstances no further steps were taken. Mr. Degnan's evidence and that of Mr. Moloney and Mr. McGary of K-tech was to the effect that all considered it unwise in the circumstances to remain, they withdrew and possession was not effected.

13. One of the matters that had been raised by the defendant and others when Mr. Degnan attended on 21st July 2014 and subsequently, was that a court order was required to effect possession, together with allegations that the appointment of the receiver was invalid.

14. In any event the solicitors for the receiver issued a letter seeking possession on 29th July 2014 and thereafter this plenary summons issued on the 1st August 2014.

15. The plenary summons forms the basis of this litigation which, accordingly, has been in existence since 1st August 2014. On 5th August 2014 the application seeking interlocutory injunctive reliefs, was heard before McDermott J., on 21st August 2014. On 22nd August 2014 he granted an injunction comprising various orders essentially requiring the defendant to deliver up possession of the properties, restraining him, his servants or agents from obstructing the plaintiff in taking possession of the properties, securing and thereafter trespassing upon them, together with the furnishing of certain documentation comprising keys, alarm codes and so on. Thereafter the Order, affixed with a penal endorsement, was served upon the defendant.

16. On 27th August 2014 Mr. Degnan again attended the Kilmuckridge property, with K-tech personnel, to seek to enforce the terms of the 22nd August 2014 Order. Amongst other matters on this occasion the defendant contended that the Kilmuckridge property is leased to Melphia Enterprises Limited ("*Melphia*"). Again, a group of individuals congregate, the Gardaí are called and a number of individuals impede the locksmith, who attended with Mr. Degnan and K-tech, from changing the locks. Mr. Simon Kavanagh also attended and disputed the validity of the Order because it was not signed by the Judge and it was not accompanied by an affidavit. He contended that the receiver's representatives were trespassing, possession was refused and again the receiver's representatives departed.

17. On 30th August 2014 an appeal was lodged against the interlocutory injunction granted by McDermott J. This appeal was not progressed with any expedition by the defendant.

18. On 5th September 2014 an application issued for an order of attachment and committal against the defendant. On 30th September 2014 the defendant gave an undertaking before Hogan J. that he would comply with the interlocutory Orders of McDermott J. That undertaking was not complied with.

19. On 3rd October 2014 Melphia Enterprises Ltd, issued proceedings against this plaintiff (Record No 8418 P 2014) alleging the plaintiff was not entitled to possession of the

properties the subject matter of the receivership. In separate proceedings (Record No 2017 IEHC 183) Laurence Corrigan issued proceedings against this plaintiff, alleging an invalid appointment of the receiver over the Oulart property. On 14th March 2017 Twomey J. dismissed the action as failing to disclose any *bona fide* question to be tried. In his *ex tempore* judgment Twomey J. noted a potential issue in respect of the plaintiff's *locus standi* and that on more than 40 occasions there had been applications before the High Court in relation to the appointment of this plaintiff over this defendant's property. By Order of Irvine J. on 26 January 2018 the appeal in respect of a motion by Laurence Corrigan seeking an order restraining this plaintiff from interfering with the Oulart property and challenging the validity of the receivership was refused.

20. In the defendant's absence, on 13th April 2015, an Order for his attachment issued (Binchy J.).

21. On 17th April 2015 Mr. Degnan attended the Kilmuckridge property (again with K-tech personnel) to seek possession – there are again a number of persons associated with the defendant present and what might be described as representations were made as to why possession should not be granted. Possession was not effected.

22. On 10th June 2015, the Order for committal of Binchy J. against the defendant, was stayed until 2nd July 2015 on his undertaking to give up possession by 1st July 2015. That undertaking was not complied with.

23. On 1st July 2015 Mark Degnan again attends the Kilmuckridge property with K-tech to seek possession and again is refused by persons associated with the defendant and again possession was not effected.

24. On 2nd July 2015 an Order of Binchy J. finds the defendant guilty of contempt and orders his committal to prison.

25. From 2nd July 2015 until January 2017 the defendant remains unlawfully at large and is not arrested throughout that period.

26. With regard to the extant Order of committal of the defendant, Sgt. White (Superintendent at Enniscorthy Garda Station) stated in evidence to this court that a considerable amount of garda time was occupied seeking to comply with the court order. He further confirmed his attendance before Binchy J. in May 2016, to explain why it had not been executed.

27. Again the plaintiff's agents (K-tech Security) attend on 5th October 2015 and on this occasion took peaceable possession of the Kilmuckridge property at 5.30am.

28. In seeking possession in October 2015 Mr. Maloney also confirmed that they had notified the Gardaí in advance and secured the property. Approximately 25 personnel from K-tech Security took possession and a crowd gathered outside and the evidence was that they were verbally abusive, the roller shutter at the front was down and throughout the day there was banging on it and at one point the Gardaí arrived. Essentially the possession of

the property had to be maintained by a number of K-tech personnel remaining in the property and working twenty-four hour shifts. Water had to be brought in both for drinking and sanitation (there was none after an initial period). The decision was again taken that they could not remain in the property and some 7 days later they left, in the presence of the Gardaí, (as confirmed in evidence by Sgt. White) on 12th October.

29. After attending in October 2015 Mr. Degnan gave evidence that he thereafter attended an auction in Gorey where Mr. Fennell was seeking to sell property as receiver. The auction was not related to any of the mortgaged properties in these proceedings and the defendant was not present. However, Mr. Degnan gave evidence that he was followed, after he sought to effect possession of the Kilmuckridge property, and that in the hotel in Gorey he was approached, verbally engaged in unpleasant terms and claimed to have been assaulted. He immediately contacted K-Tech personnel in the area (and evidence confirming this was given by Mr. McGarry and Mr. Moloney). In any event Mr. Degnan was immediately spirited from the hotel and thereafter made a complaint to the Gardaí in respect of this incident. Both Mr. Moloney and Mr. McGarry (who remained in the vehicle and did not enter the property) gave evidence that Mr. Degnan appeared shaken immediately after this incident. Sgt. White gave evidence of a complaint being made and a file being sent to the DPP.

30. On 11th March 2016 Mr. Degnan, the receiver and his solicitors meet with the Gardaí at Enniscorthy Garda Station to try and put a safe strategy in place for taking possession of the Kilmuckridge property and the removal of stock.

31. Sgt. White confirmed that this meeting had occurred in March 2016 at the Garda station, he expressed concern about previous incidents, particularly at the hotel in Gorey and he wished that steps be put in place so there would be no repeat of these incidents. A substantial policing plan was put in place, executed in September 2016. It involved 2 Inspectors, 4 Sargeants and 11 Gardaí, commenced around 4.30am so as to ensure the plaintiff and his agents were allowed to go about their lawful duty as Sgt. White described it. Effectively the village was blocked off at either end (allowing residents to pass). He thereafter confirmed his understanding that on 29th September the property was again broken into and Ms. Gardiner and Mr. Laurence Corrigan resumed trading, as a supermarket, from the Kilmuckridge property.

