

THE HIGH COURT

[2022] IEHC 120

Record No. 2019/ 9833 P

BETWEEN

KIERAN WALLACE AND CORMAC O'CONNOR

PLAINTIFFS

AND

FRANCES DAVEY

DEFENDANT

JUDGMENT of Ms. Justice Stack delivered on the 25th day of February, 2022.

Introduction

1. The within proceedings were instituted on 19 December, 2019, seeking Orders:

- i. restraining the defendant from interfering with or obstructing the plaintiffs in exercising the powers and functions as receivers over the property known as Unit One, Niles House, Bridge Street, Kilcock, County Kildare ("the Property"),
- ii. restraining the defendant from preventing the plaintiffs from exercising their lawful power to enter upon and "*re-take possession*" of the Property,
- iii. compelling the defendant to deliver up possession of the Property to the plaintiffs, and to provide to the plaintiffs forthwith the keys, alarm codes, locks and all of the security and access devices and equipment or information necessary to gain possession of the Property,
- iv. restraining the defendant from entering, accessing, occupying and/or trespassing upon the Property and from interfering with, damaging, removing, or altering any aspect of the Property.

Damages are also sought for trespass, breach of contract and/or breach of duty and for unlawful interference with the plaintiffs' economic interests. A statement of claim was delivered 6 March, 2020, in which the same relief was sought.

2. By notice of motion issued 23 December, 2019, the plaintiffs seek orders:

- i. directing the defendant to deliver up possession of the Property to the plaintiffs;
- ii. restraining the defendant from trespassing upon, entering upon or otherwise attending on the property;
- iii. restraining the defendant from interfering with, obstructing, or in any other way preventing the plaintiffs from exercising their powers and functions as Joint Receivers over the Property,
- iv. restraining the defendant from interfering with, obstructing, or in any other way preventing the plaintiffs from exercising their lawful power to enter upon and re-take possession of the Property,

- v. directing the defendant to provide to the plaintiffs forthwith the keys, alarm codes, locks and all other security and access devices and equipment or information necessary to gain possession of the Property.
3. The first issue which must be resolved is the threshold which the plaintiffs must meet to obtain these orders at this interlocutory stage. The plaintiffs rely on *Kavanagh v. Lynch* [2011] IEHC 348 for the proposition that these reliefs are in substance prohibitory in nature, but I do not agree. The situation in *Kavanagh v. Lynch* was that the defendant was not the mortgagor but a third party claiming a beneficial interest in the property on foot of an alleged partnership agreement with the mortgagor. The property in receivership was multi unit student accommodation which the defendant was purporting to let himself. The injunction was directed to ensuring that the defendant did not retain the rents or control of the collection of them and, in those circumstances, Laffoy J. was of the view that orders directing the delivery up of keys, etc., similar to those sought in the notice of motion here, were merely ancillary to what was in essence an application for prohibitory relief restraining interference with the receivers and preventing the diversion by the third party of the income from the property, to which the receivers were entitled, to his own use. That is quite a different situation to here, where the defendant is in possession of the Property. In any event, Laffoy J. was satisfied that the higher threshold for the grant of mandatory interlocutory relief had been met, so her comments on this issue are, arguably, *obiter*.
4. In addition, the Supreme Court in *Charleton v. Scriven* [2019] IESC 28 was satisfied (at para. 5.3) that a claim for interlocutory relief amounting to an order for possession and ancillary matters was mandatory in nature whereas orders restraining the diversion of rents from the receivers were classed as prohibitory, and that decision is binding on me.
5. The plaintiffs already have the benefit of an order requiring payment of rent to them, but now say they need possession of the Property in order to manage it. In my view, such an application is one for mandatory relief and the plaintiffs must satisfy the test in *Maha Lingham v. Health Service Executive* [2005] IESC 89 and show a strong case that they are likely to succeed at trial.
6. The proceedings are grounded upon the affidavit of the first plaintiff, who avers that he and one Mark Etherington were appointed by deed of appointment dated 17 September, 2013, which he accepted on 23 September, 2013, as Joint Receivers over six properties, including the Property.
7. By deed of discharge dated 14 May, 2018, Mark Etherington resigned as one of the Joint Receivers and by Supplemental Deed of Appointment dated 14 May, 2018, the second named plaintiff was substituted for Mark Etherington as one of the Joint Receivers over *inter alia* the Property.
8. The first plaintiff also avers that, by Global Deed of Transfer dated 12 February, 2015, Ulster Bank Ireland Ltd, transferred the defendant's loans and securities to Promontoria (Ireland) Ltd ("Promontoria"), and by Deed of Novation of the same date, Promontoria

