THE COURT OF APPEAL

Ryan P.
Irvine J.
Whelan J.

Neutral Citation Number: [2018] IECA 78

Record Number 2016/208

BETWEEN/

BEN HEALY AND SEAMUS SPILLANE

PLAINTIFFS /

APPELLANTS

- AND -

ROBERT McGREAL

DEFENDANT /

RESPONDENT

Record Number 2016/209

BETWEEN/

BEN HEALY

PLAINTIFF /

APPELLANT

- AND -

ROBERT McGREAL

DEFENDANT /

RESPONDENT

Record Number 2016/210

BETWEEN/

BEN HEALY AND MIRIAM HEALY

PLAINTIFFS /

APPELLANTS

AND

ROBERT McGREAL

DEFENDANT /

RESPONDENT

JUDGMENT of the Court delivered by Ms. Justice Irvine on the 16th day of March 2018

1. This judgment concerns the appeals brought by Mr. Healy and Mr. Spillane, the plaintiffs in the proceedings set forth in the title hereto, against the judgment of the High Court (Donnelly J.) of the 29th February 2016 and her order of the 15th March 2016. By her order she dismissed the plaintiffs' claims in all three sets of High Court proceedings which were heard together. She also granted a series of injunctions to the defendant, Mr. McGreal, on foot of his counter claim in those proceedings.

Background facts

2. It is common case that the plaintiffs in each of the proceedings borrowed very significant sums of money from the former Anglo Irish Bank Corporation plc ("Anglo"). Those borrowings were secured by way of mortgage on a portfolio of residential and commercial properties ("the properties") located in the midlands and south of Ireland. The properties and the relevant mortgages are fully set out at para. 3 of the judgment of the High Court judge and for that reason it is not necessary to repeat those details here. It is not disputed that the plaintiffs failed to meet their obligations on foot of the facilities provided by Anglo and that this was the position at the time when Mr. McGreal, the defendant, was appointed as receiver and manager (the Receiver") over the properties on the 12th

September 2013.

3. There are a number of key dates and events which are material in the context of this judgment which I will now identify in a skeletal manner. I will return to these key dates and events later in the judgment:-

> 15th February 2008: It is alleged by the plaintiffs that on this date Anglo created two floating charges in favour of the Central Bank which potentially incorporated their loans from Anglo.
>
> 21st January 2009: Anglo was nationalised and became part of Irish Bank Resolution Corporation ("IBRC").
>
> 7th February 2013: IBRC was placed in special liquidation by Ministerial order.
>
> 12th September 2013: According to the Receiver, IBRC (in special liquidation), by three Deeds of Appointment, each dated the 12th September 2013, appointed Mr. McGreal to be receiver and manager of the properties.
>
> 28th March 2014: According to the receiver, by Loan Sale agreement of this date ("hereinafter the Loan Sale"), IBRC (in special liquidation), sold a portfolio of loans, including those of the plaintiffs to Kenmare Property Finance Limited ("Kenmare"). Kenmare was a special purpose vehicle established under s. 110 of the Taxes Consolidation Act 1997 to purchase the aforementioned portfolio.
>
> 6th June 2014: IBRC (in special liquidation), sent a 'goodbye' letter to the plaintiffs advising of the sale of their loans to Kenmare.
>
> 23rd & 28th May 2014: According to the Receiver, three Deeds of Novation were executed by the special liquidator on behalf of IBRC (in special liquidation), which were also executed by the receiver. These deeds identified the appointing party as Kenmare as opposed to IBRC (in special liquidation).
>
> 14th October 2014: The hearing of the action in the High Court commenced. It was later adjourned for procedural reasons on a number of occasions.
>
> 14th July 2015: On this date a Deed of Confirmation and Acknowledgment was entered into between IBRC (in special liquidation) and Kenmare. It states that IBRC (in special liquidation), acting through its special liquidator, by Loan Sale dated the 28th March 2014 agreed to sell, assign etc. the assets therein referred to, including the plaintiffs' loans, to Kenmare. The Deed of Confirmation and Acknowledgment acknowledges that the terms of the Loan Sale of the 28th March 2014 were commercially sensitive. The Deed of Confirmation and Acknowledgment was signed and sealed on behalf of Kenmare and a counter part signed and sealed by IBRC (in special liquidation).
>
> 9th October 2015: The proceedings were finally concluded in the High Court.

