THE HIGH COURT

Neutral Citation [2023] IEHC 510

Record No. 2023/708P

BETWEEN

M & J DUDDY DEVELOPMENTS LIMITED

PLAINTIFF

AND

EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY, ANDREW DOLLIVER AND WILSONS AUCTIONS

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on the 4th day of August, 2023.

Introduction

1. This is an application by a borrower to restrain the sale by the defendants of certain lands in County Donegal pending trial of the action. The lands comprise a small residential development which was never completed and are held in three parcels, two of which are registered and one of which is unregistered. I will adopt the descriptions used by the plaintiff's director in his grounding affidavit and will refer to the two registered plots as "the Ballymagowan Property" and "the Knockbrack Property" and to the unregistered lands as "the Ray Property".

2. By Deed of Charge made 21 April, 2006, the Knockbrack Property was made subject to a charge in favour of Allied Irish Banks plc ("AIB"). This was registered as a burden on the relevant folio on 20 April, 2010, and Everyday became registered as owner of that charge on 11 December, 2018. Mr. Duddy's *lis pendens* was registered as a subsequent burden on 10 February, 2020. By Deed of Mortgage and Charge made 19 July, 2020, the Ballymagowan Property was similarly made subject to a charge in favour of AIB and the relevant folio discloses similar burdens registered on that property.

3. The Deed of Mortgage and Charge of 19 July, 2006, also created a mortgage by demise of the Ray Property for a term of 10,000 years and further provides that the plaintiff holds the freehold reversion in favour of the mortgagee.

4. A receiver was appointed over all of the lands on 22 November, 2017, but that receiver was subsequently discharged. The second defendant was appointed as receiver on 28 July, 2022. In the interim, Michael Duddy, a director and the secretary of the plaintiff, instituted High Court proceedings bearing record number 2020/243P against Allied Irish Banks plc and the first defendant ("Everyday") and registered a *lis pendens* against the lands. Although the plenary summons is referred to *"when produced"*, a copy of it was not in fact produced on this application. It also appears from the special conditions to the draft contracts for sale which have been exhibited in these proceedings and from the replying affidavit of the second defendant that Everyday has not been served with this summons.

5. The evidence at present certainly suggests that those proceedings have been instituted solely for the purposes of registering a *lis pendens* and impeding a sale by Everyday. Consequently, the *bona fides* of its registration must be open to question, though this could only be decided if an application to vacate it were brought. In addition, as pointed out by the second defendant in his affidavit, the summons would now need to be renewed before it could

be served. In any event, it could not provide any basis for granting the relief sought in this application.

6. The lands were all offered for sale by online auction on 22 February, 2023, and Mr. Duddy says he became aware of this on 15 February, 2023, although he was notified by letter from the second defendant dated 30 September, 2022, that the second defendant had been appointed as agent of Everyday for the purpose of *"readying the property for sale, instructing an agent to commence marketing of the Properties and contracting to sell the Properties."* The second defendant has stated on affidavit that the Properties were put on the market on 4 January, 2022. Notwithstanding, therefore, that the dual role of the second defendant as receiver and agent, to which the plaintiff now objects, was made known to Mr. Duddy by that letter of 30 September, 2022, these proceedings were not instituted until 17 February, 2023.

7. As well as the injunctive relief, the plenary summons claims damages for *"misrepresentation, slander of title, trespass, breach of constitutional rights, breach of duty, negligence and/or other unlawful acts on the part of the Defendant (sic), their servants and/or agents, or either of them."* No statement of claim has been delivered, notwithstanding the passage of almost four months before the hearing of the application for interlocutory relief, and therefore the relevance of the various causes of action referred to in the summons – with the possible exception of slander of title – is entirely unclear. In fact, the basis for asserting slander of title is not particularly clear either but it appears to relate to the action of the second defendant in marketing and preparing a contract for sale of the lands in his capacity as agent of Everyday in circumstances where the plaintiff submits that he is legally prohibited from acting as such.

8. The kernel of the plaintiff's case, as made in this interlocutory application, is that the second defendant cannot act as agent of Everyday while he stands appointed receiver, in which capacity he is deemed by Clause (3) of the relevant mortgage and charges to be the agent of

the plaintiff borrower. It should be noted that the second defendant does not enjoy a power of sale in his capacity as receiver and that his powers are confined, apart from the additional power to let and re-let the properties which is contained in Clause (4) of the relevant deeds, to those conferred by s. 24 of the Conveyancing Act, 1881.

9. The second defendant has exhibited two agency agreements, one relating to the Knockbrack Property and one relating to the Ray and Ballymagown Properties, which he has entered into with Everyday. Clause 2 of each agreement appoints the second defendant to provide certain services, identified as the *"maintenance of and marketing and contracting to sell"* the properties.