32. In the interim in April 2016 an attachment and committal application issued against Lucilla Gardiner, Laurence Corrigan, Lorraine Hope and Simon Kavanagh arising out of their obstruction of the receiver in seeking to obtain possession at Kilmuckridge. In May 2016 Lorraine Hope gave an undertaking to the court to comply with the Order, Simon Kavanagh gave an undertaking to the court on 2nd June 2016 and on that day the court gives liberty to issue an order for an attachment and committal in respect of Lucilla Gardiner and Laurence Corrigan. On 15th June 2016 both offer undertakings in relation to compliance with the Order of McDermott J.

33. Thereafter, on the same day, Laurence Corrigan issued fresh proceedings seeking to challenge the validity of the receiver's appointment in respect of the Oulart property

claiming to have a leasehold interest from the defendant. On 26th October 2016 in circumstances where the application for attachment and committal is re-entered, on the basis that undertakings have been breached, Lucilla Gardiner and Laurence Corrigan (a sister and brother of the defendant), again give undertakings in solemn form to abide by the Order and to meet with the receiver on 8th November 2016 to hand over possession. On 16th November 2016 Lucilla Gardiner issues a motion returnable for that date seeking to extend the time for the delivery of possession. The motion for attachment and committal was also re-entered on the same day. On the basis that they were to pay the receiver €1,000 per week they were given until 10th January 2017 to vacate the property and were directed to meet with the receiver on that occasion to hand over keys. On 6th January Lucilla Gardiner and Laurence Corrigan were refused a stay on the handing over of possession by the Court of Appeal (Ryan P.).

34. On 10th January 2017 the plaintiff took possession of the Kilmuckridge property and on 25th January 2017 the defendant purged his contempt before Binchy J.

35. On 3rd July 2017 the defendant's appeal against the Order of McDermott J. is dismissed.

36. On 15th December 2017 the plaintiff issues an application for the attachment and committal of Laurence Corrigan for failing to comply with an interlocutory order in respect of the Oulart property which is continuing to trade.

37. On 3rd May 2018 the application for the attachment and committal of Laurence Corrigan concluded before Costello J. by way of a direction that Laurence Corrigan would pay a "*without prejudice*" payment per week to the plaintiff pending the question of his entitlement to occupy the Oulart property being determined at the trial of these proceedings, an order restraining the defendant from bringing any further interlocutory applications challenging the validity of the receiver's appointment. That sum is being discharged to the plaintiff.

38. On 2nd November 2018, notwithstanding the Order of Costello J. above, the defendant issues a further motion seeking to challenge the validity of the receiver's appointment, made returnable for 19th November 2018 and the application made ex parte before Reynolds J. was refused. In any event no such motion appears before this court.

39. It must be noted that this defendant had deliberately chosen to absent himself from July 2015 to January 2017. This defendant gave the very distinct impression to this court that he thought or appeared to consider that this in some way absolved him from any acts that were conducted within that period. Whilst being anxious to establish, in cross examination of the witnesses, that he was not involved in any of these matters, he at no point disavowed any of the actions of those who ensured, on a number of occasions, that possession pursuant to a court order could not be effected. Nor did he explain his own blatant disregard of a court order for possession of the properties and an order of committal, arising from his breaching undertakings to the court.

40. Based upon the evidence adduced by K-Tech personnel, and those acting on behalf of the receiver, I can find no evidence of any of these personnel damaging the properties in the manner contended for by this defendant. Certainly, the plaintiff pointed out that he was well aware of his legal obligations to the creditors and dealing with the property in a manner contended for by the defendant would certainly ensure that it could not be marketed and sold to its best advantage. All emphatically denied effecting the damage and the witnesses from K-tech were at pains to point out that they had no personal feelings about the situation, they were seeking to carry out the plaintiff's instructions.

41. No witness was called to give evidence on behalf of the defendant in respect of this matters – the defendant himself being then subject to an order of committal until he purged his contempt in 2017.

42. Those who gave evidence on behalf of the plaintiff, both with his organisation (the plaintiff and Mr. Degnan) and from the security firm (K-Tech), who assisted the plaintiff throughout, were unanimous in their assessment that this receivership has been very difficult and troublesome one. The plaintiff gave evidence that, prior to this litigation, receivership costs were in the order of €1m.

43. In summary, within this receivership, in 2014 there were two attempts by the plaintiff to effect possession (July and August) – on both occasions it was considered that possession could not be safely effected.

44. In 2015, precisely the same occurred in April and July of that year. On 6th October 2015 K-Tech effected peaceful possession. On 12th October 2015 it was decided to relinquish possession (again on safety grounds).

45. In September 2016 (following a meeting with Gardaí in March 2016), possession of Kilmuckridge was obtained; again possession was re-taken of behalf of the defendant. The keys were eventually handed over January 2017 when possession was finally effected. The property was secured and is presently vacant.

46. The court order put in place in January 2018 (Costello J.) in respect of the Oulart property remains pending this court's determination of any leasehold interest in that property.

The Pleadings

47. The plaintiff in essence seeks an order for possession and various ancillary reliefs. Declaratory relief is sought that, as against this plaintiff, the lease between Melphia is null and void. Damages are sought for trespass and intentional interference with the economic interests of the plaintiff.

48. The Defence puts all matters in issue. The Counterclaim seeks a number of separate grounds in which damages are sought, including but not limited to damages in pursuit of 'the unlawful and aggressive pursuit of a receivership without lawful authority', *mala fides* and gross misrepresentation before the court in seeking interlocutory reliefs, unlawful trespass, breaches of the plaintiff's duty of care and fiduciary duty, in addition to

intentional damage to the defendant's business and economic interests. Damages are also sought for personal duress and distress to himself and other family members.

49. The Amended Reply and Defence to Counterclaim essentially includes an alternative pleading to the effect that the plaintiff was also appointed receiver pursuant to the Conveyancing Acts, 1881-1911 and a specific plea in respect of clause 13 of the 2007 mortgage between the parties.

50. By Order of Kelly P. dated 8th November 2018 the plaintiff was given leave to amend its defence and counterclaim. Within this hearing the defendant issued a motion returnable before this court also seeking to amend its reply and defence to counterclaim. That application was refused.

Relevant Documents
The 2007 Mortgage.