was substituted for Ulster Bank Ireland Ltd as a party in what is described in the affidavit as "*the receivership agreement*", which I assume is a reference to the deed of appointment dated 17 September, 2013.

9. The plaintiff and Mr. Etherington, as Joint Receivers, instituted proceedings against the defendant on 16 June, 2014, 2014/5323P ("the 2014 Proceedings"). It should be noted that these related to several properties, including a larger premises known as Niles House, of which the Property forms a part, and which was described in the Statement of Claim as "*ALL THAT AND THOSE the piece or plot of ground with the premises and out offices thereon situate at Bridge Street in the town of Kilcock, Parish of Kilcock, Barony of Ikeathy and Oughterany and County of Kildare.*" This property is more particularly described at para. 3 of the Order of Murphy J. of 30 May 2017, where it is said to comprise Units 1, 2, 3, and 4, First Floor Niles House, Bridge Street, Kilcock, County Kildare, together with Bridge Street Dry Cleaners and Laundrette and JJ Office Space (Davey Auctioneers), both situate in Niles House, Bridge Street, Kilcock, County Kildare. I will refer to these properties as "*Niles House*".
10. In the 2014 Proceedings, the following reliefs were sought in relation to Niles House and five other properties:
 1. An injunction restraining the defendant from attempting to carry on, manage or otherwise interfere with the exercise by the plaintiffs of their functions as receivers in respect of the properties;
 2. An order directing the defendant to deliver up to the first plaintiff and Mr. Etherington forthwith the keys, alarm codes, locks and all other security and access devices and equipment or information in respect of the properties;
 3. An order directing the defendant to deliver up to the first plaintiff and Mr. Etherington all books and records held by him relating to the properties to include copies of all leases and licences relating to the properties;
 4. An order directing the defendant to account to the first plaintiff and Mr. Etherington for all rents and/or licence fees received by him from the tenants and/or licensees of the properties;
 5. An order restraining the defendant from preventing, impeding/or obstructing the first plaintiff and Mr. Etherington from collecting the rents and licence fees associated with the properties, together with an order directing the defendant to pay to the first plaintiff and Mr. Etherington all rents and/or licence fees which he has collected from the tenants and/or licensees at the properties.
11. It will be seen, therefore, that the relief sought in the 2014 Proceedings against the defendant overlaps, to some degree, with the relief sought in these proceedings. In particular, the plaintiffs, in seeking an order for delivery up of keys, alarm codes, etc., were in effect seeking possession of the various secured properties, including Niles House

and therefore including the Property. I return to this issue below as it is material to some of the issues for determination.