10. It is not in dispute that the plaintiff entered into a number of loan facilities with AIB, that those loans have been assigned to Everyday, and that the plaintiff is now indebted to Everyday in a sum in excess of €2 million. Neither is it disputed that the cumulative value of the lands is estimated at present to be somewhere between €330,000 and €480,000.

11. The defendants say there is no fair question to be tried as to whether the receiver can act as such at the same time as he is appointed agent of Everyday. They say that this point has been settled at Court of Appeal level in *Vitgeson v. O'Brien* [2019] IECA 184, and after full trial, on a motion for a non-suit in this court, by a judgment of Clarke J. in *Moorview Developments Ltd v. First Active* [2009] IEHC 214.

12. They say that the point, having been already settled by those authorities, means that the judgments of this court at interlocutory stage in two cases, *Sammon v. Tyrrell* [2021] IEHC 6 and *Taite v. Molloy* [2022] IEHC 308, are wrongly decided and should not be followed.

13. They also say that, if they are wrong in their primary submission that *Vitgeson* and *Moorview* have settled the law to the point where no fair question can be tried, damages are in any event an adequate remedy for the plaintiff, and the plaintiff is debarred from relief by reason of his delay in seeking interlocutory relief.

14. Notwithstanding that these proceedings are only at interlocutory stage, it is therefore appropriate that I review the authorities in some detail in order to assess whether the defendants' argument on the fair question issue is correct. I will leave over the issue of the adequacy of damages and the balance of justice more generally, until after consideration of that first, and very important, issue.

Whether there is fair question to be tried

15. The defendants have identified the issue to be determined by the court as straightforward in nature, i.e., whether there is any conflict of interest in a receiver simultaneously carrying out the role of a mortgagee for the purposes of arranging for the sale of the properties. They say that *Vitgeson* and *Moorview* both establish that a receiver may act as agent for a mortgagee without giving rise to any conflict with his role as receiver and that, accordingly and as a matter of law, the plaintiff cannot establish a fair question to be tried in this application.

16. There are now a number of written judgments at interlocutory stage in applications brought by receivers to obtain possession of mortgaged or charged premises and in interlocutory applications brought by borrowers to restrain the entry into possession by receivers or the arrangement by receivers of the sale of such properties. Most of these are judgments of this court and therefore not strictly binding on me, though I certainly intend to adhere to the principle of comity and to adopt the reasoning of my colleagues in this court unless I am of the view that one of the circumstances identified by Clarke J. at pp. 7-8 of *In re Worldport Ireland Inc (in liquidation)* [2005] IEHC 189 decision is applicable.

17. In effect, I have been asked to find that one of those circumstances applies because it is submitted that the reasoning in *Sammon* and *Taite* is erroneous. This is in turn based on the

submission that the decision of the Court of Appeal in *Vitgeson* was binding on this court but was erroneously distinguished in *Sammon* and in *Taite*.

18. The decision in *Vitgeson* is binding on me and if that judgment is determinative of this application, then obviously I must follow that judgment. However, if *Vitgeson* is not determinative of this application, or if there is some uncertainty in the caselaw, then the defendants concede that there would be a fair issue to be tried.

19. Having been explicitly invited to do so by the defendants in this application, I have therefore considered the case law cited to me for the purposes of assessing whether there is an inconsistency in the authorities or any uncertainty as to how they apply to the application before me, and it is my view that in fact the case law can be reconciled and there is no conflict in the authorities. I am furthermore of the view that the application of that caselaw to these proceedings is clear and that there is consequently no fair question to be tried.

20. Before proceeding to a consideration of the authorities, I think it is convenient first to identify the context in which this issue appears to have arisen in the recent caselaw. The powers of a receiver appointed under a mortgage or charge created over land are contained in s. 24 of the 1881 Act, but may be supplemented in the relevant deed of mortgage or charge. These tend to be in a standard form prepared by the relevant lending institution, albeit that the standard forms themselves vary as between lending institutions. Some of the standard mortgages or charges used by lending institutions provided that a receiver was to have a power of sale, and some did not. It is in those cases where the receiver does not enjoy a power of sale under the deed of mortgage or charge that the difficulties have arisen, and the practice has developed of appointing the receiver to be the agent of the mortgagee and for the receiver to then arrange for the sale of the property in that capacity. This is one such case.

21. Where the receiver has a power of sale, his duty is to obtain the best price reasonably obtainable: see *In re Edenfell Holdings Ltd* [1999] 1 I.R. 443. This is in substance the same as

the duty of a mortgagee exercising its power of sale of mortgaged property: see *Holohan v. Friends Provident & Century Life Office* [1966] I.R. 1. There appears to be no difference in substance between the receiver's duty of care and the duty of a mortgagee who exercises its power of sale under the mortgage.