51. The indenture of mortgage is dated 28th May, 2007 and expressed to be between Hugh Corrigan and IIB Bank PLC.

52. Clause 9.1 is an important clause and defined the term 'Receiver' as follows:-

> "9. RECEIVER.
>
> 9.1 Power to appoint a Receiver. At any time after the Chargor so requests all the security hereby constituted becomes enforceable, the Bank may from time to time appoint under seal or under the hand of the duly authorised officer of the Bank any person or persons to be receiver and manager or receivers and managers (hereinafter called a "Receiver" which expression shall where the context so admits include the plural and any substituted receiver and manager or receivers and managers) of the Secured Assets or any part or parts thereof and may from time under seal or under the hand of the duly authorised officer of the Bank remove any one or more receiver or receivers so appointed and may so appoint another or others in his/their stead.
>
> 9.2 Power to appoint is additional. The foregoing powers of appointment of a Receiver shall be in addition to and not to the prejudice of all statutory and other powers of the Bank under the Conveyancing Acts, 1881 – 1911 (and so that the statutory power of sale shall be exercisable without the restrictions contained in Section 20 of the Conveyancing Act, 1881) or otherwise and such powers shall be and remain exercisable by the Bank in respect of any of the Secured Assets notwithstanding the appointment of a Receiver thereover or over any other of the Secured Assets.
>
> 9.3 Powers of a Receiver. A Receiver so appointed shall have and be entitled to exercise all powers conferred by Conveyancing Acts, 1881 – 1911 in the same way as if the Receiver had been duly appointed thereunder and shall furthermore that without limiting any powers hereinbefore referred to have the power to:-

9.3.1 possession. take possession of, collect and getting the property in respect of which he is appointed or any part thereof;

9.3.2 manage, carry on or manage or develop or diversify or concur in carrying on or managing or developing or diversifying the business of the Chargor;

9.3.3 compromise, settle, adjust, submit to arbitration, compromise …;

9.3.4 protect Secured Assets.

(a) make and effect all repairs and insurances and do all other acts which the Chargor might do as well for the protection and for the improvement of the Secured Assets…".

53. A number of other powers are specifically listed within clause 9 ending at paragraph 9.3.15 in the following terms:-

> "other powers. do all such other acts or things as you may consider to be incidentally or conducive to any of the matters or powers aforesaid and to exercise in relation to the Secured Assets or any of them all such powers, authorities and things as he would be capable of exercising if he were the absolute beneficial owner of the same".

54. Secured Assets are defined as:-

> "the property, revenues and other assets of the Chargor which are, or are expressed to be, the subject of any security created, constituted or evidenced or expressed or intended to be created, constituted or evidenced by this Mortgage."

55. In respect of 'Secured Assets' clause 7.19 beginning "not lease", states:-

> "not without first obtaining the written consent of the Bank give or agree to give any licence or tenancy affecting any part of the Secured Assets nore exercise the powers of leasing or agreeing to lease or of accepting or agreeing to accept surrenders conferred upon a mortgagor by statute or otherwise or enter into or permit any parting with possession or sharing agreement whatsoever in respect of the Secured Assets".

56. The mortgaged properties are set out and described in schedule 3 of the deed of mortgage which in turn has been signed by the chargor Hugh Corrigan the defendant to these proceedings.

57. Whilst the number of clauses are set out above, a significant portion of the defendant's objection to this plaintiff acting and operating as receiver and manager derives from clause 9.1 quoted in full above and the subsequent deed of appointment of receiver.

58. Pursuant to the terms of clause 9.1 of the 2007 mortgage, the bank may appoint any person to be a receiver and manager "hereinafter called a Receiver which expression shall where the context so admits include the plural …". In other words, the defendant contends that to be a capital R receiver is the only person who can be nominated or appointed as both receiver and manager pursuant to his construction of clause 9.1.

59. This argument becomes relevant in the context of the deed of appointment of receiver. The operative portion is set out in full below:-

> "In pursuance of the powers contained in the Mortgage dated 28th May, 2007 made between HUGH CORRIGAN OF … (the "Borrower") of the one part and IIB Bank plc who pursuant to Section 33 of the Central Bank Act, 1971, transferred its mortgage loans to KBC BANK IRELAND PLC and has its registered address at … ("the Bank") of the other part (hereinafter referred to as the "Mortgage"), the security constituted by the Mortgage having become enforceable, we, the Bank, do hereby appoint KEN FENNELL of … Dublin 4 ("the Receiver") to be Receiver of and over, all the undertaking, property and assets of the Borrower referred to and charged by the Mortgage to enter upon and take possession of the same in the manner as specified in the said Mortgage and the Receiver shall be entitled to exercise all of the powers conferred on him by the said Mortgage and by law. It is hereby declared that the Receiver shall be the agent of the Borrower who shall be solely responsible for the Receiver's acts, defaults and remuneration".

60. The deed of appointment is dated and witnessed by Ian Larkin and Kevin Geraghty and the common seal of KBC BANK IRELAND PLC was affixed.

61. It is the defendant's contention that, in his deed of appointment, the plaintiff being appointed a receiver (capital R), this is not:

(a) referable to the definition within the mortgage dated 28th May, 2007 of that entity and;

(b) does not assert that he is appointed as receiver and manger.

62. In such circumstances the defendant contends that the appointment of the receiver is null and void.

Issues

63. In my view the main issues to be determined in this case are:-

(a) The status of KBC Bank Ireland PLC (formerly IIB Bank PLC), in circumstances where it appears without the insertion of full stops, contended by the defendant as being contrary to s.4(1) of the Companies Amendment Act, 1983, as opposed to IIB Bank P.L.C. and KBC Ireland P.L.C. In the alternative what legal implications, if any, arise in respect of this submission.

(b) The validity of the appointment of the plaintiff as receiver and manager over the properties set out in schedule 3 of the 2007 mortgage.

(c) Whether this plaintiff is bound by any leases executed by the defendant in respect of the properties set out in schedule 3 of the 2007 mortgage.

(d) The claims for damages within the counterclaim.

(e) The plaintiff's claim for economic loss.

Deed of Appointment

64. The original deed of appointment was produced in court and it is clear that the seal is affixed and no issues arise in that regard.

65. As to the technical requirements Mr. Damian O'Neill, the company secretary of KBC Bank Ireland Plc, was taken initially to the resolution of IIB Bank Plc whereby the company has re-registered its name as KBC Bank Ireland Plc (no capitals used or full stops in the special resolution, a point raised by the defendant to which I will revert). He confirmed the mechanism for affixing of the seal pursuant to clause 84 of the Bank's Memorandum of Association and that that clause enabled the board to authorise persons other than board members to witness the affixing of the company seal to certain documents.

66. Mr. O'Neill then confirmed that he signed the relevant resolution of the company, in relation to the authorising of persons entitled to affix the bank's seal in the appointment of a receiver and manager; two panels were appointed; panel A being described as the "legal documentation unit" and the other panel B being described as the "corporate banking department". In essence it required that an individual from each of the nominated panels were the appropriate signatories and it was confirmed that the two witnesses, Ian Larkin (from panel B) and Kevin Geraghty (from panel A) were authorised persons to witness the affixing of the bank's seal.

67. The defendant did not cross-examine Mr. O'Neill in respect of any of his evidence.

68. Mr. Ian Larkin, a solicitor within the corporate banking section of KBC Bank gave evidence and confirmed that Mr. Kevin Geraghty (whose signature he recognised) was, for unfortunate reasons, incapacitated and was not in a position to give evidence. Mr. Larkin meticulously described the procedure of going to the company secretarial department where the company seal is held. He confirmed that the seal was affixed and he thereafter signed the document together with Mr. Geraghty. He also confirmed that, in advance, he perused the mortgage and compared it with the deed of appointment together with the demand letter to satisfy himself that the bank was in a position to appoint a receiver.