12. An interlocutory order was made by this Court (Gilligan J.) on 15 April, 2015. This Order, which was not appealed, was directed to ensuring that the Joint Receivers were in a position to collect rents payable on the properties the subject matter of the 2014 Proceedings.
13. The 2014 Proceedings ultimately went to full hearing before Murphy J., who made a final Order dated 13 May, 2017, requiring the defendant to account to the Joint Receivers for rent and licence fees which he had received or collected, to produce evidence within fourteen days from the date of the Order that he had notified in writing all the tenants of the various secured properties to forthwith pay the rent and/or licence fees associated therewith to the Joint Receivers, to produce all leases and licences to the Joint Receivers, and to pay the sum of €77,625.00 to the Joint Receivers.
14. That Order also restrained the defendant from preventing, impeding or obstructing the Joint Receivers from collecting the rents or licence fees associated with the various properties. No order requiring the delivery up of keys, security codes, etc. was made and that has, as I understand it, given rise to the need for these proceedings. The Order of Murphy J. was appealed, and the appeal was dismissed by the Court of Appeal on 26 July 2021.
15. As it is material to a number of issues raised by the defendant, and indeed to the necessary proofs required from the plaintiffs, it is convenient now to set out the various contractual and statutory provisions regulating the appointment of the plaintiffs as Joint Receivers and the powers they enjoy as such.

Relevant contractual and statutory provisions

16. The Property was mortgaged to Ulster Bank Ireland Ltd. ("Ulster Bank") by Deed of Mortgage dated 29 January, 2007 ("the Mortgage Deed"). A copy of the Mortgage Deed has been exhibited to the grounding affidavit. Clause 11 provides:

"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 expenditures 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 nor 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."

17. The plaintiffs accept that they do not have a power of sale in relation to the Property and say that they seek on an interlocutory basis an order for possession to permit them to

manage the Property. It is not disputed that the Property forms part of the Mortgaged Property as defined in the Mortgage Deed. The Mortgaged Property is Niles House.

18. Clause 8 of the Mortgage Deed provides that ss. 17 and 20 of the Conveyancing Act, 1881, shall not apply to the Mortgage and the statutory power of sale and other powers shall be exercisable at any time after demand.
19. There is no express power to appoint a receiver contained in the Mortgage Deed, and accordingly that power arises under s.19 of the 1881 Act which implies into the Deed "*[a] power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof...*".
20. Section 24 of the 1881 Act provides that a mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by the 1881 Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.
21. It is clear from the foregoing that the fundamental assertions of the Plaintiff, on which they ground their application for possession of the Property, are that Promontoria may appoint a receiver once lawful demand has been made of the Defendant to pay monies due and owing which are secured by the Mortgage Deed, that this appointment must be done in writing, and that the receivers may then enter into possession of the Property to discharge their functions as Joint Receivers in accordance with Clause 11 of the Mortgage Deed. However, as they have no power of sale, they do not have a right to enter into possession for the purposes of arranging and conducting the sale of the Property.

Issues in this application

22. Two affidavits have been sworn by the defendant and a supplemental affidavit has been sworn by the first plaintiff. Two further affidavits have been sworn by an employee of the plaintiffs, as the instructions given to Blackwater Asset Management in connection with the entry into possession of Niles House by the Joint Receivers in June, 2019.
23. From those affidavits, the following issues appear to fall for determination in this application:
 1. Whether it is appropriate to grant an injunction at all or whether this is, in reality, an application for summary judgment;
 2. Whether the defendant is entitled to question the validity of the appointment of the Joint Receivers, and, if so, whether they have in fact been validly appointed;
 3. Whether the Joint Receivers are managing the properties incorrectly and, if so, whether that prevents the grant of an injunction or whether the defendant should be confined to his remedy in damages;

4. Whether issues relating to the apparent alteration of a Facility Letter sent by Ulster Bank to the defendant on 28 May, 2007, is *res judicata* and, if it is not, whether it has any impact on the application for injunctive relief;
 5. Whether the investigation by the Gardaí which the defendant says is ongoing into the re-entry of Niles House by the Joint Receivers has any bearing on the grant of the relief sought.
 6. Whether the plaintiff has established a strong case that they will succeed at trial and, if so,
 7. Whether it is necessary to consider the balance of convenience and, if so, whether it favours the grant of the injunction.
24. As will become apparent, it will not be necessary to reach conclusions on all of these issues for the purposes of determining this application.

Whether the Joint Receivers have established that it is appropriate to grant an injunction.

