

# THE HIGH COURT

[2022] IEHC 308

[2021 No. 3765P.]

BETWEEN

**DECLAN TAITE, ANNE O'DWYER**

**AND**

**PEPPER FINANCE CORPORATION (IRELAND)**

**DESIGNATED ACIVITY COMPANY**

**PLAINTIFFS**

**AND**

**MATTHEW MOLLOY AND NICK LOZIANIS**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Allen delivered on the 26<sup>th</sup> day of May, 2022**

## *Prologue*

1. Section 62, sub-s. 7 of the Registration of Title Act, 1964 provides that where repayment of the principal money secured by an instrument of charge has become due, the registered owner of the charge may apply to the court in a summary manner for possession of the land, and the court on such an application may, if it thinks proper, order possession of the land to be delivered to the applicant, and the applicant, upon obtaining possession of the land, shall be deemed to be a mortgagee in possession.

2. For reasons which I do not understand, the registered owner of the charges in this case has not availed of that procedure but has applied for a series of ostensible interlocutory orders with a view to the sale of the land. Inevitably, the procedure adopted by the plaintiffs has spawned a wide ranging dispute as to fair questions to be tried, strong cases likely to succeed, the adequacy of damages, and the balance of convenience. Moreover, owing mostly to the pace set by the plaintiffs, what was put up as an urgent application was heard ten months after it was issued.

3. Perhaps the most interesting issue thrown up by the application is whether – or the extent to which – receivers may properly act at the same time for the mortgagor and the mortgagee.

4. This is a judgment on an interlocutory motion which is not to be understood as finally deciding a contested issue of law but, as I will endeavour to explain, it seems to me that the plaintiffs' argument is based on a misunderstanding of the judgment of the Court of Appeal in *Vitgeson v. O'Brien* [2019] IECA 184.

### *Introduction*

5. By this action, which was commenced by plenary summons issued on 18<sup>th</sup> May, 2021, the plaintiffs claim a declaration that the first and second plaintiffs (*“the receivers”*) stand validly appointed as receivers and managers over three County Westmeath properties; a variety of injunctions restraining interference with the functions of the first and second plaintiffs as receivers and managers, restraining trespass, requiring the delivery up of keys and the like; and damages for trespass.

6. Having issued their summons, the plaintiffs moved almost immediately, by notice of motion issued on 31<sup>st</sup> May, 2021, for interlocutory orders. The motion wended its way

through the list until it was heard on 1<sup>st</sup> April, 2022. In the ordinary way the motion was assigned a hearing date on the basis that the exchange of affidavits had been completed but on the Thursday before the hearing date a supplemental affidavit was filed on behalf of the plaintiffs exhibiting a number of additional documents.

7. The three properties are a farm of about 17 hectares and two residential investment properties. By the time the motion came on for hearing the plaintiffs had taken possession and sold one of the houses and on the morning of the hearing the first defendant (“*Mr. Molloy*”) made an open offer to the plaintiffs to cooperate in the sale of the other house. This judgment principally addresses the plaintiffs’ claim to interlocutory orders in respect of the farm, which is in the possession of Mr. Molloy and is being farmed by him, and the unsold residential investment property, which is said to be occupied by the second defendant (*Mr. Lozians*”).

8. On one view, the sale of the property which has been sold has resolved the dispute in relation to that property but as I will come to, the charge over that property was significantly different to that over the other two.

9. The farm – which is at Slanemore, Mullingar, County Westmeath – is made up of three folios. Mr. Molloy was registered as full owner of each of the folios on 19<sup>th</sup> October, 1994 and on the same day ACC Bank plc was registered on each folio as the owner of a charge for present and future advances. The folios show that a transfer of the charges to the third plaintiff, Pepper Finance Corporation (Ireland) DAC (“*Pepper*”) was registered on 12<sup>th</sup> September, 2019.

10. The unsold residential property is a house at 97 Ashfield, Mullingar, County Westmeath, and is the property comprised in Folio 18815F, County Westmeath. That property was obviously purchased with the assistance of funding provided by ACC Bank plc as the folio shows that Mr. Molloy was registered as owner on 16<sup>th</sup> February, 2001 and a

charge for present and future advances dated 11<sup>th</sup> August, 2000 in favour of ACC Bank plc was registered on the same day. That charge was transferred to Pepper, which was registered on the folio as the owner of the charge on 12<sup>th</sup> September, 2019.

**11.** The property which has been sold is a house at Tour Commons, Ballynacargy, County Westmeath, comprised in Folio 17258F, County Westmeath. That property was charged by Mr. Molloy to ACC Bank plc by deed of charge dated 1<sup>st</sup> June, 2004 but for some reason Mr. Molloy was not registered as owner on the folio until 1<sup>st</sup> March, 2007 and the charge in favour of ACC was not registered until 16<sup>th</sup> April, 2008. As with the other properties, Pepper which was registered on the folio as the owner of the charge on 12<sup>th</sup> September, 2019.

#### *The evidence*

**12.** The motion was grounded on the affidavit of Mr. Declan Taite, sworn on 26<sup>th</sup> May, 2021 from facts within his own knowledge and from a diligent perusal of his own books and records and unidentified books and records of Pepper said to be relevant to the application.

**13.** Mr. Taite deposed that by deed of appointment dated 6<sup>th</sup> June, 2018 he and Ms. O'Dwyer were appointed by ACC Loan Management Designated Activity Company ("ACC") to be receivers and managers over the three properties: and he exhibited a copy of the deed of appointment. He deposed that the three properties had been mortgaged in favour of ACC under its previous name of ACC Bank plc by three deeds of charge: in the case of the farm, a deed of 26<sup>th</sup> August, 1994; in the case of the property at Ashfield, a deed of 11<sup>th</sup> August, 2000; and in the case of the property at Tour Commons, a deed of 1<sup>st</sup> June, 2004. Mr. Taite exhibited copies of the deeds of charge and folios.

**14.** The three charges were in printed forms but each was different. Materially, for present purposes, the charges over the farm and the house at Ashfield provided for all the

powers conferred on mortgagees by the Conveyancing and Law of Property Act, 1881 but the charge over the house at Tour Commons provided that any receiver appointed by the mortgagee should have, in addition to the statutory powers, a power of sale.

15. Mr. Taite deposed that the interest of ACC in the mortgages was transferred to Coöperatieve Rabobank U.A. (“*Rabobank*”) on 17<sup>th</sup> December, 2018 and that the interest of Rabobank was transferred to Pepper on 23<sup>rd</sup> August, 2019. Mr. Taite did not exhibit any transfer from ACC to Rabobank, or from Rabobank to Pepper but he did refer to and exhibit a deed of novation dated 23<sup>rd</sup> August, 2019 between Rabobank, Pepper and the receivers by which, he said, Pepper was substituted in place of Rabobank and ACC Investments Limited as a party to the deed of appointment. The deed of novation recited a mortgage sale deed between Rabobank and Pepper of 12<sup>th</sup> April, 2019 and, with the consent of the receivers, substituted Pepper for Rabobank with effect from 23<sup>rd</sup> August, 2019.