69. Mr. Larkin has been taken to both the 2007 mortgage and the deed of appointment and expressed himself satisfied that the 'Receiver' must refer to both receiver and manager and that all of the powers set out in clause 9.3 of a 2007 mortgage were operative and vested in the plaintiff.

70. In his cross examination of Mr. Larkin, the defendant took issue with page 2 of the deed of appointment which appears in the following terms:-

> "I hereby acknowledge receipt of this Notice upon the date aforesaid and accept appointment thereby notified upon and subject to the terms and conditions above referred to and more particularly contained in the said mortgage.
>
> **ACCEPTANCE**

> I, Ken Fennell of … do hereby accept the appointment direct as a receiver of the security constituted by the Mortgage and in accordance with this Deed of Appointment and do hereby undertake to discharge of the duties of such office and to duly and regularly account to the Bank for all monies received by me as such receiver."

71. The defendant raised the issue, with regard to this clause, in that at no point does the word "receiver" appear as capitalised, did not include the word 'manager' and accordingly that the plaintiff had not accepted his role as receiver and manager.

72. Mr. Larkin confirmed that the mortgage deed does not prescribe any manner in which the receiver is obliged to accept his appointment and agreed in re-examination that he could accept it orally.

73. Mr. Shane O'Connor the head of corporate receivership at KBC confirmed the terms of the facility letter and thereafter the letter of demand culminating in the appointment of the plaintiff as receiver. He confirmed the circumstances whereby IIB initially changing to a plc and thereafter changing its name to KBC Bank (Ireland plc); that it remains the same legal entity but under a different name.

74. Thereafter he confirmed that he had inspected the deed of appointment prior to its execution by Mr. Fennell and had also looked at clause 9.1 and what he accepted was a standard form mortgage. The deed of appointment in his view was to be read in conjunction with the mortgage.

75. He also confirmed the letters of the certificate of incorporation of IIB Bank plc on 26th April, 2006, the special resolution of IIB Bank plc that the company re-register its name as KBC Bank Ireland plc and the resolution effected with regard to the articles of association, memorandum of association and the extracts of the minutes of a meeting of KBC on Friday 13th September, 2013 which were also dealt with by Mr. Damien O'Neill.

76. In short, he confirmed that full statutory compliance had taken place with regard to the method of execution of the deed of appointment of the plaintiff in accordance with the Bank's requirements and in addition the deed of appointment of receiver was correct and proper based upon the terms of the 2007 mortgage.

77. He also stated that both the seal and the signatures witnessing that seal were present when he signed his acceptance which in turn was witnessed by Mr. Mark Degnan who, in his evidence, confirmed these matters.

78. Based upon the evidence of Messrs, O'Neill, Larkin, O'Connor and Degnan, I am satisfied that what might be described as the technical formalities have been all properly observed in the execution of the deed of appointment of the plaintiff.

IIB Bank PLC and KBC Bank Ireland PLC - IIB Bank P.L.C. and KBC Ireland P.L.C.

79. The defendant contends that both banks, as these events happened prior to the enactment of the Companies Act, 2014, did not abide by the terms of Companies Amendment Act, 1983 s. 4(1). It states as follows:-

> "The name of a public limited company must end with the words "public limited company" or (the Irish version) which may be abbreviated to "p.l.c." or "c.p.t." respectively".

80. Section 1008(2) of the 2014 Act provides:-

> "The words "public limited company" may be abbreviated to "p.l.c." or "plc" (including either such abbreviation in capitalised form) in any usage after the company's registration by any person including the PLC."

81. It is not clear as to what implication arises from the defendant's submission. In short is the absence of punctuation (full stops between the letters 'p', 'l', and 'c') fatal?

82. Counsel for the plaintiff referred to the then House of Lords decision in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 W.L.R. 896 and the well-known quotation of Lord Hoffman, a decision endorsed in this jurisdiction on many occasions including that of the Supreme Court in *Analog Devices B.V. & ors v. Zurich Insurance Company & anor* [2005] 1 I.R. 274.

83. In one of the many iterations of the jurisprudence in *Moorview*, being the judgment in *Moorview Developments Limited & ors v. First Active Plc. & ors* [2010] IEHC 275, Clarke J. puts the matter as follows:-

> "It is also clear from the speech of Lord Hoffman in Investors Compensation that a correction of the type with which I am concerned is not a separate branch of the law, but rather an application of the general principle that contractual documents should be construed according to their text but in their context. That context may make it clear that the words used in the text are a mistake. Thus, a reasonable and informed person may conclude that the words used are an obvious mistake and may also be able to conclude what words ought to have been used. In those circumstances, as a matter of construction, the court will, as it were, construe the contract as if it had been corrected for the obvious mistake. The reason for so construing the contract in that way is that the proper principles for the construction of contracts lead to that construction in any event."

84. In that case the learned judge was required to determine in respect of a guarantee, whether the entity referred to on that document as "*Moorview Properties Limited*" was properly "*Moorview Developments Limited*". There was no entity known as "*Moorview Properties Limited*" and in such circumstances the court concluded:-

> "In those circumstances there is only one conclusion. The reference to *Moorview Properties Limited* in the guarantee was a clear mistake. Not only was it a clear mistake but also what the correct reference should have been is equally clear. The

guarantee should have made reference to *Moorview Developments Limited. Moorview Properties* did not exist. It never existed. *Moorview Developments* was, at exactly the same time as the guarantee was entered into, involved in entering into loan arrangements with First Active. It is inconceivable that there could have been any other intention of the parties but that the company whose liabilities were to be guaranteed was *Moorview Developments Limited* and not *Moorview Properties Limited."*

85. Here there is no necessity to construe an implied or any term to a contractual document. The sole issue in my view is as to whether the omission of three full stops in the appellation plc is either contrary to s. 4(1) of the 1983 Companies Act or, as per *Moorview*, can one readily identify the error and the manner of its correction?

86. No case law or statutory power has been opened to me, to the effect that the omission of punctuation, in the manner set out above, thereby renders any document issued on behalf of that company null and void. The letter of demand, deed of appointment and indeed prior to that the facility letters from the Bank were all without intervening full stops 'p.l.c.' – the 2007 mortgage by its predecessor is in the name of IIB Bank plc. The defendant appears to contend that the omission of full stops as set out above renders the letter of demand and deed of appointment invalid. In my view it is perfectly clear as to what was intended by the use of the term 'plc' as opposed to 'p.l.c.', it is the nature of the entity that is of importance not the omission of full stops in its title. It does not, for example, render it another form of corporate entity. It remains a public limited company as a matter of law and in my view this is what section 4(1) of the 1983 Act is directed towards, not the inclusion or exclusion of full stops.