25. The plaintiffs accept that the leading authority of *Charlton v. Scriven* [2019] IESC 28 is to the effect that an application for interlocutory relief should not be used as a means of obtaining summary judgment. Clarke C.J. stated quite clearly at para. 7.1 of that judgment that:

"Interlocutory injunctions should not be treated as a means of attempting, in practice, to obtain a summary judgment."

26. It is accepted in this case, and was accepted in the 2014 Proceedings, that the plaintiffs do not have a power of sale. Indeed, this is evident from the Mortgage Deed itself. The plaintiffs claim that they wish to seek possession of the Property in order to manage it.
27. To contradict that, the defendant points to a number of factors which he says demonstrate that the real purpose behind the application is to ensure that vacant possession is recovered so that the property can be sold.
28. First, the defendant points to a Tax Registration form, TR1, by which Mr. Etherington and the first plaintiff registered as Joint Receivers over certain assets of the defendant. This was signed by a member of the staff on behalf of the first plaintiff and Mr. Etherington on 24 September, 2013, and demonstrates that the then Joint Receivers registered for income tax indicating that their main sources of income would be "Rental Income" and "Other" income, which was specified as deriving from "sale of property".
29. This form was exhibited to the first replying affidavit of the defendant sworn 1 September, 2020. This exhibit was reproduced in the book prepared by the plaintiffs' solicitor in incomplete form. I was told at hearing, and completely accept, that this resulted by reason of an error in the scanning whereby the exhibit when first received was inaccurately scanned, and then the scanned copy was used thereafter. That may be so, but the exhibit is, on its face, incomplete, as it is routine for forms of this kind to end

with a declaration, signature, and date, as is in fact the case with this form. This is apparent from the complete copy produced by the defendant in the course of the hearing.

30. Accordingly, counsel for the plaintiff very properly resiled from his original submission that the plaintiff had no grounds for his averment at para. 7 of that affidavit to the effect that the Joint Receivers as originally appointed had stated that their purpose was to sell the secured properties.
31. It is apparent from that form that it is being completed in relation to all of the assets of the defendant which were under the management of the receivership. The purpose of registering is stated to be both the collection of rental income and the sale of property. It is not specified as to which property will be the subject of a sale.
32. While it could be said that this form relates to the various secured properties and there may well have been a power of sale in relation to some of the other properties, it seems unlikely that the mortgages executed by the defendant in favour of Ulster Bank were in differing forms. It seems much more likely that they had the same standard terms. Furthermore, there is uncontroverted affidavit evidence from the defendant in this case that the plaintiffs have not re-let the various units in the properties in the receivership. It therefore seems to me that this form supports the defendant's contention that it is in fact the intention of the Joint Receivers to sell the various properties, including the Property itself.
33. I do not, however, think it would be sufficient in itself to show that the intention of the plaintiffs is to sell, rather than manage, the Property and the related properties, as that form was signed immediately after appointment of the first plaintiff and Mr. Etherington as the original Joint Receivers and it may have been filled out in accordance with standard procedure, without reference to the specific terms of the Mortgage Deed, and on the assumption that there was a power of sale.
34. In addition, however, the defendant also claims in his affidavit of 1 September, 2020, that contrary to the stated purpose of the plaintiffs of management of the property and the collection of rent, he says that all they want to do is sell the properties "*for a quick profit*" as the properties are not luxurious and are located in a small country town and would not generate huge rent. He avers quite specifically that when former tenants left, the units were closed up and the Joint Receivers never attempted to replace the tenants in any of them. This appears to be a reference to Niles House as well as other properties over which the plaintiffs (and previously Mr. Etherington) had been appointed receivers. This has not been contradicted by either of the plaintiffs in their affidavits. Further, he claims that the tenants who are still there never had their rent increased. While he seems to assume that it should have been increased in line with inflation, that would depend on the rent review clauses in the various tenancies, which are not in evidence.
35. The defendant points specifically to a 35-year lease of one of the properties, which is a licensed premises, the subject of a separate mortgage, and which is one of the premises to which the 2014 Proceedings relates. The defendant says that this has been vacant

since April, 2015 without the Joint Receivers ever attempting to assign the lease to another tenant. He claims they have allowed the premises to deteriorate and it is rat infested, and that the Joint Receivers took no steps to renew the licence which was due to expire in September, 2019. He also points to various incidents of what he says are disrepair which the Joint Receivers took no steps to remedy.