22. The result is that, where a receiver has the necessary power of sale, not only does the conflict not arise in practice because there is no incentive for a mortgagee to appoint a receiver as agent, but were such an appointment to take place, there would be no difference in the obligation of the person acting simultaneously as receiver and as agent of the mortgagee in terms of his or her duty to the borrower. In both cases, the obligation would be to obtain the best price reasonably obtainable. There might be an issue surrounding the costs and expenses of a person acting simultaneously as receiver and agent and whether these were chargeable out of the receivership. But, as I say, the issue does not appear to have arisen in practice because there is no incentive to appoint a receiver who already has a power of sale under the deed of mortgage or charge to be agent of the mortgagee.

23. It is when a receiver does not have a power of sale, that the perceived difficulties have arisen for mortgagees and the practice has developed of appointing the receivers to act as agents of the mortgagee in connection with a sale. The question might well be asked: if the obligation of the receiver to the borrower so far as the exercise of the power of sale is the same whether the receivers act as such or as agent of the mortgagee, how can any conflict arise in the exercise of the two roles?

24. The answer is that where a receiver purports to act in a dual capacity, two issues may arise, depending on how the receiver then proceeds to act. The first relates to the power to enter into possession, and the second concerns the obligations owed to the borrower while in possession, that is, the obligation to account to the borrower for the rents and profits of the land for the duration of the period of possession.

25. The second of these is, in my view, more important, because whether a receiver enters into possession as such or *qua* agent, he or she must either enter peaceably or obtain a court order. The main difference which arises in relation to the lawfulness of entry into possession will turn on whether the receiver has utilised the correct procedure. Some of the cases, and in particular *Taite*, turn on the fact that urgent interlocutory relief was sought which was defined in terms of a proposed receivership but where the evidence demonstrated that the receivers did not in fact intend to act as such.

26. By contrast, the difference in the obligations of a receiver and a mortgagee might become important where a receiver re-enters mortgaged property and where that property is capable of generating an income. Particularly where the receiver in fact intended to sell the property *qua* agent of the mortgagee, it might be thought that he or she should, while in possession, be subject to the higher obligations of a mortgagee in possession even if he or she was also appointed receiver over the lands. Otherwise, mortgagees could circumvent their legal obligations by the device of appointing their desired agent to be receiver also. But that would only arise where the property was such as to be capable of generating an income.

27. Before turning to the authorities, I think it would be helpful to set out very briefly the respective entitlements of receivers and mortgagees to enter into possession and the obligations on them once they are in possession, as I think this helps to explain the caselaw.

Entry into possession

i. By a receiver

28. The entitlement of a receiver to enter into possession is usually a contractual right enjoyed on foot of the deed of mortgage or charge which is either expressly conferred as a

power ancillary to the other powers of the receiver, or is necessarily implied by reason of those powers. In the first instance, the extent of the power to enter into possession will be stated explicitly in the deed, in the second it will arise because it is necessary in order for the receiver to exercise his express powers. *Kavanagh v. Lynch* [2011] IEHC 348 is the leading authority on the right of a receiver to go into possession in order to exercise his power to collect the income and rent from properties which were subject to a mortgage. That power was implied by Laffoy J. on the basis that, without it, the receiver could not *"do his job"* (see para. 5.2), that is, he would not have been able to manage the lettings of the property as he was explicitly empowered to do by the mortgage.

29. It needs to be clearly understood, however, that the power of a receiver acting as such to enter into possession is not a general power to enter and retain possession but one which is merely ancillary to the other powers of the receiver. This ancillary right to enter into possession for the purpose of exercising the other powers, I think, has been confused with a right of possession more generally, such as is enjoyed by a person enjoying an estate in lands, such as the fee simple, or the right of the registered owner of lands. In those instances, the right to possession is an incident of ownership and is not restricted by the requirement to demonstrate any particular purpose in entering into and retaining possession.

ii. By a mortgagee

30. Where lands are unregistered, and where the mortgage was created prior to 1 December, 2009, as is the case for the Ray Property in this case, the mortgagee will generally enjoy an estate or interest in land: see Wylie *Irish Land Law*, 6th ed., (Bloomsbury Professional, 2020) at paras. 14.77 and 14.78. In this case, Everyday holds the Ray Property for the residue of a term of 10,000 years and is beneficial owner of the fee simple reversion. This leasehold estate

is one which normally entitles the holder thereof to enter into possession, although a mortgagee would traditionally be reluctant to exercise that right to take possession as it would impose on the mortgagee the duty to account strictly for the rents and profits of the lands.

iii. By the owner of a charge

31. As a charge does not create an estate in land, the owner of a charge does not enjoy any right to enter into possession of lands. This is the situation so far as the Knockbrack and Ballymagowan Properties are concerned. However, Everyday can obtain vacant possession either by agreement with the plaintiff or may apply for possession pursuant to s. 62 of the Registration of Title Act, 1964. The chargeholder's position, therefore, is somewhat similar to that of a receiver: it can only go into possession for the purpose of realising the security. It does not, as does the registered owner of land, enjoy a right of possession as an incident of any estate in land as it does not hold any estate in land.