4. The plaintiffs commenced their three actions against Mr. McGreal on the 14th October 2013. It should be stated that Ms. Miriam Healy, the wife of Mr. Healy, who was a plaintiff in the third action compromised her claim against Mr. McGreal and therefore did not participate in the High Court proceedings.

5. The thrust of the claim made by the plaintiffs in each set of proceedings was that Mr. McGreal had not been properly appointed. They maintained that the instrument purporting to appoint him as receiver dated the 12th December 2013 was a false instrument. They also asserted that it was for the Receiver to prove that he was entitled to act as a receiver and also claimed that there was no "provision in law" for his appointment. The plaintiffs further claimed that the letter of demand received from IBRC (in special liquidation) did not comply with the provisions of the Land and Conveyancing Law Reform Act 2009 with the result that Mr. McGreal enjoyed no power of sale. However, if the deeds of appointment were valid the plaintiffs argued that they did not specifically authorise the Receiver to sell or dispose of the properties as required under the provisions of the Land and Conveyancing Law Reform Act 2009.

6. In an amended statement of claim, later delivered, the plaintiffs claimed that by reason of a floating charge created in favour of the Central Bank on the 15th February 2008, which likely captured their loans, IBRC (in special liquidation) had nothing to transfer to the Receiver as of the date of his appointment. Further, they maintained that the collateral charged to the Irish Central Bank had impermissably been pledged without their consent. Finally, the plaintiffs pleaded that the deeds appointing the Receiver were invalid as they were not given under seal.

7. The Receiver filed a full defence to the proceedings. Further, in circumstances where he maintained that the plaintiffs were interfering with his ability to carry out his duties as receiver, he sought a range of orders destined to prohibit them from impeding, obstructing or otherwise preventing him from managing the properties and collecting the rents associated therewith.

8. Following what can only be described as a protracted hearing, the details whereof are fully set out in the judgment of the trial judge, she delivered her judgment on the 29th February 2016. By her order dated the 15th March 2016 she dismissed each of the claims brought by the plaintiffs and granted Mr. McGreal the injunctions which he had sought to enable him carry out his functions as receiver and manager of the properties.

Judgment of the High Court judge

9. In a thorough and detailed judgment which runs to some sixty two pages, the trial judge set out her reasons for dismissing the plaintiffs' claims and finding in favour of the Receiver on his counter claim. It has to be said that the issues which the trial judge addressed in the course of her judgment go beyond those which are joined in the pleadings. This is perhaps not unsurprising in circumstances where the Loan Sale of the 28th March 2014 and the deeds of novation of the 23rd and 28th May 2014 post date the commencement of the proceedings as does the Deed of Confirmation and Acknowledgment which was executed on the 14th July 2015. As will be seen later, the plaintiffs advanced a range of arguments in their efforts to find some defect in these documents that would bring the receivership to an end.

10. What follows is a skeletal summary of the findings of the High Court judge which are relevant to the issues raised for consideration on this appeal.

11. The High Court judge concluded that, given the challenge to his appointment, it was for Mr. McGreal to prove on a *prima facie* basis the validity of his appointment. Thereafter it was for the plaintiffs to call evidence to rebut that which had been adduced by the

Receiver.

12. The High Court judge rejected the plaintiffs claim that there was no power to appoint a receiver in the mortgage deeds. She held that the mortgage deeds provided a contractual basis for the Receiver's appointment and expressed herself satisfied that the trigger for that appointment had been reached in each case. The fact that IBRC (in special liquidation) may have enjoyed a statutory right to sell the properties did not, of itself, take away from its entitlement, pursuant to the contractual provisions set out in the deed of mortgage, to appoint a receiver to effect such a sale. She also rejected the plaintiffs' argument that a receiver could only be appointed when the statutory power of sale became exercisable. Further, because the Receiver was not exercising a statutory power of sale, whether the letter of demand received by the plaintiffs from IBRC (in special liquidation) was in compliance with s. 100(1) of the Land and Conveyancing Reform Act 2009 was irrelevant.