87. The description and legal entity of this bank is entirely clear and therefore in my view the designation of that entity as 'plc' as opposed to 'p.l.c.' is an obvious (technical) mistake, as obvious as any potential correction required. In any event it can be properly construed without difficulty. As I have also noted, this defendant executed a mortgage (registered as a charge in the PRA), all without punctuation, together with the terms of various facility letters accepted by this defendant. This defendant and this court can be in no doubt as to the entity in question and any suggestion that the demand made by the bank or its deed of appointment of this plaintiff can be rendered invalid or null and void pursuant to the failure to insert the relevant punctuation or in any construction of s. 4(1) of the Companies Act is dismissed.

Nature of the Plaintiff's appointment - Receiver and/or manager?

88. The defendant contends that the receiver's appointment is null and void. Specifically, he asserts that the plaintiff Mr. Fennell has not been appointed as receiver and manager and accordingly cannot act in such capacity. In doing so he places heavy reliance upon the decision of McDonald J. in the case of *McCarthy v. Moroney & anor* [2018] IEHC 379 ('*McCarthy*').

89. In so far as this case is concerned, the operative portion of *McCarthy* was the application, at an interlocutory stage, by the plaintiff receiver restraining the defendants from taking

any steps preventing him from taking possession of certain lands together with other consequential orders and reliefs.

90. The court having determined that a validly appointed receiver would have a strong case (accepting that the *Maha Lingham* test applied) to be entitled to take possession of the lands the subject matter of these proceedings then stated (para. 152):-

> "However, Mr. Moroney seeks to make the case that the Deed of Appointment of Mr. McCarthy as receiver is defective in that it merely appoints Mr. McCarthy as receiver only and does not appoint him as 'receiver and manager'. He says that under Clause 9.1 of the Deed, it is clearly contemplated that any person appointed to exercise the powers conferred by Clause 9.4 must be appointed as a 'receiver and manager '. He draws attention to the way in which the term 'receiver ' is defined as the person appointed to be such a receiver and manager."

91. Thereafter McDonald J. embarked upon a close textual analysis of Clause 9 of the Deed. With regard to Clause 9.1 he finds that there was nothing within the text of that clause to suggest that "the mortgagee is entitled to decide to appoint a person solely to be a receiver without also appointing that person to be a manager".

92. With regard to any statutory powers of a mortgagee to appoint a receiver pursuant to the terms of the Conveyancing Act, 1881 the court held that pursuant to the terms of that Act a person could only be appointed as receiver having all of the powers of the 1881 Act. In addition, the statutory powers again conferred by that Act upon a receiver would be limited pursuant to the terms set out more fully in the judgment of Laffoy J. in *Kavanagh v. Lynch* [2011] IEHC 348.

93. McDonald J. then concludes:-

> "It is, however, clear from the Deed of Appointment in this case that Mr. McCarthy was not appointed as a 'receiver and manager '. The language used in the Deed of Appointment simply purports to appoint him as a 'receiver '. On the face of it, there is nothing in the language of Clause 9 of the Deed which suggests that the mortgagee is entitled to proceed in that way. On the contrary, the only form of appointment contemplated is that of a 'receiver and manager '. Obviously, no final conclusion can be reached in relation to this issue at this interlocutory stage. My task at this point is solely to consider whether Mr. McCarthy has established a strong case that he is entitled to the relief which he seeks in these proceedings. It is therefore necessary to consider in more detail the submissions which have been made on his behalf.
>
> As noted above, I have not been addressed in any detail by counsel on behalf of Mr. McCarthy in relation to the decision of Gilligan J. in The *Merrow*. Nor have I been referred to any additional authorities by counsel notwithstanding the very extensive way in which Mr. Moroney opened the decision of Gilligan J. to me and notwithstanding the significant reliance that is placed by Mr. Moroney on this

decision. I have not been referred to any decision of the Court of Appeal or of the Supreme Court which throws any doubt on the decision of Gilligan J."

94. The court continued (para. 167):-

> "In light of what seems to me (on the basis of the submissions made to date) to be the natural meaning of Clause 9 of the Deed of Mortgage and Charge, I believe that Mr. McCarthy will have an uphill struggle in persuading the court at trial that he has been validly appointed. In this context, it appears to me to be clear from the decision of Gilligan J. in The *Merrow* that one looks to see whether there has been strict compliance with the terms of the relevant instrument under which a receiver is appointed (in this case, the Deed of Mortgage and Charge)."

95. As noted above, McDonald J. carefully considered the judgment of Gilligan J. in *The Merrow Limited v. Bank of Scotland plc. & anor* [2013] IEHC 130 *('the Merrow'*). The issue in that case was the effect of the requirement that the appointment of a receiver would be (in the words of the 1981 debenture) *"By writing under its seal*" and in the debenture of April 2008 "*Under seal or under hand a duly authorised officer or employee of the Bank…*", in circumstances where no seal had been affixed did the absence of a seal render the appointment void?

96. Gilligan J. stated :-

> *"Since 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. This principle has been recognised by the leading commentators in this area and accepted and applied by the courts throughout the common law world".*

97. Gilligan J. also quoted Picarda in his text *The Law Relating to Receiver's, Managers and Administrators* (4th ed.) as follows:-

> *"There is no set statutory form for the appointment of a receiver and manager out of court. On the other hand, any other formalities laid down by the relevant debentures or deed trusts must be followed. If the debenture requires the appointment to be made in writing or under hand an oral appointment is not sufficient. Again, if the appointment is required to be by deed that formality must be observed".*

98. Gilligan J. also quoted from the decision in *R Jaffe Limited (in liquidation) v. Jaffe (No. 2)* [1932] N.Z.L.R. 195 as follows:-

> *"The importance of the strict observance of these requirements has shown, I think, by other consideration. A receiver is not an officer of the Court, but, if he is duly appointed, his title is superior to that of a person interfering with the assets under his control, and the Court will then grant an injunction. If a receiver were unable to prove his title according to the terms of his contract, then I doubt whether he*

would be entitled to an injunction. Furthermore, while the company is a going concern, a receiver, if the conditions of the debenture so provide, may be the agent of the company, and the company will then be responsible for his contract. This is particularly important if the debenture holder has power to appoint not merely a receiver, but a receiver and manager. Under such circumstances the company must be entitled to insist I think, upon the fulfilment of the terms of appointment as a condition of its liability".

99. In *The Merrow* the court held that the absence of the affixing of the company seal had the consequence that the receiver was not validly appointed as receiver manager over the property and the appointment was invalid, void and of no effect.

100. The decision of Cregan J. in *McCleary v. McPhillips* [2015] IEHC 591 and in particular his careful summary of the applicable principles in the appointment of a receiver again emphasises that, as the authority of that receiver is derived from the instrument of his appointment, the proper level of formality must be observed at all times. I entirely endorse that view.