36. The plaintiffs say this is not an issue which is material to the application for possession and can be the subject of a damages claim, which indeed the defendant has instituted by High Court Record No. 2019/230 P.
37. However, even if that is correct, the contention of the defendant that the plaintiffs have not taken any steps to manage the property or collect rents for the last few years has a larger significance for this application. I think the averments of the defendant raise a concern because the Order of Murphy J. was directed towards ensuring that the Joint Receivers collected all the rent and/or licence fees in the secured properties the subject of the 2014 Proceedings and that the defendant should not impede the collection of them. It therefore seems that the 2014 Proceedings were taken to ensure that the Joint Receivers were in a position to collect income from the property on behalf of Ulster Bank and, subsequently, Promontoria.
38. The averments of the defendant in relation to the failure of the Joint Receivers to re-let properties after they had become vacant and to keep up the licence in the licenced premises, are uncontradicted by the plaintiffs, both of whom have sworn affidavits in this application. This inaction would appear to be inconsistent with the stated purpose of the plaintiffs in seeking to recover possession of the Property.
39. Combined with the tax registration form put in evidence by the defendant, I have a doubt as to the purpose for which possession is being sought and whether it is related to the discharge by the plaintiffs of their powers and functions as Joint Receivers. It seems to me that there is, at the very least, an issue to be tried at hearing on this point. Given the higher threshold which the plaintiffs must meet, this is, in my view, fatal to the application for possession at this stage.
40. I would point out that the plaintiffs still have the benefit of the Order of Murphy J., pending determination of their claim for possession in these proceedings.
41. However, in case I am wrong in that conclusion, I will consider the next issue, which is whether the plaintiffs have proven the essential matters grounding their application for possession, to the high threshold identified in *Maha Lingham*.

Whether the Plaintiffs have been validly appointed as joint receivers

42. The plaintiffs' right to possession rests on clause 11 of the mortgage deed, already set out above. It will be evident from a reading of that clause that two matters need to be established before it can be said that they have been properly appointed: first, that the mortgagee's power of sale has become exercisable and secondly, the Joint Receivers have been appointed in accordance with the requirements of s. 24 of the 1881 Act. In addition,

because the Joint Receivers are appointed by an assignee of the original mortgagee, the plaintiffs must also demonstrate that Promontoria is the successor-in-title of the original mortgagee.

43. The plaintiffs claim that they are not obliged to tender evidence of most of these matters as they claim that these issues were already determined in the 2014 Proceedings. Alternatively, the plaintiffs say that, as the relevant issues could have been raised in the 2014 Proceedings and were not, the defendant is not entitled to litigate them now. I will deal with each of the three essential proofs, therefore, in turn, focusing on whether proofs have been tendered in the course of this application and, if not, whether the matter has already been determined in the 2014 Proceedings such that the defendant cannot relitigate on it now or, alternatively, was not raised in the 2014 Proceedings such that the defendant is precluded by the rule in *Henderson v. Henderson* from raising it now.

(i) Whether the power of the Joint Receivers to go into possession has become exercisable.