16. Mr. Taite in his grounding affidavit dealt, quite briefly, with “*Events since appointment*”. The first such event was that on 14<sup>th</sup> June, 2018 solicitors on behalf of Mr. Molloy had written to the receivers indicating that Mr. Molloy did not, at that point, accept that they had been validly appointed. The letter of 14<sup>th</sup> June, 2018 suggested first, that at the date of the mortgage of the Tour Commons house it had been the family home of Mr. Molloy and his wife, and that Mrs. Molloy had not consented to the creation of the charge; second, that Mr. Molloy wished to redeem the charge over the agricultural lands and had sought redemption figures; third, that the receivers had no power of sale over the farm or the Ashfield house; and fourth, asked for various documents to vouch the appointment of the receivers, specifically a copy of the power of attorney of the person who executed the deed of appointment on behalf of ACC, and a copy of the demand letter or letters issued by ACC.

17. Mr. Taite deposed that he had then instructed his and Ms. O’Dwyer’s solicitors to reply to Mr. Molloy’s solicitors and that a letter had been sent on their behalf on 2<sup>nd</sup> July,

2018. That letter merely advised that the solicitors acted on behalf of the receivers and that they were taking instructions and would revert shortly.

18. Thereafter, as Mr. Taite put it, “*matters fell into abeyance for a period of time*”, first, he said, by reason of the transfer by ACC to Rabobank and by Rabobank to Pepper and later by the COVID-19 pandemic restrictions. I pause here to say that I do not understand how the progress of the receivership might have been hindered by the transfer from ACC to Rabobank, its parent. Nor do I understand how either the transfer to Pepper – which was apparently agreed on 12<sup>th</sup> April, 2019 and completed on 23<sup>rd</sup> August, 2019 – could have accounted for the time between then and the first COVID-19 lockdown.

19. In the summer of 2020 the receivers instructed a firm of property agents called Blackwater to ascertain the occupancy status of the Tour Commons and Ashfield properties. Mr. Taite, at paras. 14 and 15 of his grounding affidavit, deposed that a Mr. Brian Buckley of Blackwater attended at the properties on 7<sup>th</sup> August, 2020 and established that the Tour Commons house was occupied by a Ms. Angela Casserly and the Ashfield house by Mr. Lozians. He exhibited copies of Mr. Buckley’s “*occupancy check*” in respect of each of the properties. Mr. Buckley reported that when he visited Tour Commons he had spoken with “*the tenant Angela Casserly* ” and that at Ashfield he had spoken with “*a male who identified himself as Nick Lozians.*” Ms. Casserly was reported as having said that she had been residing in Tour Commons with her family since November, 2019. There was no indication that Mr. Lozians had said who he was, or whether or for how long he had been in occupation of the Ashfield house, or whether, if he was in occupation, how or when he had come to be in occupation, or who else was living in the house.

20. On 17<sup>th</sup> September, 2020 the receivers’ solicitors wrote to Ms. Casserly and Mr. Lozians asking for details of their occupancy of the properties. They first said, please, could the information and documents be provided by no later than 5.30 p.m. on 24<sup>th</sup> September,

2020 and concluded with a threat that if it was not, the receivers reserved the right to take all such steps as might be lawfully open to them in order to take possession and secure the property without notice. On the same day the receivers' solicitors wrote to Mr. Molloy demanding a series of formal undertakings not to impede or obstruct the receivers in their dealings with Ashfield and Tour Commons and an account of all money received since 6<sup>th</sup> June, 2018. Mr. Molloy was allowed until 5.30 p.m. on 24<sup>th</sup> September, 2020 to provide the undertakings, failing which, it was said, proceedings would be issued seeking injunctive relief, including interim relief.

**21.** Ms. Casserly instructed solicitors to correspond with the receivers and agreement was reached – before the commencement of the proceedings – that she and her husband would be permitted to remain in Tour Commons until 16<sup>th</sup> June, 2021, subject to the payment of mesne rates.

**22.** Mr. Lozians did not respond to the receivers' solicitors' letter and has consistently since ignored all correspondence and has failed to engage with the proceedings.

**23.** Mr. Molloy instructed his solicitors to respond, which they did by letter of 16<sup>th</sup> October, 2020. Mr. Molloy's solicitor protested that he had not had a substantive response to his letter of 14<sup>th</sup> June, 2018. He demanded such a response and further called for evidence of the transfer of the loans and security to Pepper and the novation of the alleged receivership.

**24.** The receivers' solicitors replied by letter of 9<sup>th</sup> November, 2020. In that letter they identified their clients as including Pepper. They gave figures for Mr. Molloy's liabilities on foot of four loan accounts as of 6<sup>th</sup> November, 2020 and provided some copy documents.

They asserted that Tour Commons was not Mr. Molloy's family home and that Mr. Molloy had signed a family home declaration, witnessed by his previous solicitor, to that effect.

They stated that the sale of the farmlands and of the Ashfield house would "*be completed by mortgagee delivery of deed*". I pause here to note that as far as the evidence on this

application goes, there had been no previous demand for possession of the farm and Blackwater had not been instructed to carry out an occupancy check.

25. The plaintiffs' solicitors' letter of 9<sup>th</sup> November, 2020 referred to and apparently enclosed "*copy demand letters from Capita to Matthew Molloy dated 6<sup>th</sup> April, 2017*" but these were not included with the copy letter put into evidence. Mr. Molloy was invited to make any proposal he wished on a without prejudice basis but it was made clear that in the meantime "*our client*" would continue with arrangements to prepare for sale the residential properties together with all lands the subject of the receivership. On 27<sup>th</sup> November, 2020 the plaintiffs' solicitors followed up with a demand for formal undertakings – within seven days – in relation to "*the properties ... as set out in the schedule to the Deed of Appointment*", failing which the plaintiffs reserved the right to issue proceedings for injunctive relief, including interim relief. That demand was repeated by letter dated 14<sup>th</sup> December, 2020, with a new deadline of 5.30 p.m. seven days thence.

26. As of the date of swearing of the affidavit grounding the motion, Mr. and Mrs. Casserly were in occupation of the Tour Commons house, subject to their agreement to pay mesne rates and to vacate the property on 16<sup>th</sup> June, 2021; Mr. Lozians was – or at least was said to be – in occupation of the Ashfield house and had not paid anything to the receivers; and the agricultural lands were in the possession of Mr. Molloy, by whom they appeared to be farmed. The case made in support of the motion was that Mr. Molloy had refused to recognise the validity of the receivership and had taken steps to frustrate the receivership by instructing the tenants to ignore the receivers' appointment. The receivers apprehended that Mr. Molloy would seek to impede them from "*dealing with*" Tour Commons when it became vacant and from "*dealing with*" the agricultural lands. It was said that any purported lease or letting of any of the properties was unenforceable against the receivers in the absence of the written consent of ACC or Pepper. It was said that damages would not be an adequate



remedy as the conduct of the defendants would have a serious detrimental effect “*upon the conduct of the receivership*” and that the receivers’ “*ability to deal with and to market the properties the subject of the receivership will be irretrievably impaired*”

**27.** I do not believe that it is unfair to say that the grounding affidavit was almost entirely formulaic. The only figure in Mr. Taite’s affidavit was an alleged total indebtedness of €622,122,66. The plaintiffs’ solicitors’ letter of 9<sup>th</sup> November, 2020 suggested that there were four loan accounts and that all of the charges were for all sums due: but the affidavit referred to only three charges. As I will explain, it later became clear that one of the four loan accounts referred to in the letter of 9<sup>th</sup> November, 2020 is a home loan account for which Pepper has further security by way of a charge on what is now Mr. Molloy’s family home.