101. The deed of appointment in *McCarthy* of 11th March 2016 was actually furnished by both parties to this court. In my view the capitalisation is different as in the present case the capitalisations reflect that 'Receiver' is defined within both mortgage deeds as defining 'receiver and manager' – the capitalisation allied with the definition of that entity is reflected throughout the deed of appointment of this plaintiff. The doubt raised by McDonald J. was whether the use of the word (lower case 'r') receiver, particularly with reference to taking possession of the property, raised a serious doubt as to whether that (lower case 'r') receiver was properly appointed as a receiver and manager as the mortgage deed defined it as being referable to receiver and manager, is absent from the deed in this case.

102. In his evidence the plaintiff asserted that he believed himself to be properly appointed as receiver and manager over the assets more particularly set out and described in the 2007 mortgage.

103. Whilst this defendant's submission focussed extensively upon the capitalisation or otherwise of the term 'Receiver' and the absence in the deed of appointment of the term 'receiver and manager', in other words the omission of the word 'manager', in my view one must also have proper regard to the 2007 mortgage. The powers and duties of the receiver and manager are clearly set out in detail and in my view, equally clearly, the deed of appointment is explicitly made referable to that 2007 mortgage and the extensive powers and duties of the person so appointed as receiver and manager. There is no delineation of powers for a receiver and then powers for receivers and managers. The extensive powers and duties can only be exercised (per McDonald J. in *McCarthy* as a person appointment receiver and manager). If that person is not appointed in both capacities, then that appointment is void. I accept it is more than mere capitalisation and then strict formalities must be observed in the appointment of this plaintiff.

104. I am satisfied this plaintiff is appointed as a receiver and manager pursuant to the terms of the 2007 mortgage. The mortgage sets out the powers extensively and these are the powers to be afforded a receiver and manager. In my view that is properly reflected in the deed of appointment. *McCarthy* was the consideration of the grant of interlocutory reliefs, in my view the reference to the terms of the mortgage of the powers and duties of the person appointed as receiver and manager is cross referenced within the deed of appointment. To the extent that it is relevant the correct capitalisation is utilised. Given my view that this plaintiff is appointed as receiver and manager of the assets of the defendant within the 2007 mortgage, it is not therefore necessary to consider any issue regarding his appointment pursuant to the terms of the Conveyancing Act 1881.

Leases

105. Within the reliefs to the statement of claim the plaintiff also seeks the following specific relief:-

> "A declaration that the purported lease purportedly entered into on the 24th day of October, 2013 and made between the defendant and Melphia Enterprises Limited in respect of the property is void and of no legal effect as against the plaintiff herein" ('Melphia').

106. To reiterate, clause 7.19 of the 2007 Mortgage states that the mortgagor may:-

> "Not lease, not without first obtaining the written consent of the bank give or agree to give any licence or tenancy affecting any part of the Secured Asset nor exercise the powers of leasing or agreeing to lease or of accepting or agreeing to accept surrenders conferred upon a mortgagor by statute or otherwise or enter into or permit with parting with possession or sharing agreement whatsoever in respect of the Secured Asset".

107. The plaintiff contends, primarily through the evidence of Mr. Shane O'Connor (head of corporate receivership within KBC Bank Ireland plc) and also of the plaintiff, that whilst the bank had a general awareness that there was possibly a lease operating over the Oulart property, they had no knowledge whatsoever in respect of any other leases and none at all in respect of which the bank had furnished written consent.

108. The defendant contends that the bank was aware of all of the leases which had been furnished to them, were on notice of them and accordingly bound by them.

109. The lease in question is dated 24th October, 2013 and described as being between Hugh Corrigan as landlord of the one part and Melphia Enterprises Limited as tenant on the other. The lease appears to have been executed by Hugh Corrigan and his signature witnessed by a Mr. Rory Deane solicitor. The lease is stated to be "signed and delivered by Melphia Enterprises Limited" and executed by Aisling Leacy.

110. The pertinent portions of the October 2013 lease are that the initial rent is defined as being €45,000 per annum, for a term of ten years from the date of the lease. The operative part of the lease is the demise by the tenant of the demised property "from and

including the term commencement date for the term…", with the provision for five yearly rent reviews.

111. It is well known that, in general terms, pursuant to the landlord and tenant legislation, after five continuous years in occupation a tenant using the property for business purposes acquires the right to renew the lease. It is therefore now standard for such commercial/business leases to reflect a term of four years and nine months in order to preclude this automatic entitlement. The property in question are described as:-

> "ALL THAT AND THOSE the supermarket property and surrounding lands situate at Kilmuckridge, Gorey in the County of Wexford which said property and lands are more particularly outlined in red on the map attached hereto together with…".

The map is not coloured in my papers but it does appear to comprise a larger surface area than the supermarket property itself.

112. It must also be borne in mind, and I believe it to be a relevant factor, that in late 2013 the defendant was subject to an independent business review (IBR) by Kavanagh Fennell on behalf of the bank, to seek to assess its financial position. Indeed, the defendant took issue with what he contended to be a conflict of interest in the plaintiff's firm undertaking this IBR and the subsequent receivership. Documentation sought by Kavanagh Fennell was being forwarded by this defendant in October 2013 and in my view it cannot be mere coincidence that this lease is executed in or about the same time. It is referenced within the IBR.

113. Mr. Shane O'Connor in his evidence was clear that the bank did not and would not consent to such a lease (of which he and it was wholly unaware) precisely for the reason identified above; namely that it afforded the tenant Melphia an automatic entitlement to seek a renewal of its lease and was not in accordance with standard commercial practices in respect of such business leases.

114. The plaintiff gave evidence that he first became aware of it when contacted by Mr. Degnan stating that he had been handed a lease and that it was being claimed over the Kilmuckridge property. Immediate enquiries at the bank revealed that they had no knowledge of it, nor had they consented to its terms.

115. Whilst I understand that Melphia has instituted separate proceedings in respect of its interest in Kilmuckridge, it is noteworthy that no witness on behalf of Melphia was called to give evidence of any beneficial interest that it had in the Kilmuckridge property. Nor was any evidence adduced that constituted notification to the bank, followed by its consent to the terms of this lease, pursuant to the terms of the 2007 mortgage.

116. Counsel for the plaintiff relied upon, *Fennell & anor v. N17 Electrics Limited (in liquidation*) [2012] IEHC 228 and *Ferris v. Meagher & anor* [2013] IEHC 380, (to which I shall refer to as "*N17*" and "*Ferris*" respectively).

117. Within the *N17* case the applicant sought declaratory relief that a business lease agreement was not binding upon them and was not an asset of the company for the purposes of winding up. The respondent contended they had an entitlement pursuant to the terms of its business lease to occupy the relevant property and that the lease remained an asset. In essence the bank contended, as does the plaintiff here, that there was no prior written consent in accordance with the terms of the mortgage and accordingly the lease was not therefore binding on the bank. I shall deal with the position of the plaintiff as receiver separately.