44. As is clear from the relevant statutory and contractual provisions set out above, the power to enter and manage the property is dependent on the power of sale having become exercisable, which in turn is dependent on secured monies having become due and owing and demand having been made.
45. There is no evidence on affidavit of either of these matters. Counsel for the plaintiffs submits that the demand was referred to in the judgment of Murphy J. in the 2014 proceedings, and that therefore the matter is *res judicata*. At para. 7 of her judgment of 16 May, 2017, Murphy J. certainly refers to letters of demand dated 26 March, 2013 and 2 May, 2013. It is not clear whether any issue was raised in relation to the letters of demand (as opposed to a preceding facility letter of 28 May, 2007, which the plaintiff says he never signed and which he says was subsequently altered).
46. Counsel for the plaintiffs also submitted that the defendant had accepted in evidence before Murphy J. that he had borrowed the moneys in question, had signed the relevant deed of mortgage, and that he was indebted to Promontoria to the tune of €5 million. It was also submitted that the defendant had accepted that the facility letter of 28 May, 2007, had been superseded by a further facilities letter. Based on that, Murphy J. had held that the appointment of the first plaintiff and Mr. Etherington as Joint Receivers was valid.
47. It seems to me that the validity of the letters of demand was not questioned in the earlier proceedings, rather than being something which was specifically determined by Murphy J. and therefore it is doubtful that the doctrine of *res judicata* attaches to it. Of course, one should say that the defendant should have raised this in the 2014 Proceedings, in which case the rule in *Henderson v. Henderson* might apply, but that rule is a flexible one designed to prevent abuse of process, as is apparent from the judgment of Lord Bingham in *Johnson v. Gorewood & Co.* [2002] 2 A.C. 1 at 31, where he stated:

"... But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in

common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus, while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice." [Emphasis added.]

48. That passage was specifically approved by the Court of Appeal (per Finlay Geoghegan J.) in *Vico Ltd v. Bank of Ireland* [2016] IECA 273 at para. 28. It will be noted from the discussion of Lord Bingham that the dominant rationale of the Rule is based on abuse of process and there is no automatic rule that just because something could have been raised before, the raising of it in later proceedings constitutes unjust harassment of the other party.
49. It must be recalled that the necessity for the second set of proceedings has come about because the plaintiff appears not to have pursued the claim for possession in the 2014 Proceedings and is claiming it now. I am not saying there is anything wrong about the manner in which the application for an order for possession is now being pursued, but merely point out that this second set of proceedings has become necessary by reason of

the decisions made by the receivers and not because of any abuse of process by the defendant. It was open to the plaintiffs to seek possession at an earlier time if they wished to have it in order to manage the Property, but they chose not to do so, and that has necessitated these second set of proceedings.

50. I have difficulty in finding here that there is unjust harassment of the plaintiffs, who come to court seeking an interlocutory injunction for the purposes of recovering possession of the Property. This is not to say that the rule in *Henderson v. Henderson* will not be found to apply at full hearing. However, it is not sufficiently clear at this stage that it is applicable, and I do not think it can be used in substitution for a necessary proof of this kind, at least in the context of an application for mandatory interlocutory relief.
51. It would have been a very simple matter for the plaintiffs to put the letters of demand on affidavit and to prove that monies were due and owing as of the date of demand. It is a necessary proof and one which was available to the court in *Kavanagh v. Lynch* [2011] IEHC 348, on which the plaintiffs rely. In my view, the relevant facility letters and letters of demand should have been exhibited for the purpose of asking the court to grant an order for possession at interlocutory stage. In their absence, it is not possible to be satisfied to the high standard necessary and the application must fail.

(ii) Whether the Joint Receivers have been appointed in accordance with the requisite formalities