**28.** Mr. Taite expressed a general apprehension that the property market might change but there was no indication of the value of any of the properties: not least Tour Commons which it was then expected could be sold soon after Mr. and Mrs. Casserly were due to leave on 16<sup>th</sup> June, 2021. Nor indeed was there then – or for that matter at any time before or at the hearing of the motion – any indication of what the income from that house had been. As I will come to, Mr. and Mrs. Casserly did vacate the Tour Commons house and a purchaser was soon found for it, although the sale fell through by reason of a planning difficulty. As of the hearing of the motion a new purchaser had been found. Presumably – although no one was able to say so for sure – the planning difficulty which had prevented the first sale completing had been resolved. No one was able to say what price had been achieved for it.

**29.** Whatever about the lack of detail, it is quite clear from the grounding affidavit that the receivers’ object in seeking the interlocutory orders was to sell the three properties. And it is quite clear from the deeds of charge in respect of Ashfield and the farm lands that the receivers have no power of sale of those properties. It is true that part of the receivers’ complaint was that Mr. Molloy had instructed the tenants of Ashfield and Tour Commons not

to pay the rent to the receivers. But it is also clear that the receivers did not want to collect any rent. Their position is and has consistently been that whatever tenancies there may have been were made in breach of the negative pledge in the mortgages and were unenforceable against them. They were careful in making their arrangement with Mr. and Mrs. Casserly to characterise the money which was to have been paid until the house was vacated as mesne rates.

**30.** In circumstances which have not been explained, the summons, which had been issued on 18<sup>th</sup> May, 2021, and the notice of motion seeking interlocutory relief which had been issued on 31<sup>st</sup> May, 2021 and was returnable for 7<sup>th</sup> September, 2021, were not served on Mr. Molloy until 20<sup>th</sup> July, 2021 when they were sent to him by registered post. The summons and motion papers were hand delivered to Mr. Lozians on 12<sup>th</sup> June, 2021 and a further copy of the papers was sent to “*The occupant(s)*” of 97 Ashfield under cover of a letter of 31<sup>st</sup> August, 2021.

**31.** In his replying affidavit filed on 7<sup>th</sup> September, 2021 Mr. Molloy objected that the plaintiffs had not established that Pepper had acquired the loan facilities and security or that the requirements of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 had been complied with. He suggested that the plaintiffs’ delay was such as to disentitle them to interlocutory injunctive relief.

**32.** Mr. Molloy deposed that he had had four loan facilities with ACC, the largest of which was in respect of the construction of his and Mrs. Molloy’s family home at Slanemore, Mullingar, County Westmeath. He said that he could not understand the suggestion that his current indebtedness was €622,122,66 and that he was unclear as to what facilities Pepper had allegedly acquired. Mr. Molloy pointed to a letter sent to him by ACC on 22<sup>nd</sup> July, 2015 which indicated that the total then owing was €491,342.95, of which, he said, he was then told, €241,450 was in respect of his family home mortgage. I pause to say here that the

figures shown on Mr. Molloy's exhibits are not entirely clear but the account numbers are the same as those given in the plaintiffs' solicitors' letter of 9<sup>th</sup> November, 2020, to which I have referred, and that ACC's schedule ties one of those account numbers to a liability for €241,450 the "*purpose*" of which is shown as "*House at Ballyhug, Sonna (Family Home)*". The security shown to have been held by ACC for that liability is "*Property at Ballyhug, Sonna*" as well as 27 acres of land at Slanemore and a solicitor's undertaking to lodge the proceeds of sale of a property at Tour Road (*sic.*), Ballynacargy.

**33.** According to Mr. Molloy, he had sought to engage with ACC since 2012 with a view to restructuring his liabilities but from September, 2016 all attempts were unsuccessful. Mr. Molloy now presumes that the alleged lack of engagement by ACC was referable to the sale of the loans but I do not see how this fits with the fact that it was ACC who appointed the receivers on 6<sup>th</sup> June, 2018. On one view, I suppose, the appointment of the receivers did amount to engagement and the silence between then and September, 2020 amounted to a lack of engagement.

**34.** Rather cryptically, Mr. Molloy says that he is advised that insofar as the loans at issue are housing loan mortgages as defined in s. 2 of the Consumer Credit Act, 1995 and s. 92 of the Land and Conveyancing Law reform Act, 2009 he is entitled to discharge these loans without having to also discharge any other mortgage loans and which other mortgage loans relate to his family home.

**35.** As to the house at Tour Commons, Mr. Molloy deposed that it was, as of the date of what he described as the purported charge to ACC, his and Mrs. Molloy's family home and that he had not – as an unidentified dealing filed with the Property Registration Authority suggested he had – sworn any declaration otherwise.

**36.** Mr. Molloy denied that he had instructed Mr. and Mrs. Casserly not to pay rent to the receivers and characterised the suggestion that he had as a "*bald and unsupported*

*allegation*". He exhibited an exchange of text messages between himself and Mrs. Casserly which was said to show that Mrs. Casserly had said to him that she had been advised by her solicitors or the receivers' solicitors by e-mail not to pay any further rent to him and that he had replied that that was fine, would she send him a copy of the e-mail. Without dwelling on the detail of his and his wife's engagement with Mrs. Casserly, Mr. Molloy's main point appears to have been that since – he understood – the Casserlys had vacated the house and since – he understood – it had been sold, for – he understood – €285,000, he could not understand why the plaintiffs were seeking urgent injunctive relief in respect of that property.

**37.** As to the Ashfield house, Mr. Molloy deposed that it was leased as it had been since he bought it, with the consent and knowledge of ACC to whom the rent had "*historically*" been paid. He questioned whether, by reference to whatever he might have been shown, Mr. Taite's averment that ACC had not consented to the letting of Ashfield and Tour Commons was justified. Mr. Molloy averred that the property was let to Ms. Babia Lozians rather than to Mr. Nick Lozians who, he said, was Ms. Lozians' husband. He denied that he had directed the Lozians not to pay the rent to the plaintiffs. Rather, he said, it was the Lozians who had decided to continue to pay the rent to him. In his account of his dealings with Pepper, Mr. Molloy emphasised that the Ashfield and Tour Commons properties appeared to be recorded on Pepper's books as "*buy to let*". Mr. Molloy offered an undertaking, pending the determination of the proceedings, to pay the rent from Ashfield (less outgoings and income tax) to his solicitors.