118. This mortgage is governed by the terms of the Conveyancing Act 1881 and the well-known application of s.18(1), subject only to s.18(13).

119. Pursuant to s.18(1) of the 1881 Act a mortgagor of land, whilst in possession, can essentially execute a lease of the mortgage land or any part thereof. The only proviso that is relevant in this case is s.18(13) which states that it applies "only if and as far as a contrary intention was not expressed by the mortgagor and the mortgagee in the mortgage deed, or otherwise in writing and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained".

120. I am satisfied that on the facts of this case Clause 7.19 of the 2007 Mortgage is clear in its terms and constitutes a contrary intention pursuant to s.18(13) of the 1881 Act.

121. In N17 Dunne J. quoted with approval the passage from Megarry & Wade, *Law of Real Property* (7th ed.) as follows:-

> "If the power is excluded and the mortgagor nevertheless grants an unauthorised lease, the lease is void against the mortgagee and its successors in title (unless they are estopped from asserting this), but valid as between the parties to it. The statutory powers of leasing do not deprive the parties of their common law rights to create leases not binding upon each other. For example, if the mortgage contains a covenant by the mortgagor not to exercise a statutory power of leasing without the mortgagor's written consent, the mortgagor may, nevertheless, grant a yearly tenancy which binds the mortgagor under the principle of estoppel but which does not bind the mortgagee".

Having exhaustively considered the authorities on the matter Dunne J. stated:-

> "A number of useful observations can be made from the authorities referred to above. I think, first of all, that it is clear that a mortgagor and mortgagee can expressly agree to exclude the power conferred by s.18 of the 1881 Act. If the power is excluded, it may be done in a way that permits the mortgagor to grant a lease subject to the prior consent of the mortgagee. If such prior written consent is not obtained by the mortgagor and the mortgagor proceeds to enter into a lease with a tenant, the lease will be binding on the mortgagor as lessor, that as against the mortgagee, the lease will not be binding. It is also clear that in certain circumstances, the lease may be binding on the mortgagee in circumstances such

as those described in the authorities referred where, for example, the mortgagee "serves a notice on a tenant to pay the rent to him". It is also clear from the authorities referred to above, that the mere facts that the mortgagee is aware of the existence of a tenancy and that a tenant is paying a rent to the mortgagor which is being used to pay the obligations of the mortgagor to the mortgagee, is not of itself, sufficient to create a relationship between the mortgagor as tenant and the mortgagee".

122. In my view that represents an excellent exposition of the law in this area and its relevance to the facts of this case is, in my view, immediately apparent.

123. The court concluded:-

> "There may be an argument to be made that modern commercial realities are somewhat different to the facts and circumstances outlined in those authorities which are of some vintage. However, the answer to that argument may be simply that those principles have stood the test of time because the logic of the principles is unassailable; the one thing I am sure of is that on the facts of this case no commercial reality would justify departing from these well-established authorities. It is essential from a lender's point of view that the secured property is available as security in the event of default by the borrower. It is therefore important to ensure from the lender's point of view that any impediment to the realisation of its security by reason of a lease binding on the mortgagee should be one in respect of which the mortgagee had furnished its consent. That is the importance and the function of the negative pledge clause contained in the various mortgages/charges. From the bank's point of view in this case, there was no commercial reality apparent in the business lease agreement. It is inconceivable that the bank would ever have consented to a lease in the terms of the business lease agreement had it been asked to do so. Its conduct in granting loans from time to time without appropriate leases having been put in place does not alter the position".

124. *Ferris* was in essence an action by a receiver seeking orders restraining the defendants from preventing impeding or obstructing his obtaining possession of the property. Whilst the validity of the appointment of the receiver was raised on behalf of the defendant, of more relevance to this present case was the argument by the second named defendant that the receiver is the agent of the mortgagor. In this regard the court (Birmingham J.) having considered the caselaw, quoting from *N17* and its predecessor *ICC Bank plc. v. Richard Verling & ors* [1995] 1 I.L.R.M. 123 (also quoted in *N17*) stated:-

> "It seems to me that entirely different considerations apply to the question of whether a tenant who has gone into occupation on foot of a lease which had not received approval that was required can rely on the lease against a receiver, then the question whether the lease can be relied upon as against the landlord who granted the very lease. It would clearly be inequitable to allow a party who had granted a lease without obtaining consent, to benefit from his failure by being able to point to the absence of consent in order to validate the lease. However, the

position insofar as the receiver, who has no hand, act or part in granting the lease is altogether different."

125. In respect of the Oulart property, by Order of Costello J. on 3rd May, 2018 an order was made that Laurence (Lar) Corrigan (who claimed to be entitled to a lease) might pay a certain amount per week in respect of the supermarket property and takeaway pending the outcome of this plenary trial. The court further confirmed that such payments would not result in any landlord and tenant relationship nor lead to any proprietary interest in the Oulart property.

126. In my view, the terms of the Order of Costello J. in respect of the Oulart property, also requires that I consider any leases granted over that property.

127. The initial lease furnished in respect of the supermarket (formerly Londis and now a Spar) is dated 19th day of February, 2008, between Hugh Corrigan of the one part and Laurence Corrigan of the other part being an assignment of the Londis supermarket situate at Oulart, Gorey, Co. Wexford for a term of four years and nine months from the 19th day of February, 2008, subject to the annual rent of €100,000 per annum and to the covenants and conditions therein contained. The fourth schedule makes the standard provisions with regard to five-yearly rent reviews.

128. The next lease, between the same parties, is dated the 19th day of December, 2012. There are two significant and material differences to this lease. The term is expressed to be ten years and a rent of €62,400 per annum.

129. With regard to the supermarket the final document is headed Deed of Variation of Lease and Memorandum dated 1st November, 2013. It essentially states two matters. The first is that the parties agreed that the next rent review date in accordance with the lease will be the 31st day of October, 2018 and that further rent reviews will be on the fifth anniversary thereafter and secondly that the rental has been varied to €615 per week payable in advance on a weekly basis (by my calculation an annual rent of just short of €32,000).

130. In any event in my view the granting of a ten-year term would again, as set out above in respect of the Melphia lease, entitle this tenant to a statutory renewal of the tenancy. Mr. O'Connor gave evidence of having never seen this document and again that no consent had been sought or given by the bank. He also raised the same objection with regard to the ten year term of the lease as he had raised in respect of the Melphia lease.

131. The next document is a lease in respect of the takeaway portion of Oulart being for a period of ten years from 2nd October, 2013 for a rent of €150 per week again with a provision for five-yearly rent reviews.

132. There are also rental agreements in respect of the apartments over the Oulart supermarket expressly stated to be that the letting is for the 'temporary convenience of

the landlord only' which expressed in each case to be for a period of two years nine months at a rental rate of €90 per week in respect of each apartment.