13. The trial judge held as a matter of law that the Deeds of Appointment were not invalid because they were not executed by the receiver and the special liquidator of IBRC (in special liquidation) at a time when they were present at the same time. There was no contractual or statutory requirement that they should be so executed. Further, the deeds were not invalidated because they had not been signed by the two special liquidators of IBRC. The Irish Bank Resolution Corporation Act 2013 (Special Liquidation) Order, 2013 (S.I. 36 of 2013) applied. The same provides that any act required or authorised by the Act to be done by a special liquidator may be done either jointly or severally. The trial judge also found as a fact that the seal of IBRC (in special liquidation) had been affixed to the deeds of appointment which had been validly signed and witnessed.

14. The trial judge found as a fact that the plaintiffs' loans had been transferred to Kenmare by virtue of the Loan Sale of the 28th March 2014. She did so based upon the Deed of Confirmation and Acknowledgment of the 14th July 2015 and the evidence of Ms. de Lacy Murphy. That deed confirmed that the plaintiffs' loans had been part of the Loan Sale of the 28th March 2014. It had been signed and sealed by Kenmare and the counterpart signed and sealed by IBRC (in special liquidation). Thus she concluded the Deed of Confirmation and Acknowledgment was also valid.

15. The trial judge rejected the submission that IBRC (in special liquidation) had no standing to produce valid deeds of novation in relation to the Receiver given that its interest in the loans had passed to Kenmare on the 28th March 2014. She rejected the plaintiffs' submissions that IBRC should have discharged the Receiver at the time of the Loan Sale and that Kenmare should have re-appointed the receiver. Thus, she rejected the plaintiffs' submission that even if the Receiver had been validly appointed initially he was no longer validly appointed post the 28th March 2014.

16. The High Court judge concluded that the sale of the plaintiffs' loans by IBRC (in special liquidation) to Kenmare did nothing to invalidate the Receiver's appointment. The monies remained owing and the Receiver remained in place. He was bound to act and realise the assets. It was, according to the trial judge, for IBRC (in special liquidation) and Kenmare to decide who was entitled to receive any monies recovered. The identity of the owner of the loan was irrelevant to the relationship between the Receiver and the plaintiffs.

17. The High Court judge was satisfied that there was no legal reason why IBRC (in special liquidation) and the new owner of the loans could not enter into a novation agreement. The fact that there was no provision for novation in the Mortgage Deed was irrelevant. In circumstances where IBRC (in special liquidation) had the power to appoint a receiver and manager and an entitlement to sell the security, it was, she stated, "axiomatic" that the right to novation existed.

18. Regardless of certain evidential difficulties which are referred to at paras 84 to 89 of the trial judge's judgment, the High Court judge was satisfied as a matter of fact that these three Deeds of Novation were validly executed by the special liquidator on behalf of IBRC (in special liquidation) and by Kenmare. She referred to the two originals that had been produced in the course of the evidence and to the evidence of Ms. de Lacy Murphy and that of the Receiver in relation thereto and also to the third Deed of Novation which she found as a fact had been freshly re-executed by all three parties in the course of the proceedings. That re-execution, the trial judge concluded, did not invalidate the earlier Deeds of Novation or the lawfulness of the Receiver's appointment. She was satisfied on the evidence that all of the said deeds had been properly signed and executed.

19. The trial judge concluded as a matter of law that the fact that the Deeds of Novation post dated the Loan Sale did not mean that the deeds appointing the defendant as receiver could not be novated. She relied in this regard upon the provisions of s. 12(1)(v) the Irish Bank Resolution Corporation Act 2013.