**38.** As to the agricultural lands, Mr. Molloy deposed that he was and at all times had been in possession of them and had not leased them. He pointed out that there was no power in the charge to appoint a receiver, other than the limited power in the Conveyancing and Law of Property Act, 1881. While he was, he said, uncertain as to the basis on which he was alleged to be trespassing or on what basis he was alleged to be interfering with the receivers' function

and office, he suggested that no validly appointed receiver and manager would ever have the power to take control of or manage the property or to restrict him from continuing to farm the property.

**39.** As to damages and the balance of convenience, Mr. Molloy deposed that damages were an adequate remedy. Mr. Molloy suggested that if the €285,000 for which he understood Tour Commons had been sold were deducted from what he described as the alleged but unvouched debt of €622,122.26, the value of the agricultural lands, without regard to his other assets, far exceeded the value of the sum claimed. He did not say what the value of the agricultural lands was, or what his other assets were, or what the value of his other assets was. Mr. Molloy said that his business and livelihood depended on his continued use of the agricultural lands, that the Ashfield property was generating an income and that the current tenants had rights and he urged that the balance of convenience was in favour of the application being refused.

**40.** In response to the affidavit of Mr. Molloy an affidavit of Mr. Patrick O'Dwyer was filed on 12<sup>th</sup> November, 2021. I cannot forbear to observe that the two months which it took for the receivers' response, on top of the two months it took them to serve the summons and motion, contrasts starkly with their seven day demands for a response to their correspondence.

**41.** Mr. O'Dwyer is a portfolio manager with Pepper. His starting position was that Mr. Molloy had not set out any basis for disputing Pepper's acquisition of the loans and security.

**42.** Mr. O'Dwyer exhibited the facility letters in relation to the four facilities identified by Mr. Molloy.

**43.** By letter of 16<sup>th</sup> March, 2004 ACC sanctioned a loan to Mr. Molloy of €130,000, the purpose of which was to build a private dwelling house at Tour Commons. The letter described the facility as "*Annuity Home Loan Agreement*" and set out the "*Notice of*

*important information to be included in a housing loan agreement*” required by s. 129 of the Consumer Credit Act, 1995, to which it expressly referred. The letter incorporated the statutory warning that Mr. Molloy’s home would be at risk if he not keep up payments on a mortgage secured on it.

44. By letter dated 13<sup>th</sup> February, 2007, in more or less the same form, ACC sanctioned an “*annuity home loan*” of €250,000 for the purpose of completing the construction of a dwelling house at Sonna, Mullingar, County Westmeath, and to repay an existing loan. The letter spelled out that the loan was a top-up home loan, which allowed an existing customer to borrow additional funds secured against their family home. Part of the security stipulated for was a solicitor’s undertaking to lodge the sale proceeds of the house at Tour Commons.

45. By letter dated 30<sup>th</sup> August, 2007 ACC sanctioned a loan of €137,000 for the stated purpose of “*equity release on a residential investment property at Ashfield, Mullingar, County Westmeath.*” Incidentally, the letter was in the same form as the earlier letters and included the statutory notice and warnings applicable to home loans. And by letter dated 25<sup>th</sup> February, 2008 ACC sanctioned a commercial loan facility for €20,000 for the construction of a slatted shed.

46. Mr. O’Dwyer deposed that ACC Bank plc resolved on 27<sup>th</sup> June, 2014 to change its name to ACC Loan Management Limited and on 13<sup>th</sup> July, 2016 to convert into a designated activity company. He deposed to the transfer by ACC to Rabobank on 17<sup>th</sup> December, 2018 of all of its rights, interest and benefit in ACC’s loan assets, including the loans and security the subject of the proceedings, and to the further transfer by Rabobank to Pepper by global deed of transfer dated 23<sup>rd</sup> August, 2019.

47. Mr. O’Dwyer exhibited a redacted copy of the deed of transfer by Rabobank to Pepper – which identifies the four loans and mortgages – and a letter of 28<sup>th</sup> August, 2019 from Rabobank to Mr. Molloy and a letter of 6<sup>th</sup> September, 2019 from Pepper to Mr. Molloy

giving notice of that assignment. He pointed to the registration of Pepper as the owner of the charges on the various Land Registry folios, copies of which had been exhibited by Mr. Taite.

48. Mr. O'Dwyer deposed that the total sum currently outstanding to Pepper was €631,401.23 and he exhibited what he referred to up to date statements of account but what in fact were statements showing an "*opening arrears balance*", without a date, a series of quarterly charges for interest between 15<sup>th</sup> September, 2019 and 15<sup>th</sup> September, 2021 and a "*closing arrears balance*", without a date. By the way, the total of the balances on the four statements of account is not €631,401.23 but €628,791.73 but no one suggested that anything turned on that. I think that it is fair to say that Mr. O'Dwyer dismissed Mr. Molloy's declared confusion as to his total liabilities without engaging with it: specifically by pointing out that the account numbers were consistent or that upwards of six years interest had accrued on the loans since ACC's letter of 22<sup>nd</sup> July, 2015.

49. Mr. O'Dwyer exhibited a copy of the mortgage in respect of Mr. Molloy's principal private residence.

50. As to the status of Tour Commons, Mr. O'Dwyer emphasised the fact that the facility was to be used to build a private dwelling house – which he suggested went to show that the house did not then exist – and he pointed to the various addresses shown on the various letters of sanction. He exhibited a form of solicitor's undertaking dated 7<sup>th</sup> March, 2007 by which Mr. Molloy had certified that Tour Commons was not a family home. All of this, Mr. O'Dwyer said, contradicted the assertion at para. 10(c) of Mr. Molloy's affidavit, that Tour Commons constituted the family home of Mr. Molloy and his wife.

51. Now the fact of the matter is that Tour Commons has been sold but as the issue has so exercised the parties I think that I should say something about it. What Mr. Molloy said about Tour Commons was that it was as of the date of the purported charge, the family home of himself and his wife. The letter of loan offer was dated 16<sup>th</sup> March, 2004. The deed of

charge is dated 1<sup>st</sup> June, 2004. The certificate on the solicitor's undertaking was dated 7<sup>th</sup> March, 2007. If there was no house on the site at Tour Commons on 16<sup>th</sup> March, 2004 it does not follow that the loan was not a housing loan for the purposes of the Consumer Credit Act, 1995. If there was no house on the site as of 16<sup>th</sup> March, 2004 it does not follow that there was no house on the site on 1<sup>st</sup> June, 2004. If the house was not Mr. Molloy's principal private residence on 7<sup>th</sup> March, 2007 it does not follow that it was not his principal private residence on 1<sup>st</sup> June, 2004.