Obligations while in possession

32. Once in possession, the obligation of a receiver to a borrower is less onerous than the obligation of a mortgagee in possession. The receiver is the agent of the borrower and s. 24 (2) of the 1881 Act provides that the borrower is liable for his defaults, unless the mortgage deed provides otherwise, which it invariably does not. Indeed, in this case, Clause (3) of the relevant deeds of mortgage and charge in this case also provides for this agency.

33. However, a mortgagee in possession is liable to account strictly, i.e., on the footing of wilful default to the mortgage: see Wylie at para. 14.83. He must account not only for the rents and profits which he receives but also for those which he would have received, on foot of his default or mismanagement.

34. As a result, where the same person is both receiver and agent for a mortgagee and is in possession, it may be that a conflict will arise as regards accounting for the rents and profits and for any default or mismanagement of the income derived from the mortgaged property. In a case where the nature of the property is such that it can generate an income to be applied to the debt, therefore, the dual role may give rise to a conflict as regards the obligation to account to the borrower.

35. However, that conflict does not arise in this case. The property is a small, unfinished, residential development. I have been told that the residences built on the lands are not completed and the valuations exhibited by the second defendant described them as "*finished to a builder's finish"*. As such, they are not capable of letting or management. There are no funds in the receivership to complete the properties and there is, accordingly, no reality to any receivership. In fact, other than to avail of the lesser legal duty of receiver in possession, it is entirely unclear as to the purposes for which the receiver was appointed. However, I stress that the purpose for which the receiver was appointed in this case was not fully argued and, while the affidavits do not deal with it, it appears that neither the mortgagee nor the receiver (in any capacity) has ever gone into possession.

36. The situation might be different if a receiver went into possession and was appointed agent for the purposes of exercising a power of sale. In that event, if the properties were capable of generating an income, one could see the potential for conflict which would arise where the actions of a single individual engaged two quite different legal duties to the borrower. However, that does not arise for determination here.

37. In my view, the caselaw needs to be read bearing in mind those general principles as to the rights, powers and duties of receivers on the one hand and mortgagees on the other.

The authorities

38. *Moorview* is not only the first in time but was, as correctly submitted by counsel for the defendants, a decision to grant a non-suit having heard all of the plaintiff's evidence and is therefore a decision on the merits after trial. It is a lengthy and comprehensive judgment dealing with a variety of issues and, very helpfully for the purposes of my consideration, setting out in some detail the factual background against which Clarke J. decided the issues before him in that case.

39. That case, so far as this application is concerned, related to a mixed-use development site in Salthill, County Galway, the commercial units of which had been completed and leased to a company related to the borrower, and the residential units of which consisted in the main of an apartment block which had not been completed and which therefore could not be leased or sold to retail customers until construction was completed. The only other alternative was to sell the site to another developer who would be able to complete it.

40. When the receiver went into possession of this site, there had been no construction for some time. The receiver therefore entered into an agreement in principle for the sale of the site at an early stage of the receivership. There then followed litigation by the tenant of the commercial units, to whom the borrower had let in order to avail of tax relief, and litigation by the borrower. Clarke J. held at para. 14.24 that the latter *"had a significant effect both on the ability to put the sale through in the ordinary way and on the reputation of the property as being one which could be purchased without risk of litigation."* He went on to state (at para. 14.26) that the difficulties in relation to the litigation might explain why the mortgagee might well have felt that it was more advantageous to enter into possession as a mortgagee in possession and sell as such.

41. One of the issues before Clarke J. in *Moorview* was a legal objection raised by the plaintiff which related to the manner in which the mortgagee had taken possession from the receiver. The defendants rely heavily on para. 16.62 of the judgment and I will therefore quote it in full:

> *"As to the second argument the suggestion is that there was, somehow, a legal difficulty in Mr. Jackson, as receiver, handing over possession to First Active as mortgagee in possession. It does not seem to me that the passage cited from Barr J. in Bula v. Crowley offers Porterridge any assistance in this regard. While it is true to say that a mortgagee has no right to interfere in the receivership in the sense of interfering in the relationships between the receiver and third parties arising out of the receivership, that does not, in my view, provide any support for the proposition that a mortgagee who is entitled, independently of the receivership, to enter into possession itself as a mortgagee in possession, is not entitled to do just that, and to require the receiver to give up possession. The receiver is, or course, in one sense, an agent of the company. However, the company itself was obliged to give up possession to the mortgagee and there was nothing inconsistent, even to the extent that Mr. Jackson was receiver of Porterridge, in Mr. Jackson giving up possession in that capacity and on behalf of Porterridge in favour of First Active as mortgagee in possession. The fact that Mr. Jackson also acted as agent for First Active thereafter seemed to me to be of no relevance. I was, therefore, also satisfied that this … ground entirely lacked merit."* [Emphasis added.]