20. Concerning the arguments advanced by the plaintiffs based on upon two floating charges granted by Anglo in favour of the Central Bank of Ireland in 2008, the High Court judge concluded that having regard to the evidence of Mr. Wigglesworth she was not satisfied, as a matter of probability, that the plaintiffs' loans had been securitised as alleged. Further, the fact that Kenmare later bought the loans was also evidence in favour of her finding that the loans remained with Anglo / IBRC at the time of the Loan Sale to Kenmare. The trial judge further concluded that even if the plaintiffs' loan had been securitised this would not have put an end to Anglo's / IBRC's rights of foot of their security. A floating charge, she concluded, does not affect the grantor's rights to deal with the asset in the ordinary course of its business. It does not transfer the legal and beneficial ownership of those assets. It gives no more than an equitable interest to the grantee.

21. Finally, the trial judge rejected the plaintiffs' arguments based upon the provisions of s. 117 of the Central Bank Act and the Code of Practice therein provided for. First, the code applied only to residential properties where the mortgagor was residing in the property, and that was not the case here. Second, the code of conduct does not provide the borrower with a defence to legal proceedings based upon a breach of the code. In this regard she relied upon the decision of Clarke J. in *Irish Life and Permanent plc v. Dunne* [2015] IESC, p. 46.

The appeal

22. The notice of appeal is a lengthy document which, in the respondents' notice is described, with some considerable validity, as a legal submission. Accordingly, on a Directions hearing, this Court made orders that the plaintiffs produce written submissions in relation to all three appeal in one joint submission. This approach was considered proper and convenient in circumstances where the cases had been heard together in the High Court and had resulted in one single judgment.

23. The principal grounds of appeal relied upon by the plaintiffs in their written submissions appear under the following headings:-

A. Statutory / Contract (Power of Sale);

B. Incorrect reliance on 2013 IBRC Act as cure-all;

C. Evidence Redaction, Deployment and Retraction;

D. Prejudice;

E. Land Registry

24. In respect of items B. and D. there are, respectively, three sub-divisions and six sub-divisions.

A. Power of sale

25. The High Court judge held at para 50 of her judgment that each Mortgage Deed, albeit with certain variations as to wording, provided for the appointment of a receiver by the bank at any time after the mortgage debt became payable. She pointed to the fact that there was difference between the form of deed in the case of the first six mortgages and the form in respect of the other two. Nonetheless, she held that the power of sale was the same and was available to the receiver in each instance.

26. The plaintiffs challenge these finding based upon the terms and provisions of the Mortgage Deeds. Concerning all eight mortgages, they contend that the trial judge erred in law in concluding that the terms therein contained provided a contractual as opposed to a statutory basis upon which the Receiver might lawfully sell the properties. They argue that it is only the mortgagee that enjoys the power of sale and that the same is a statutory power. In particular they rely upon the wording of clause 8.1 in the first six mortgages which provides, inter alia, that the "Statutory Power of Sale shall apply to this security". This clause, the plaintiffs submit, is the one that governs the power of sale. Further, they seek to rely upon the fact that the statutory power of sale under s. 20 of the Conveyancing Act 1881, did not confer a power of sale on a receiver.

27. The plaintiffs further submit that the trial judge erred in law having regard to the proper construction of clause 8.4 of the first six Mortgage Deeds. They submit that insofar as this clause provides the Receiver with a power of sale, that power is confined to a statutory power of sale. Thus, it was for the Receiver to demonstrate that he had a statutory right to sell in each case and, according to the plaintiffs' submissions, he adduced no such evidence.

28. In my view the High Court judge was clearly correct as a matter of law when she construed the terms of the first six Mortgage Deeds so as to conclude that clause 8.3 created a separate and free standing contractual entitlement on the part of the bank to proceed to appoint a receiver at any time after the Mortgage Debt became payable and to recover that debt on foot of a sale by the Receiver. There is simply no basis upon which it can reasonably be argued that the bank's entitlement to appoint a receiver is to be read subject to the statutory power contained in clause 8.1. It is patently clear from the terms of the first six Mortgage Deeds that IBRC (in special liquidation) could have decided to exercise its statutory entitlements under clause 8.1 but it was equally entitled to appoint a receiver under clause 8.3 to realise the security with a view to the discharge of the mortgage debt. These are, as the trial judge correctly concluded, separate entitlements and there is nothing in clause 8.1 to restrict the bank's entitlement to appoint a receiver with a view to recovering the Mortgage Debt. Once the bank pursued its contractual entitlement under clause 8.3 the Receiver enjoyed the power set out in clause 8.4 which includes a power of sale. Further, clause 8.4. (c), which provides for the Receiver's power of sale, cannot in my view, be reasonably construed as a provision which restricts the Receiver's right of sale to a statutory power of sale. That is not what the clause says. The right of sale is an unfettered entitlement.