**52.** As to what Mr. O'Dwyer referred to as "*an issue as to the absence of an express power of sale for the receivers under certain of the mortgages*", Mr. O'Dwyer explained that "*it is the intention of the plaintiffs that any sale of the properties would be effected by Pepper as mortgagee in possession. In this regard I say that Kroll Advisory (Ireland) Limited will act as Pepper's agent for the purposes of carrying out preparatory work in relation to the sale of the said properties.*"

**53.** Mr. O'Dwyer took exception to something said by Mr. Molloy in his replying affidavit. Mr. Molloy, at para. 14 and 15 of his affidavit, touched on his engagement with Mr. Brian Buckley of Blackwater following Mr. Buckley's visit to the residential properties in the summer of 2020 and on his, and later his solicitor's, engagement with Pepper. He said that he was advised by his solicitor that in the course of a conversation between his solicitor and Mr. O'Dwyer:- "*there was also an extraordinary statement that monies would not be accepted from your deponent by Pepper as I was 'involved in money laundering'*". Mr. O'Dwyer – rightly, it seems to me – complained that any reference was made to what had been a privileged conversation but – again, rightly, it seems to me – was not going to allow to go unanswered an allegation that he had said to Mr. Molloy's solicitor that Mr. Molloy was engaged in money laundering. Mr. O'Dwyer deposed that the only reference to money laundering was that in the event that terms could be agreed, Pepper would require evidence as



to the source of funds for the purpose of compliance with anti-money laundering legislation: which it clearly would. I do not understand why Mr. Molloy's affidavit included what appears to me to have been a fairly wild hearsay allegation.

**54.** In further response to the affidavit of Mr. Molloy a supplemental affidavit of Mr. Taite was filed, also on 12<sup>th</sup> November, 2021. Mr. Taite – who had previously described himself as the managing partner of Duff & Phelps – deposed that he is the managing partner of Kroll Advisory (Ireland) Limited and he made that affidavit – as he had his earlier affidavit – on his own behalf and on behalf of Ms. O'Dwyer.

**55.** As to the delay of significantly upwards of two years in replying to Mr. Molloy's solicitors' letter of 14<sup>th</sup> June, 2018, Mr. Taite acknowledged that it ought to have been replied to sooner but blamed the transfer of the security – six and fourteen months later – and the first COVID-19 lockdown – nine months later. In any event, he said – more convincingly – Mr. Molloy had not suggested that he had been prejudiced by the delay.

**56.** As to Tour Commons, Mr. Taite exhibited a copy of a "*Notice for Arrears of Rent*" dated 18<sup>th</sup> December, 2020, signed by Mr. and Mrs. Molloy and which was said to have been sent to Mr. and Mrs. Casserly complaining that the rent was in arrears to the tune of €3,200 and threatening a termination of the tenancy. Mr. Taite confirmed that Tour Commons had previously – he did not say when – gone sale agreed – he did not say at what price – but that the sale had been lost due to unspecified planning issues.

**57.** As to Ashfield, Mr. Taite observed that Mr. Molloy had not exhibited any written consent to the letting. Mr. Taite said that Mr. Molloy had said that the property had been leased to Mr. and Mrs. Lozians with the prior written consent of ACC. That is not quite what Mr. Molloy said. What he said was that Ashfield had been let with the knowledge and express consent of ACC, which consent he believed would have been evidenced in writing. More significantly, as I will come to, Mr. Molloy did not say that the property was let to Mr.

and Mrs. Lozians. He said that it was let to Mrs. Babia Lozians, and not to Mr. Lozians who had been named in the proceedings as a defendant. In fairness to Mr. Taite, Mr. Molloy, later in the same paragraph of his affidavit, referred to the Lozians – plural – as having been the tenants of Ashfield for several years. Mr. Taite was critical of Mr. Molloy’s proposal to lodge the rent with his solicitors for a number of reasons but the principal reason was that such a course of action “*would not protect the receivership against any decline in the value of the Ashfield property pending the outcome of a full plenary hearing.*”

**58.** As to the agricultural lands, Mr. Taite suggested that Mr. Molloy did not appear to dispute the validity of the receivers’ appointment but rather the extent of their powers. This, he said, was a matter better addressed in legal argument but he suggested that having been validly appointed, the receivers were entitled to possession and that Mr. Molloy was a trespasser. There was more vague talk of the adequacy of damages and the balance of convenience but still no evidence of the value of anything.

**59.** On 10<sup>th</sup> February, 2022 – three months later – a third affidavit of Mr. Taite was filed. The affidavit was filed on behalf of the plaintiffs but like the earlier affidavits, it was sworn on behalf of the receivers. Mr. Taite’s third affidavit was said to be supplemental to his earlier affidavits and was made for the purpose of exhibiting agency agreements under which he and Ms. O’Dwyer had been formally appointed by Pepper for the purpose of exercising certain powers on behalf of Pepper in relation to Ashfield and the agricultural lands, including the power to enter into possession, the power to market, the power to execute a contract for sale, and the power to complete the sale of the properties. He exhibited two agency agreements dated 2<sup>nd</sup> December, 2021 – one each in respect of the farm and Ashfield – which were said to have been “*served on*” Mr. Molloy’s solicitors under cover of a letter of 3<sup>rd</sup> February, 2022.

**60.** On 24<sup>th</sup> March, 2022 – a week before the hearing date – a second affidavit of Patrick O’Dwyer was filed on behalf of the plaintiffs. Mr. O’Dwyer’s declared object in making that affidavit was to put before the court certain documents which, he was advised, should properly be placed before the court. He exhibited copy letters of demand dated 6<sup>th</sup> April, 2017 by which Capita Asset Services (Ireland) Limited, on behalf of ACC Loan Management DAC, formally demanded payment of the balance said to be then owing in respect of each of the facilities. For some reason he exhibited two copies of each of the letters. Mr. O’Dwyer also exhibited a copy deed of novation dated 17<sup>th</sup> December, 2018 between ACC, Rabobank and the receivers, substituting Rabobank for ACC as a party to a number of receiver agreements, including the deed of appointment of 6<sup>th</sup> June, 2018; a copy of the executed deed of novation of 23<sup>rd</sup> August, 2019 – the version previously exhibited by Mr. Taite and described by him as a true copy not having been executed – a copy of the Irish law deed of transfer from ACC to Rabobank dated 17<sup>th</sup> December, 2018 and a copy of a previous mortgage sale deed between ACC and Rabobank dated 31<sup>st</sup> October, 2018.

**61.** In the meantime, on 16<sup>th</sup> March, 2022 – ten months after the summons was issued – the plaintiffs had delivered their statement of claim.

*The arguments*

**62.** Mr. Niall Ó hUiginn, for the plaintiffs, filed a focussed written legal submission and put together a folder of seventeen cases in support of his argument.

**63.** The argument is:-

- (a) The defendants have not identified any arguable basis on which the reliefs sought should not be granted;

- (b) Even if the defendants could point to a deficiency in the appointment or powers of the receivers, Pepper would still be entitled to injunctive relief *qua* mortgagee;
- (c) In the absence of an arguable defence, the plaintiffs are entitled to the reliefs sought *ex debito justitiae*;
- (d) In the alternative, the plaintiffs have made out a strong case that they are entitled to the injunctive relief sought and the balance of convenience favours granting the injunctions.