42. Because Clarke J. was satisfied in that case that the mortgagee was entitled to enter into possession *"independently of the receivership"*, he did not see a problem with the receiver giving up possession because if the lender had been in possession he would similarly have been required to deliver up possession to the mortgagee. I should add that there was no suggestion in that case that the receiver had entered into possession other than to exercise the powers he

enjoyed as such. Indeed, the time lapse between appointment as receiver and the handing over of possession, as well as the facts recited in the judgment, all suggest that the receiver acted as such after he entered into possession and that he attempted to exercise his powers as receiver of the property for a time before the mortgagee decided to go into possession itself for the purposes of selling the property.

43. *Moorview* is, therefore, not authority for the proposition that possession can be taken by a receiver for the purpose either of purporting to exercise powers which he does not have *qua* receiver, nor is it authority for the proposition that a receiver can apply for an order granting possession to him or her for the ostensible purpose of exercising the receiver's powers as such, but in fact for the purpose of simply delivering up possession to the holder of a charge who would have been obliged to seek possession by way of application under s. 62 of the 1964 Act.

44. It was submitted at hearing that an identical argument as to conflict of interest was made there as in this case, namely that the mere fact that the receiver also enjoyed a role as agent of the mortgagee necessarily gave rise to a conflict of interest, and that it had been rejected. I was referred to para. 16.57 but, on careful reading, and in particular looking at p. 166, I do not think that submission is correct as the alleged conflict of interest in that case was alleged not to arise merely because of the appointment of the existing receiver as agent of the mortgagee, but by reason of what was said to be a conflict between the receiver's duty to obtain the best price reasonably obtainable and the allegation that the mortgagee in that case had in fact entered into a profit-sharing agreement with the proposed purchaser. Clarke J. found on the facts that no such agreement or arrangement existed and that therefore the alleged conflict did not arise.

45. The next case of importance is *Vitgeson* which is, of course, binding on me and in which Haughton J. in this court explicitly adopted para. 16.62 of *Moorview*.

46. In *Vitgeson*, an issue arose as to whether a person appointed as receiver could act *qua* agent in organising a sale. It is correct, as stressed by counsel for the defendants, that the

evidence in the High Court in that case (and relayed at para. 26 of the judgment) was to the effect that it was always intended that the chargeholder would use its contractual power of sale and sell as mortgagee in possession.

47. There is, however, nothing in the judgment to say that the receiver had entered into possession in any capacity and the mortgagee had in fact counterclaimed for an order for possession, indicating that the mortgagee had yet to go into possession for the purposes of effecting the intended sale. Indeed, the issue of whether the receiver could arrange for the sale of the property was framed in terms of whether the receiver enjoyed the necessary power as opposed to whether, in doing so, he would have been conflicted.

48. My interpretation of the High Court and Court of Appeal judgments in *Vitgeson* is that they are authority for the proposition that a receiver can act as agent in arranging a sale and this does not in itself conflict with his duties *qua* receiver. Where the receiver enjoying the dual role has not entered into possession, there would be no conflict in undertaking the dual role of receiver/agent as the duties to the borrower would be the same regardless of the capacity in which the sale was arranged.

49. As a result, the actions of the receiver/agent in marketing the property did not give rise to any conflict, and the receiver was careful to say that his fees in connection with this activity were not charged to the receivership, an acknowledgement that he did not enjoy a power of sale under all of the relevant mortgages.

50. It was urged on me very strongly in this application by counsel for the defendants that Allen J. erred in *Taite* in his interpretation of the Court of Appeal judgment in *Vitgeson* and that I should not adopt the reasoning in *Taite* for that reason.

51. *Taite* was a case where the plaintiffs sought a variety of interlocutory orders with a view to sale of the land. One of those plaintiffs was the mortgagee who was entitled, as set out by Allen J. at the outset of his judgment, to apply by way of summary procedure pursuant to s. 62

(7) of the 1964 Act for possession of the lands, but which had instead chosen to seek interlocutory relief to achieve the same result. That interlocutory relief is described at para. 5 of the judgment and was, in essence, orders restraining interference with the receivers and managers and the delivery of keys to them, all of which suggests that it was directed to activity *qua* receiver.

52. Distinguishing *Vitgeson*, Allen J. did not depart from the conclusion that a receiver could, simultaneously with the receivership, become appointed agent of the mortgagee – a statement which I think clearly follows the Court of Appeal in *Vitgeson* – but pointed out that this could not be done merely to utilise the right of a receiver to enter into possession for purposes other than those related to the discharge of the receiver's powers and duties as such. In doing so, he explicitly referred to the decision of Clarke J. in *Charleton v. Scriven* [2019] IESC 28 and to the fact that mortgagors may challenge not just the formal validity of the appointment of a receiver but may question the purposes for which it has been effected.