133. As stated above Mr. Corrigan adduced no evidence of his having obtained the prior written consent of the mortgagee to any of these leases. The terms of the *N17* judgment are entirely clear; mere notification or a suggestion that they may have been alluded to in conversation or indeed documentation possibly dispatched to the mortgagor (as part of the IBR or otherwise) is insufficient. The terms of the 2007 mortgage are clear and must be adhered to. Prior written consent is required and if it is not obtained, then the leases are not ones that bind the mortgagee. The decision of Birmingham J. in *Ferris* makes it clear that the receiver is also not bound by the leases and I agree with that judgment.

134. I accept the evidence of Mr. O'Connor that the bank, had they been notified of these leases (in respect of the supermarkets at Kilmuckridge and Oulart), would never have consented to terms of ten years in respect of these commercial premises. In short, I am satisfied on the evidence and the documentation furnished that no prior written consent was sought of the bank and no consent was given. As in *N17* and *Ferris*, failure to comply with s.18 of the Conveyancing Act and its strict requirements as clearly analysed in *N17*, makes it clear that both the mortgagee and the plaintiff receiver is not bound by the terms of any of the leases in respect of the properties the subject matter of the 2007 mortgage.

The Counterclaim

135. Within his counterclaim the defendant seeks damages on a number of grounds. The claims relate to matters consequent upon the appointment of the receiver and in particular to damages to the Kilmuckridge property. At the hearing of this matter the defendant was informed that his failure to adduce any evidence in respect of loss would make that aspect of his claim very difficult if not impossible to deal with.

136. The defendant called Mr. Jerry Geaney a mechanical and electrical consultant who had been asked to furnish a report in respect of the damage to the supermarket property at Kilmuckridge. He inspected the property on 8th October, 2016. Mr. Geaney confirmed that wires in the fuse box had been severed or cut and were still live (he also recorded water damage to the floor but stressed he was primarily examining the electrics). It appeared that cables linked to the fuse box had been cut and that the status of the property, from an electrical point of view, was of concern. He confirmed that if the power cut was isolated, then the alarm system would generally be operational for 12/24 hours thereafter. Mr. Geaney very properly further confirmed that he could not determine who had effected this damage but that the property was now in a very sorry state.

137. The defendant claimed that the actions of K-tech Security (possibly upon the instructions of the plaintiff) was responsible for this damage.

138. The plaintiff's evidence was that at no point had he instructed any persons to in any way damage the mortgaged properties, that he had utilised the services of K-Tech for some 15-20 years and spoke of them in the highest possible terms. In addition,

with regard to his role he confirmed that he was an agent of the borrower, but his primary duty of care was to the bank as charge holder.

139. The actions of those acting on behalf of the plaintiff in seeking to effect possession of the Kilmuckridge property in particular have been set out in some detail above. The evidence adduced by Mr. Geaney, whilst evidencing damage to the property, does not in any sense establish who was responsible for such damage. The representatives from K-tech when they were in possession of the Kilmuckridge property for periodic periods, often in trying circumstances, was clear that they did not do any of the damage. There was no countervailing evidence. Of course the obligation is upon this defendant, in terms of his counterclaim, to seek to mitigate his loss. His actions in deliberately absenting himself for a significant period, acquiescing in the actions taken on his behalf and failing to deliver possession in a timely fashion pursuant to court order, only exacerbated the situation of which he now seeks to complain.

140. Based upon the matters set out above I can find no basis for any claim by the defendant that the plaintiff, or anyone under his control, supervision or direction, committed any of the acts of damage as alleged. The reliefs sought within the counterclaim, which are varied and set out above as including 'damages for mala fides and gross misrepresentation before the court in seeking interlocutory reliefs, unlawful trespass, breaches of the plaintiff's duty of care and fiduciary duty, in addition to intentional damage to the defendant's business and economic interests' are dismissed in their entirety. As set out above no evidence of any damages under these heading was given to this court, nor can this defendant seek damages on behalf of another family member. This head of damage is also dismissed.

Economic Loss

141. Evidence was adduced by the plaintiff from Mr. Bannon, a surveyor. He was asked specifically, following his attendance at the property on 4th November, 2018 to calculate the (potential) rent forgone by the receiver:

    (a) From 21st July, 2014 to 8th November, 2018 in respect of Oulart and

    (b) From 21st July, 2014 to 21st January, 2017 (the date the receiver secured possession) in respect of Kilmuckridge.

142. In Mr. Bannon's view the open market rent for the Kilmuckridge property as at 21st July, 2014 would comprise €10,000 per annum for the former first floor restaurant and €49,500 per annum for the retail unit comprising a total of €59,500.

143. Undertaking the same exercise he suggests the retail unit at Oulart at a rent of €34,300 per annum the takeaway €9,000 per annum and the apartments (both combined) at €10,400 per annum (€5,200 each) (€100 per week) comprising a total of €53,700 per annum.

144. In extrapolating figures in respect of Oulart, adopting a multiplier of 4.51 years arrived at an annual rental figure, a total annual rental figure of €242,187 and in respect of

Kilmuckridge applying a multiplier of 2.47 years to an annual rental of €146,965 giving an overall total of €389,152.

145. In my view it must be borne in mind that whilst the Order of McDermott J. was made in 22 August 2014, the appeal against that Order was only dismissed on 3rd July 2017. I appreciate the plaintiff contends that the delay was in large part occasioned by the defendant's inability to prosecute his appeal as he had 'gone to ground' pursuant to the Order of committal made against him. Nevertheless, in my view, notwithstanding that there appears to have been no stay upon the Order of McDermott J., the plaintiff is not entitled within this litigation to any claim for 'intentional interference with the economic interests of the plaintiff'.

146. It was argued that the plaintiff could potentially have obtained rental monies for this period but I also note that there was litigation as to the efficacy of the Melphia lease and injunctive reliefs regarding the Oulart property. Whilst there may ultimately be reliefs available to the plaintiff, in my view such relief is a matter potentially open to the plaintiff consequent upon this judgment and not in advance of it.

Conclusion

147. If ever it could be said that litigation assumes an existence or life of its own, then this case satisfies that criteria. I considered it necessary, in the unique circumstances of this case to set out the history and relevant events in some detail. The amount of court time engaged has been extensive. Perhaps in circumstances such as this, where there has been some 34 court orders arising from 60 court applications, future consideration might be given to a more active form of case management.

148. In dealing with the issues and their analysis as set out above my conclusions are as follows:-

(a) No issue arises in respect of any lack of compliance with s.4(1) of the Companies Amendment Act, 1983.

(b) The plaintiff is validly appointed as receiver and manager over the properties set out within schedule 3 of the 2007 mortgage. I am further satisfied that the formalities attendant upon such appointment have been complied with.

(c) The plaintiff is not bound by any leases executed by the defendant over the properties set out within schedule 3 of the 2007 mortgage.

(d) The claims for damages within the counterclaim are rejected in their entirety.

(e) In my view it is not appropriate for the court to consider the plaintiff's claim for economic loss at this time.

149. I will hear the parties in respect of the terms of any final orders including orders as to costs.