**64.** The dispute is said to stem from the fact that Mr. Molloy has repeatedly refused to acknowledge the validity of the appointment of the receivers and has continued to occupy the agricultural lands to the exclusion of the plaintiffs and that Mr. Lozians remains in unlawful occupation of Ashfield while paying rent to Mr. Molloy.

**65.** It is acknowledged that the receivers have no power of sale of the farm or Ashfield but it is said that it is the intention of the plaintiffs that these properties would be sold by Pepper as mortgagee in possession. Moreover, it is said, the receivers – at a minimum – are entitled to rent the properties and to obtain possession for that purpose.

**66.** Under the heading “*right of possession and power of sale*” the plaintiffs refer to the judgments of Laffoy J. in *Kavanagh v. Lynch* [2011] IEHC 348 and O’Malley J. in *McAteer v. Sheahan* [2013] 2 I.R. 328. A rent receiver, it is said, has an implied right of possession and there is no basis on which Mr. Molloy can plausibly assert that the receivers do not have power to take control of the properties. The plaintiffs point to the express power of Pepper under the charges to enter into possession of the secured properties. Reference was also made to *Vitgeson v. O’Brien* [2019] IECA 184, in which the Court of Appeal upheld as valid an arrangement under which a rent receiver was appointed as agent of the mortgagee to carry out functions for the purpose of preparatory work as part of a sales process.

67. The defendants, it is submitted, have not raised an arguable defence. The simple answer to any confusion on the part of Mr. Molloy as to the extent of his indebtedness, it is said, is that interest has continued to accrue since Mr. Molloy got the figures he got from ACC in 2015. That, I have to say, was my impression looking at the figures but Mr. O'Dwyer did not say so. In any event, it is said, what the plaintiffs seek is possession of the properties, not a money judgment. Reference was made to *Launceston Property Finance Ltd. v. Burke* [2017] IESC 62.

68. The plaintiffs' written submission properly anticipated reliance on other issues raised in Mr. Molloy's affidavit but which, in the event, were not relied on and which, accordingly, can be passed over.

69. Mr. Roland Rowan, for Mr. Molloy, submits that the plaintiffs are attempting to obtain summary judgment under the guise of a motion for interlocutory relief. That, he says, citing *Charleton v. Scriven* [2019] IESC 28 and my own judgment in *Charleton v. Hassett* [2021] IEHC 746, is not permissible.

70. The plaintiffs, it is submitted, have not proved their case. Specifically, it is said, there is no evidence that notice was given of the assignment of Mr. Molloy's debts from ACC to Rabobank, as required by s. 28(6) of the Supreme Court of Judicature Act (Ireland), 1877. Absent proof of notice of assignment, any assignment to Rabobank was equitable only. Reference was made to *AIB Mortgage Bank v. Thompson* [2018] 3 I.R. 172.

71. The receivers, as such, it is submitted, have no right to possession in order to sell. The agency agreements relied on post-date the commencement of the action and so cannot justify the receivers' complaints.

72. As to Ashfield, it was said that Mr. Molloy was willing to cooperate in a sale and had – if memory serves, it was on the morning of the hearing – written an open letter to that effect. Previously, it was said, Mr. Molloy's offer to pay the rent to his solicitors pending the

trial would have been a satisfactory regime pending the trial of the action that would have minimised the risk of injustice.

73. As to the farm, it was submitted that this is Mr. Molloy's property and that his ownership carries with it the right to occupy it. The farm, it was said, was never leased and there was never any income that the receivers could have collected.

### *Discussion*

74. While this application is in form a motion for interlocutory relief, the orders sought, if made, would bring to an end any issue as to the validity of the appointment of the receivers or their entitlement to sell, or arrange for the sale of, the properties.

75. It is acknowledged by the plaintiffs that the orders sought as far as Mr. Lozians is concerned are mandatory in nature – so that the plaintiffs must make out a strong case that is likely to succeed at trial – but it is suggested that as against Mr. Molloy the reliefs are essentially prohibitory – so that the plaintiffs need make out no more than a fair issue to be tried as to their entitlement to relief against him. There is in the summons and notice of motion a difference in the language in which the reliefs claimed against Mr. Molloy, on the one hand, and Mr. Lozians, on the other, is expressed but I cannot see any difference in substance. Mr. Molloy is in possession of the farm and Mr. Lozians is said to be in possession of Ashfield. The plaintiffs want them both out in order that the properties will be sold.

76. The written submissions filed on behalf of the plaintiffs, and Mr. Ó hUiginn in oral argument, addressed the adequacy of damages and the balance of convenience but the lynchpin of the plaintiffs' argument is that they are entitled to the orders they seek as of right.

77. To go back to the very beginning, Mr. Molloy was notified by the receivers by letter dated 6<sup>th</sup> June, 2018 of their appointment that day. He was sent a copy of the deed of appointment and asked for the usual information. His response, *inter alia*, was to call on the receivers to prove the validity of their appointment. If one were to assume, for the sake of argument, that the appointment was valid, it would have been easy enough to prove it. But the receivers did not then prove it, and they did not when the issue was raised again on 16<sup>th</sup> October, 2020, prove it. Rather, the information and documents sought were provided in dribs and drabs, starting with the receivers' solicitors' letter of 9<sup>th</sup> November, 2020 and ending with Mr. O'Dwyer's second affidavit on 23<sup>rd</sup> March, 2022. Among the last documents exhibited were the letters of demand, which were a pre-condition to the appointment of the receivers. The demands were said by Mr. O'Dwyer to have been made by Capita Asset Services (Ireland) Limited on behalf of ACC Loan Management Limited, and that is what the letters said, but there was no direct evidence of the authority of Capita to have made the demands. Neither, as Mr. Rowan correctly pointed out, was there evidence of notice of the assignment by ACC to Rabobank.

78. Repeatedly, the plaintiffs submitted that the defendants had not identified a single reason for disputing their entitlement to the reliefs claimed. Even if that were so – and as I will come to, it is not so – it seems to me that the submission courts confusion as to where the onus of proof lies.

79. With respect, the proposition that Mr. Molloy has failed to acknowledge the validity of the appointment of the receivers is based on the assumption that they were validly appointed. Moreover, it seems to me that as was apparent from Mr. Molloy's solicitors' correspondence from the outset, and as is recognised in the affidavits filed on behalf of the plaintiffs, the real dispute was and is as to the extent of the receivers' powers.

**80.** Pepper was named as a plaintiff in the action and the motion was nominally brought on behalf of the plaintiffs but the grounding affidavit (and indeed the later affidavits) of Mr. Taite was sworn on behalf of the receivers, rather than the plaintiffs. Mr. O’Dwyer’s affidavits were also filed on behalf of the plaintiffs but were expressed to have been sworn on behalf of Pepper, only.