53. Commenting on *Vitgeson*, Allen J. stated in *Taite* (at para. 84) that he did not understand the Court of Appeal judgment *"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."*

54. He continued (at para. 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."

55. I do not see anything in that passage which conflicts with *Vitgeson*. Instead, Allen J. merely distinguished it on the basis that the issue which concerned him, namely, the purpose for which the interlocutory injunction was sought, did not arise in *Vitgeson*. In *Taite*, the orders sought were framed in terms of restraining interference with the receivership, but the evidence pointed to the fact that they were in fact sought for purposes outside the receivership. At para. 87, Allen J. clearly states that the receivers were entitled to obtain possession only to collect the rent payable in respect of the properties and if they didn't want possession for that purpose, they were not entitled to possession at all.

56. When I quoted above from *Moorview*, I highlighted that, at para. 16.62, Clarke J. stated that the receiver could hand over possession to the mortgagee when the mortgagee was legally entitled to it and could *thereafter* act as agent. This seems to me to be consistent with *Taite* where Allen J. seems to have suggested that (at para. 86) that it would be inconsistent with taking possession *qua* receiver to then use that possession for a purpose inconsistent with the receivership. As I have already said, everything in *Moorview* points to the exercise by the receiver of his powers as such for a time before the mortgagee decided that the best option, given the difficulties with the site, was to sell as mortgagee in possession.

57. It should be recalled that the facts of *Taite* were that the receivers had power to collect the income, but it appeared that they sought possession so as to sell as agents, which would prevent them exercising their powers as receivers. In those circumstances, they did not in fact enjoy the right to enter into possession on foot of the mortgage deed as that right was enjoyed

solely for the purposes of the receivership and was merely ancillary to the exercise of the powers enjoyed by the receiver to gather in income for the purpose of reducing the debt owed.

58. As Allen J. also pointed out, it would be different if the receiver had a power of sale: in that event, there would be nothing to stop the receiver demanding possession for the purposes of exercising that power and from going to court to seek the necessary order if he could not enter peaceably.

59. I fail to see how Allen J. could be said to be wrong in his reasoning. As already stated, Laffoy J. in *Kavanagh* implied a right to enter into possession to allow the receiver to *"do his job"*, that is, to exercise his powers as receiver. In other words, whether express or implied, the right of a receiver to enter into possession is an ancillary one, connected to an enjoyed for the purpose of the receivership. The reasoning in *Taite* is predicated on the same analysis.

60. The right of a mortgagor to remain in possession derives from ownership of the lands, whereas the right of a receiver or chargeholder to enter into possession is connected to their rights as such. I note that Allen J. expressed a preliminary view which appears to be to the same effect, stating (at para. 91) that *"a mortgagee's right to possession is quite different to the owner's right to possession".* He went on (at para. 92) to point out that the mortgagee, as the owner of charges *"has a right to apply to court for an order for possession but it has no estate in land"*, and points out that a court will ask on an application pursuant to s. 62(7) of the 1964 Act whether the application is made *bona fide* with a view to realising the security. This is quite different from the owner of an estate in land who is entitled as of right to possession.

61. Similarly, in *Sammon*, Allen J. specifically did not object in principle to a receiver being appointed as agent for the mortgagee. Indeed, he assumed (at para. 46) from the fact that the receiver had put up signage advertising the property for sale, in circumstances where he had, *qua* receiver, no power of sale, that he was acting as the agent of the mortgagee. He also specifically stated (at para. 87):

"I do not believe that it is objectionable in principle that a person appointed as receiver should undertake a dual role as agent of the mortgagee…"

This is a clear application of *Vitgeson*. However, that statement was then qualified by stating that while there was no difficulty with the receiver having a *"dual role"*, he or she could not be *"a double agent"*, which seems to be a clear reference to the prior statement that where a receiver purported to act as agent of the mortgagee, he was subject to the same constraints in discharging that role as would apply to the mortgagee. Again, that would seem to be uncontroversial.

62. I am in complete agreement with the views as expressed by Allen J. in both *Taite* and *Sammon* and would add that, if receivers were to seek to wrongly enlarge their right to possession beyond what was necessary for the exercise and enjoyment of their powers as receivers, then that would be also inconsistent with the judgment of Laffoy J. in *Kavanagh*, which is settled law. Furthermore, if they were then to simply be appointed as agents for the purpose of sale, having achieved possession ostensibly for an entirely different purpose, then that would nullify the discretion under s. 62 (7) of the 1964 Act (as described by Geoghegan J. in *Bank of Ireland v. Smyth* [1993] 2 I.R. 102 and cited recently with approval by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26), albeit that it is a limited one designed merely to ensure that the application to enter into possession is to enforce security for a debt owed and to do no more than is necessary for that purpose.