52. A similar issue arises in relation to the question of whether it has been shown that the plaintiffs have been validly appointed as receivers.
53. The first plaintiff was initially appointed as receiver over the property, along with Mr. Mark Etherington by deed of appointment dated 17 September, 2013. That deed of appointment has not been exhibited. By deed of discharge dated 14 May, 2018, Mark Etherington resigned as one of the Joint Receivers and, by Supplemental Deed of Appointment, dated 14 May, 2018, the second plaintiff was substituted for Mark Etherington as one of the Joint Receivers over the secured properties. Copies of the Deed of Discharge and Supplemental Deed of Appointment both dated 14 May, 2018 have been exhibited. On their face, the Deed of Discharge has been executed as a deed by both Promontoria and Mr. Etherington. No issue has been taken as to the validity of the execution of this deed.
54. However, it should be noted that the first plaintiff was originally appointed as receiver by Ulster Bank. He has stated on affidavit that, by Global Deed of Transfer dated 12 February, 2015, the bank transferred the defendant's loans and securities to Promontoria, and that by Deed of Novation of the same date, Promontoria was substituted for the bank as a party to the receivership agreement. Neither the Global Deed of Transfer nor the Deed of Novation has been exhibited.
55. Section 24 of the 1881 Act requires that the receivers be appointed in writing. On the facts of this case, proof of the novation of the first plaintiff's appointment in favour of Promontoria is also required. In order for this Court to be satisfied that these matters have occurred, the relevant documents should, in my view, have been exhibited.

56. Counsel for the plaintiff says that it is not necessary to exhibit the deeds appointing the first plaintiff for two reasons. First, he says the first plaintiff has said on affidavit that he has been appointed and, secondly, he says that no issue was raised as to the validity of his appointment by Ulster Bank in the 2014 Proceedings.
57. As regards the first issue, the onus is on the plaintiffs, who are seeking mandatory interlocutory relief, to show that they have a strong case that they will likely succeed at trial. There is no doubt, should this matter go to trial, that those deeds would have to be produced in their original form and any issue as to the validity of the deeds, including their due execution (if that is put in issue), could then be litigated as an issue at hearing.
58. Leaving aside for the moment any question as to whether the defendant is precluded by the rule in *Henderson v. Henderson* from raising this as an issue, it seems to me that the onus on the plaintiffs in an application such as this requires them to put before the court the documentary evidence of matters which, as a matter of law, must be done in writing. It is not sufficient to simply aver to the existence of the documents, and there would appear to be no good reason why they were not exhibited. The averment amounts to a statement by the first plaintiff that he has been validly appointed, but the validity or otherwise of his appointment is a matter for the court to decide on sight of the documents,
59. Insofar as the plaintiffs say they do not have to exhibit either the Deed of Appointment of the first plaintiff or the Deed of Novation because these matters were not raised in the 2014 Proceedings, it certainly seems from the judgment of Murphy J. that the validity of these Deeds were not questioned in that case.
60. However, again it seems to me that, for the reasons already set out above, this is not a situation where the defendant is engaged in harassment of the plaintiffs or an abuse of process by engaging in serial litigation where issues are held back until proceedings are determined and then fresh proceedings are issued in order to litigate issues which could have been decided in the first proceedings.
61. Given that this is an application for interlocutory relief, any question of the application of the rule in *Henderson v. Henderson* is not, in my view, so clearly in favour of the plaintiffs herein as to lead me to decide that I do not need to look at all at the Deed of Appointment of the first plaintiff or the Deed of Novation by which he came to be appointed to act on behalf of Promontoria.
62. In my view, the document showing that the Joint Receivers have been formally appointed in compliance with the relevant Mortgage Deed and/or the relevant statutory provisions is an essential proof where an application of this nature is brought. I do not think the application of the rule in *Henderson v. Henderson* can be said, at least at this interlocutory stage, to be so clear in this case as to relieve the plaintiffs from meeting the usual requirement to demonstrate to the court their authority as receivers.

(iii) Whether there is proof that the mortgage has been assigned to Promontoria.

63. Similarly, it is my view that the Global Deed of Transfer, presumably in redacted form (though I make no comment as to the appropriate extent of redactions) should also have been exhibited to the grounding affidavit. As stated already, I do not believe that raising these issues is so clearly an abuse of process that I could apply the rule in *Henderson v. Henderson* to an application for interlocutory relief of this kind.
64. For those reasons, I am of the view that the joint plaintiffs have not submitted the essential proofs for seeking the relief claimed, and, in the circumstances, I do not have to deal with the other issues raised by the defendant in his replying affidavits.