**81.** On the hearing of the motion it was formally acknowledged by the plaintiffs that the receivers *qua* receivers had no power of sale over the agricultural land or Ashfield. While, along the way, there was talk that the extent of the powers of the receivers was a matter for legal argument, it seems to me that the limited extent of their powers was implicitly accepted in the receivers’ solicitors’ letter of 9<sup>th</sup> November, 2020 when they said that “*the bank*” would exercise its power of sale and that the sale of the properties would be completed by “*mortgagee delivery of deed*”.

**82.** Assuming that their appointment was valid, the receivers were appointed to exercise the powers which Pepper was entitled to exercise under the Conveyancing Act, 1881, that is, to appoint receivers to collect the income of the mortgaged property. Formal validity apart, it seems to me that the evidence discloses, at the very least, a real question as to the purpose for which the receivers were appointed – or, perhaps, if that purpose was not a proper purpose, purportedly appointed.

**83.** The judgment of Clarke J. in *Charleton v. Scriven* clearly recognises that arguments may be made by mortgagors not only as to the formal validity of the appointment of receivers but that the receivers, although validly (or perhaps formally validly) appointed are seeking to exercise powers which they do not have. It seems to me that from the very outset, this was and is such a case. Without finally deciding the issue, it seems to me that the correspondence strongly suggests that the receivers never had any intention of collecting the income from the properties. Instead – as appears to have become common practice – all the appearances are



that the receivers were appointed to take possession of the properties and, by what has been described as a “*workaround*”, deliver possession to the mortgagee, so that the mortgagee can sell as mortgagee in possession.

**84.** In *Vitgeson Limited v. O’Brien* [2019] IECA 184 the Court of Appeal upheld a finding of the High Court that an income only receiver was entitled to act as the agent of the mortgagee for the purpose of marketing the properties for sale but I do not understand it to be authority for the proposition that an income only receiver may be used as a Trojan horse to get possession of the secured property in order that it may be sold.

**85.** *Vitgeson* was an appeal from a judgment of the High Court, following a full trial, of an action in which the mortgagor challenged the validity of the appointment of a receiver and the assignment of their liabilities, and the mortgagee counterclaimed, *inter alia*, for orders for possession of various secured properties. Critically, it seems to me, and by contrast with the instant case, the marketing of the properties in *Vitgeson* appears to have been undertaken with a view to a sale by the mortgagee on foot of an order for possession which had been claimed by, and was ultimately granted to, the mortgagee to allow the mortgagee to realise the security. In those circumstances, there was no conflict between the role of the receiver in collecting the income and the desire of the mortgagee to sell. The role of the receiver in collecting the rents would come to an end on the execution by the mortgagee of the court order for possession but unless and until then, the receiver’s functions and duties were clear.

**86.** The issue in this case is whether the receivers were entitled to take possession for a purpose quite different and at variance to that for which they had supposedly been appointed. By the terms of the mortgages on foot of which they were appointed, the receivers, from the time of their appointment on 6<sup>th</sup> June, 2018, were to be deemed to be the agent of the borrower. Their function under the mortgage was to collect the income. They obviously could not do that if the properties were sold. By the terms of the agency agreements of 2<sup>nd</sup>

December, 2021, they were to be the agents of Pepper to sell the properties. If they were to do that, they would put it beyond themselves to collect the income.

**87.** I am afraid that Mr. Ó hUiginn's reliance on *Kavanagh v. Lynch* and *McAteer v. Sheahan* is misplaced. In each case the issue was whether the receiver was entitled to possession of the secured property for the purpose for which he had been appointed: that is, to collect the rents. In this case, the receivers do not want possession for the purpose for which they have been appointed. I do not believe that it is correct to say that the receivers are entitled at a minimum to obtain possession in order to rent the properties. In my view they are entitled to possession for no other purpose, and if not for that purpose, they are not entitled to possession at all.

**88.** I should say that I accept the argument on behalf of Mr. Molloy that the date upon which the lawfulness of the defendants' conduct is to be determined is the date of commencement of the proceedings and I suppose that to that extent the later agency agreements are not directly relevant. That said, it seems to me that, if anything, the acceptance by the receivers of the agency agreements fuels Mr. Molloy's argument as to the exercise of their powers *qua* receivers.

**89.** The experience of the chancery list is that receivers tend to equate a failure on the part of the defaulting borrower to acknowledge the validity of their appointment and to cooperate with the receivership with obstruction of the receivership. In my firm view the two are not the same. In this case Mr. Molloy was required to give up possession of his farm to facilitate a sale. He refused to do so because the receivers did not have a power of sale. Even if he was wrong, I do not believe that it could properly be said that his refusal to cooperate with the receivers amounted to obstruction. I do not believe that the addition of Pepper to the strapline of the receivers' solicitors' letter of 9<sup>th</sup> November, 2020 or as a plaintiff in the action materially altered the position. For present purposes it is inappropriate to say any more than

that there is an issue to be tried as to whether Mr. Molloy was obliged in law to do or not to do that which he was required to undertake to do and not to do.

**90.** If, in another case, the insistence of the mortgagor that the rent should continue to be paid after the appointment of a receiver might very well be characterised as interference with the receivership: that is not this case. In the first place, Mr. Molloy's correspondence calling for proof of the appointment was ignored. Secondly, the receivers never wanted the rent from any of the properties. If a receiver with a power of sale might justifiably complain about the continued payment and collection of rent as interference with the receivership, that is not this case: as the receivers did not have a power of sale. It would not be possible on an application such as this to decide the dispute as to the engagement with Mr. and Mrs. Casserly in relation to the rent in respect of Tour Commons. In any event, the receivers had made their arrangements with Mr. and Mrs. Casserly before the summons was issued.

**91.** Mr. Ó hUiginn argues that a defaulting mortgagor who remains in possession after a demand for possession is, vis-à-vis the mortgagee, a trespasser. That is contested by Mr. Roland. The issue was not fully argued but it seems to me in principle that a mortgagee's right to possession is quite different to the owner's right to possession.

**92.** Pepper, as the owner of the charges, has a right to apply to court for an order for possession but it has no estate in the land. As was explained by Geoghegan J. in *Bank of Ireland v. Smyth* [1993] 2 I.R. 102 and more recently by Baker J. in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, the discretion of the court on an application pursuant to s. 62(7) of the Registration of Title Act, 1964 is limited but the court will ask whether it is satisfied that the application is made *bona fide* with a view to realising the security. The mortgagee's usual demand for possession before instituting proceedings claiming an order for possession may very well go to the costs of the application but I am far

from convinced that the mortgagor, in the event of a failure or refusal to give up possession, will thereby be constituted a trespasser.

**93.** In oral argument, Mr. Ó hUiginn urged that the receivers, at the very least, were entitled to the orders sought for the purpose of collecting the rent. That submission, in my view, fails to recognise that any right of the receivers to possession – by contrast with the right to possession of the owner of land – is not a freestanding right but a right for a particular purpose. In this case, on the evidence, the receivers’ purpose was not to collect the rents.

**94.** I do not see that the express power given to the charge holder to enter into possession after a demand is made or the express power of sale created by the deeds of charge alters the position.