63. I am therefore of the view that it is settled law that:

i. A receiver may only enter into possession of lands the subject of the mortgage or charge for the purposes of the exercise of his or her powers *qua* receiver and not for any other purpose;

ii. It follows that where a receiver enjoys a power of sale, he or she may enter into possession for the purpose of effecting a sale;

iii. Where the receiver does not enjoy a power of sale, he or she can only seek to enter into possession for the purposes of discharging his powers and duties as rent receiver (and, if provided for in the mortgage deed, manager);

iv. Having entered into possession *bona fide* for the purpose of exercising his powers as receiver, there may come a point where the mortgagee or chargee decides to sell. If the receiver is satisfied that the mortgagee or chargee's power of sale has arisen and that the mortgagee or chargee enjoys the right to enter into possession for the purpose of delivering up vacant possession on a sale, then the receiver may hand over possession. This is because he is agent of the borrower and can be obliged, like the borrower, to deliver up possession;

v. Having delivered up possession, there is nothing to stop the receiver then being appointed as agent of the mortgagee;

vi. A conflict may arise if a receiver enters into possession of lands which are capable of generating an income ostensibly for the purpose of receivership, and then purports to act as agent of the mortgagee for the purposes of effecting a sale, as his or her obligations to the borrower differ depending on whether he is regarded as receiver or as agent of the mortgagee.

64. The defendants also relied on *McGirr v. Everyday Finance DAC* [2022] IEHC 612, submitting that it was to the effect that Roberts J. had accepted as settled law that a receiver could also act *qua* agent, subject only to there being proof of the existence of an agency agreement, and they referred in particular to paras. 37 and 38 of that judgment.

65. That was a case where borrowers sought to restrain the sale by public online auction of two *"buy to let"* properties on which various loans were secured and in respect of which it was admitted the borrowers were in default. It is clear from para. 38 that the principal concern of

Roberts J. in that case was the absence of any evidence of the appointment of the receiver as agent of the mortgagee.

66. However, I think it is important that Roberts J. states (at para. 41):

> *"It is my view that a charge holder should provide some evidence to a court, even at interlocutory stage, when faced with a direct challenge to an agency appointment, that it has an entitlement to possession and that the receiver has actually been appointed as its agent for the purposes of marketing the property for sale."* [Emphasis added.]

67. This paragraph is clearly intended to incapsulate the reasons why interlocutory relief to restrain the sale was granted in that case. Minimum proof of the authority to conduct the sale was not provided by the defendant charge holder and relief was refused. While I do not believe it was the primary concern of the learned judge in that case, as it was sufficient for her to determine the matter on the basis of the absence of any proof of agency, she was nevertheless careful to state that the proofs would include proof that the mortgagee was entitled to possession, the evidence in that case being that the mortgagee would sell as mortgagee in possession.

68. Although it was the absence of any evidence of agency which grounded the decision that the plaintiffs had raised a fair question to be tried, I think Roberts J. was entirely correct in stating that, if reliance is to be placed by lenders on the status of the receiver as agent of the mortgagee, then they are in effect asserting that the agent has the necessary powers, such as a power of sale, because the lender has delegated its powers to the agent. In that case, the previous sales being as mortgagee in possession, it seems that it was proposed that the receiver, in his capacity as agent, would arrange for the sale of the remaining two properties as mortgagee in possession, with the deeds of conveyance or transfer ultimately being executed by the mortgagee itself.

69. That would beg the question of how the mortgagee came to be in possession. Roberts J. never got as far as considering that issue because she was satisfied that the plaintiffs had raised a fair question to be tried on the question of whether there was an agency at all. Her explicit reference at para. 41 of her judgment to the requirement to prove the mortgagee's entitlement to possession suggests that, had she been satisfied as to the existence of the agency, she would have moved on to consider how the mortgagee came to be in possession or proposed to take possession. She did not need to deal with that point but, if she had, then the issue which was of concern to Allen J. in the two judgments which I am invited not to follow would come to the fore, namely, can a mortgagee circumvent the provisions of s. 62 of the 1964 Act by appointing a receiver, then conferring an agency on the receiver so as to confer on the receiver the powers of a mortgagee.

70. In those circumstances, the receiver is appointed solely to exercise his right of possession *qua* receiver but in circumstances where he has no intention of acting *qua* receiver at all. Why should this be permitted? In my view, Allen J. has correctly highlighted that this is not a proper exercise of the receiver's powers and the sole purpose of the appointment of the receiver in those circumstances appears to be to circumvent s. 62.

71. I now turn to apply those principles to the facts of this case and to consider whether it falls within the ambit of settled law, in which there is no fair question to be tried. If it does not, then the plaintiff has established a fair question to be tried and the balance of justice – including the question of whether damages would be an adequate remedy - would need to be considered, as well as the defendants' arguments on delay.

Application to this case

72. In this case, it appears that the plaintiff is in possession. I infer this from the statement in the course of the oral submissions that the properties were vacant. Of course the properties are unoccupied, as they are not suitable for letting, but it seems clear that the plaintiff remains in possession as registered owner or owner of the fee simple, as the case may be, of the various plots, and that none of the defendants has purported to take possession of any of the properties.

73. Furthermore, unlike *Taite* and *Sammon*, this is not an application by a receiver seeking an interlocutory injunction to the effect that possession should be delivered up to him, which necessarily involves a consideration of the receiver's right to possession, the purposes for which that right is enjoyed, and whether those are the purposes for which the injunction is sought.