Postscript on possession

65. The plaintiffs in their affidavits and in their submissions at hearing, stressed the unlawfulness of the defendant's possession of the Property. What appears to have happened is that, on the authority of the Joint Receivers, a third party security company appear to have secured possession of a number of units within Niles House and perhaps other secured properties to which the Order of Murphy J. of 30 May, 2017 relates. These units are not identified in the affidavits by unit number or otherwise but are referred to in general terms as "the Occupied Units". Insofar as they relate to units in Niles House other than the Property, they are not directly relevant to this application and I therefore make no finding as to the lawfulness or otherwise of the possession or taking of possession of any premises other than the Property.
66. It is asserted by the second plaintiff in his affidavit of 2 March, 2020, that the defendant, "*by illegally breaking the locks, unlawfully ceased control and took occupation of [the occupied units]*". However, the Order of 30 May, 2017, did not grant possession of any of the properties to which it related to the plaintiffs named in those proceedings. The affidavits sworn by the plaintiffs in these proceedings assert a right to possession on the basis of the Mortgage Deed and this is correct so far as it goes. However, that right is a right to enter, and therefore must be either asserted on foot of a court order or exercised peaceably: see *Charleton v. Hassett* [2021] IEHC 746, where it was held that the breaking of locks does not constitute peaceable re-entry.
67. Mr. O'Connor says in his affidavit that, through an employee, he instructed Blackwater Asset Management to take possession of the occupied units and install anti-snap locks to prevent the defendant from "*regaining*" entry. He concedes that Blackwater Asset Management also "*in error*" "*regained*" possession of the Property and installed anti-snap locks on it.
68. Despite apparently conceding that the Joint Receivers' agents should not have taken possession of the Property, he then asserts that "*[t]he Defendant ... regained unlawful possession and occupation of the Property.*"
69. I find this very confusing. If Blackwater Asset Management were not instructed to take possession of the Property, which appears to be a small unit, but incorrectly followed instructions and recovered possession of the Property when they had been instructed not

to take possession of it, I do not see how the defendant can be said to be in “*unlawful occupation*”.

70. If the Joint Receivers wanted to enter into possession of any of the properties secured by the mortgage deed, then either they must obtain the keys from the defendant and enter in a peaceable manner, or they must obtain a court order to authorise such entry. In the process of obtaining the court order, any dispute as to their entitlement to enter into possession in their capacity as receivers can be resolved.
71. That clearly has not been done here, and therefore, the *status quo* is that the defendant is in possession as mortgagor, that is, as owner of the Property, unless and until a court order dispossessing him is obtained.

Conclusion

72. I am satisfied that the plaintiffs have not made out a strong case that they are likely to succeed at trial. They have not put the usual proofs on affidavit, but have instead relied on a combination of the doctrine of *res judicata* and the rule in *Henderson v. Henderson* in circumstances where it is not at all clear that these doctrines apply. In an application of this kind, the correct course for the plaintiffs to take was to exhibit the necessary documents to show that the mortgagee’s power of sale was exercisable, to exhibit the various documents by which the plaintiffs were appointed as receivers, so as to show that they had been appointed in accordance with the relevant formalities, and to exhibit the relevant documents of title showing that Promontoria was now, in law, the mortgagor under the Mortgage Deed, such that it had authority to appoint them. That has not been done.
73. In any event, the facts deposed to by the defendant as to the failure by the Joint Receivers (for the time being) to secure and manage lettings in the secured properties, both in Niles House and elsewhere, are not consistent with a desire to go into possession so as to manage the properties. An issue has been raised as to the reason why possession is being sought, given that there is no right to re-enter for the purposes of selling the Property. I would therefore, even if the proofs were in order, refuse the application on discretionary grounds.