*Mr. Lozians*

**95.** At the sitting of the court to hear this application there was no appearance by or on behalf of Mr. Nick Lozians. The court was satisfied by several affidavits that Mr. Lozians had been personally served with the summons and motion papers returnable for 8<sup>th</sup> September, 2021 and thereafter by post with notice of the adjourned dates and of the hearing date.

**96.** Earlier in this judgment, I examined in some detail the evidence as to Mr. Lozians’ association with the Ashfield house. He was identified in the grounding affidavit of Mr. Taite as “*a male who identified himself as Nick Lozians*” who had answered the door to Mr. Buckley of Blackwater. While there was, as I have said, some uncertainty or ambiguity in Mr. Molloy’s affidavit as to who the tenant was, he did say unambiguously that the house was let to Mrs. Babia Lozians rather than to Mr. Nick Lozians.

97. It is well established by a long line of authorities starting with *N17 Electrics Ltd. (In Liquidation)* [2012] IEHC 228 that any lease made by a mortgagor in breach of a covenant not to do so without first obtaining the written consent of the mortgagee will not generally be binding on the mortgagee. Mr. Molloy, in his replying affidavit, sought rather to skirt around the issue but there is no evidence of the prior consent in writing of the mortgagee to the creation of any lease of the Ashfield house. By the time the motion came on for hearing, Mr. Molloy was willing to cooperate in the sale of Ashfield but not, as I understood the position, to unconditionally give it up to the receivers or to Pepper.

98. It seems to me that as far as Mr. Molloy is concerned, the issue which he has identified as to the receivers' lack of a power of sale applies to Ashfield as it does to the farm. As far as that property is concerned, it seems to me that the evidence discloses another issue which is whether Mrs. Lozians is the tenant, or at least a tenant. Notwithstanding what Mr. Molloy had said as to the occupancy of Ashfield, Mrs. Molloy was not named as a defendant or otherwise given notice of the application. If all the appearances are that whoever is in occupation of the Ashfield house has no right to be there, it seems to me nevertheless that whoever was put in by Mr. Molloy as tenant is entitled to an opportunity to be heard before any order is made against them. That, indeed, is the premise on which Mr. Lozians was named as a defendant. I am not sure where, if anywhere, it would have got the plaintiffs to have obtained an order against the occupier or occupiers of Ashfield without an order against Mr. Molloy as well but in the event, it does not arise. I am not satisfied that the plaintiff's proofs are in order as far as the occupiers are concerned.

### *Conclusions*

**99.** This is an application for interlocutory relief. As was emphasised by the Supreme Court in *Charleton v. Scriven* (Unreported, Supreme Court, 8th May, 2019) [2019] IESC 28, interlocutory injunctions should not be treated as a means of attempting, in practice, to obtain summary judgment. As Clarke C.J. said, such orders are designed to do what they say, that is, to hold the situation until there can be a full trial. That is not the purpose of this application.

**100.** The plaintiffs, in their written submissions, point to the jurisdiction of the court identified in *Abbey International Finance Ltd. v. Point Ireland Helicopters* [2012] IEHC 374 to grant final relief on a summary basis but that jurisdiction was not invoked by the notice of motion, nor did the plaintiffs seek to argue the application on that basis.

**101.** The premise of the motion is that the plaintiffs want to sell the properties before any trial. Formally, an undertaking as to damages is offered but the expectation surely is that if the orders sought were to be made and the properties sold, there never would be a trial. It is true that a statement of claim was eventually delivered but that was ten months after the summons issued, more or less on the eve of the hearing date for the motion.

**102.** If, as to the sale of the loans and security by ACC to Rabobank and by Rabobank to Pepper and the novation of the receivership is concerned, every i has not been dotted and every t not crossed, I am satisfied nevertheless that the plaintiffs have established a strong case which is likely to succeed as to the formal validity of the appointment of the receivers. While Mr. Molloy pointed to gaps in the plaintiffs' proofs – such as the letters of demand and notice of the assignment from ACC to Rabobank – he did not deny that there had been a valid demand or that he had not been given notice of the earlier assignment.

**103.** However, I am no less satisfied that there is a very real issue of substance to be determined as to the entitlement of the plaintiffs to do what they set out to do. If the receivers have a right to possession of the properties in order to collect the income, that is not the purpose of the application. If it is not clear that the receivers are not entitled to take

possession of the properties only to immediately hand them over to Pepper, then Mr. Molloy has a substantial argument to make that they are not.

**104.** I am not persuaded that the plaintiffs have laid the evidential ground for the intervention of the court on an interlocutory basis. The plaintiffs apprehend that the property market may turn. They do not distinguish between the market for agricultural land and residential properties or between Westmeath and anywhere else. Absent any evidence whatsoever as to the value of the properties I find it impossible to see why – if that is the inferential premise of the motion – it is apprehended that a sale sooner rather than later is necessary to ensure that Pepper will be paid what it is owed. Similarly, without any evidence as to the price achieved for Tour Commons or the value of Ashfield or the farm, I cannot make any sensible assessment of the need for an order for possession of both unsold properties.

**105.** On an application pursuant to s. 62(7) of the Registration of Title Act, 1964 for an order for possession of a single property held as security, the value of the property will generally be immaterial. In such a case, the secured property will be sold and the proceeds applied to the mortgage debt and any balance paid to the mortgagor. In a case where there is more than one security, however, the proper exercise of the discretion of the court may entail a consideration of whether one or other, and if so which, should be sold first, which, in turn, would have to be made by reference to what price is likely to be realised on sale. I cannot see how, otherwise, the mortgagee could satisfy the court that the order for possession was required *bona fide* to realise the security in order to pay the debt. Similarly, if it had come to it, I do not see how, on the state of the evidence, I could have justly decided what orders were required.

**106.** On an application by the reregistered owner of a charge under s. 62(7) of the Act of 1964 I do not believe that the fact that the land is being farmed by the mortgagor or that the

mortgagor is dependent on the profits for his living would count for much, beyond, perhaps, a stay until harvest time. On this application, however, I believe that it does. The issue is not whether Pepper is entitled to sell but whether the receivers – whether as initially appointed or as later appointed as Pepper’s agents – are entitled to sell, and to that end to orders tantamount to an order for possession.

**107.** Similar considerations apply to the Ashfield house. The folio shows that it belongs to Mr. Molloy and the issue on this application is whether the receivers – who do not have a power of sale – are entitled to sell it, or to orders tantamount to an order for possession to that end. If the receivers had asked for interlocutory orders directed to ensuring that they could collect the rent, it is difficult to see how they should not have had such orders. But they did not. I do not think that Mr. Molloy’s belated offer to pay the rent net of income tax and outgoings would have been an answer to a claim by the receivers that they were entitled to collect the rent and to manage the property.

**108.** Not for the first time, I am somewhat perplexed as to the procedure invoked but I must decide the case as it has been presented and argued.

**109.** For the reasons given, I must refuse the application.

**110.** I will list the case for mention on Thursday 2<sup>nd</sup> June, 2022 at 10:30 a.m. to deal with the question of costs.