74. This is a very different type of application, namely, an application to restrain the receiver, in his capacity as agent of the mortgagee, from carrying out a sale. The receiver has been appointed to act as agent of the mortgagee and he has gone about arranging the marketing and sale of the various properties. He has done that in his capacity as agent of the mortgagee and as such, the case is comparable to *Moorview*, *Vitgeson* and *McGirr*. There is no conflict here arising from second defendant's status as receiver as he does not appear to have purported to have exercised any of his powers as receiver and he has not sought to go into possession.

75. Given that the unfinished nature of these properties means that there appears to be no scope for the exercise by the second defendant of his powers of receiver, it is doubtful if he could purport to enter into possession in this case other than as agent of Everyday for the purposes of taking steps to facilitate the sale of the property as mortgagee in possession. As such, in order to sell with vacant possession, the mortgagee will presumably have to secure possession in accordance with s. 62 or by way of peaceful entry into possession.

76. The question of whether a mortgagee might be required to attempt to sell with vacant possession in order to discharge his duty to the borrower to obtain the best price reasonably obtainable was not raised by the plaintiff in this case and, accordingly, Everyday has not dealt with this issue in its affidavits. It may well be that it is apprehended that it may not be possible to sell with vacant possession because of the *lis pendens* which has been registered by the plaintiff's director, and it seems that it is for this reason that the draft contracts for sale caution the purchaser that it may not be possible to offer vacant possession.

77. I would comment in passing that valuers usually assess market value on the assumption that vacant possession will be delivered up on closing. Where a borrower engages in litigation to challenge the exercise by a mortgagee or charge of its powers to enforce the security, then it may not be possible to offer vacant possession and therefore evidence of the market value is probably not material to the question of whether a mortgagee is discharging its duty to obtain the best price reasonably obtainable. Clarke J. alluded to this issue in *Moorview* at para. 14.10.

78. However, in this case, the only injunction sought is one restraining the defendants from selling the secured property and the only basis on which it is sought is that it is necessarily a conflict of interest for a receiver to be appointed agent. That is not the case where a receiver acting in a dual capacity arranges a sale on behalf of a mortgagee without entering into possession.

79. A conflict could arise where a receiver was appointed solely for the purpose of circumventing s. 62 of the 1964 Act or indeed to circumvent the duty on a mortgagee in possession to account strictly for the profits of the secured property, a duty which is more onerous than the duty on a receiver. In those circumstances, a receiver could not seek to exercise his right to enter into possession because that right is ancillary to a receivership. But these issues do not arise because these particular properties have not been completed, are

incapable of being let, and the receiver has not sought to go into possession. Accordingly, there is no evidence of any conflict here.

80. In my view, it does not follow as a matter of law that there is necessarily a conflict of interest where the same individual is appointed as both receiver and agent of the mortgagee. Such a conflict could arise on the facts of a particular case, however, where that individual is in possession and where the property is capable of generating an income. Or at least there is a fair question to be tried as to whether that is so.

81. However, as there is simply no conflict on the facts of this case, the plaintiff has failed to establish a fair question to be tried and the injunction must be refused.

82. Had a fair question to be tried been established, then the question would arise in considering the balance of justice and, in particular, the adequacy of damages, as to the application of *Holohon* to an injunction of this kind. That was a case where a mortgagor sought to restrain a sale by a mortgagee of tenanted property without considering whether vacant possession should first be obtained. The sale in that case had not closed and the Supreme Court explicitly considered that s. 21(2) of the Conveyancing Act, 1881, which confines a mortgagor to his or her remedy in damages, did not prevent the grant of an injunction: see p. 26.

83. I do not accept the submission that the case is of such antiquity that it can be overlooked or the submission that, as it has not been commonly cited recently, it is no longer a binding authority. In my view, it is obviously relevant to the questions which would arise on an application to restrain a sale by a mortgagee and it is not necessarily overruled by *Merck Sharp and Dohme v. Clonmel Healthcare Ltd.* [2020] 2 I.R. 1. On the contrary, the emphasis in the latter judgment on difficulties in quantifying damages might well be highly relevant, as would the general proposition that property rights are normally protected by relief *in specie* and not merely by an award of damages. I also note that the mortgagor in *Holohan* had not brought

himself within the category of a mortgagor who had obstructed the sale, thereby depressing the price.

84. Finally, I think there is some merit in the argument that, as the plaintiff was aware from receipt of the letter of 30 September, 2022, of the receiver's dual role, and as that was the only basis upon which this injunction was sought, it is debarred from seeking interlocutory relief on the basis of delay. An application brought in October could possibly have been capable of determination in advance – and possibly even well in advance – of the auction scheduled to take place in February, 2023. However, as there is no fair question to be tried, I do not need to come to a final view on this.

85. On the basis that there is no such fair question to be tried, I therefore refuse the application.