29. In the case of the other two mortgages, whilst the wording is somewhat different to that discussed above, clause 9 provides that the mortgagee might, at any time after the secured liabilities had become payable, itself sell the mortgaged properties to satisfy those liabilities. In addition to that right at clause 10.1 the deed goes on to provide that at any time after the secured liabilities have become payable the mortgagee may appoint a receiver. If they do so the Receiver so appointed, as per clause 10.4, as the trial judge correctly observed, enjoys an unrestricted power of sale.

30. In circumstances where I am satisfied that the High Court judge was correct as a matter of law to conclude that the bank's entitlement to appoint a receiver under the relevant mortgages was a free standing contractual one which existed entirely independently and separately from any circumstances which might entitle it to invoke its statutory power of sale, it is not necessary to engage with the appellants' submissions insofar as they concern s. 24 of the Conveyancing and Law of Property Act 1881, the Land and Conveyancing Law Reform Act 2009 or the Land and Conveyancing Law Reform Act 2013.

B. Incorrect reliance on IBRC Act 2013

31. The point that the plaintiffs make here is that following the sale of the securities on the 28th March 2014 to Kenmare, there was nothing left for IBRC (in special liquidation) to later transfer, whether by way of Deed of Novation or by Deed of Confirmation and Acknowledgement. They refer to s. 58(9) of the Asset Covered Securities Act 2001, which provides:-

> "(9) On the transfer of a business or assets under this section:
>
> (a) the transferee credit institution has the same rights (including priorities) and obligations in respect of that business or those assets as the transferor credit institution had immediately before the transfer took effect, and
>
> (b) the transferor ceases to have those rights and obligations."

32. At para 92 of her judgment, the High Court judge says concerning s.12 of the IBRC Act 2013, that:-

> "The powers contained within s. 12 are wide ranging and, even if s. 58 of the Act of 2001 ordinarily had the effect the plaintiffs contend (which effect is not so clear in light of the provisions of s. 58(9)(a) of the Act of 2001), the provisions of s. 12 and in particularly s. 12(1)(b) override any such restriction."

However, the plaintiffs point out that the IBRC Act 2013 at s. 18(2) says:-

> "(2) Nothing in this Act affects the operation of the Asset Covered Securities Acts 2001 and 2007."

The plaintiffs submit that this was an error on the judge's part insofar as she relied upon s. 12 of the IBRC Act 2013 to override the provisions of s. 58(9) of the Asset Covered Securities Act 2001.

33. The essential point the plaintiffs make therefore is that, following the Loan Sale of the 28th March 2014, IBRC (in special liquidation) ceased to have any right or interest in the assets which it had transferred to Kenmare. Thus, it had no ability to execute the three Deeds of Novation or the Deed of Confirmation and Acknowledgement.

34. In light of her other findings in my view it matters not whether the trial judge was or was not in error insofar as she relied upon s. 12(1)(b) of the IBRC Act 2013 to override what she considered might be the effect of s. 58(9) of the Asset Covered Securities Act 2001. She had, as is clear from paras 81 and 82 of her judgment, in any event concluded that the Deeds of Novation were in fact matters only material to IBRC (in special liquidation) and Kenmare and did not affect the relationship between the receiver and the plaintiffs.

35. As was observed by the trial judge, Mr. McGreal had been appointed receiver prior to the Loan Sale to Kenmare. That receivership was valid and ongoing pursuant to the original deeds of Appointment. The fact that IBRC (in special liquidation) entered into the Loan Sale with Kenmare and was no longer a party to the loan did not affect the validity of the Receiver's appointment or the ongoing nature of the receivership. The only question arising as a result of the Loan Sale was to whom the Receiver would remit any sums recovered in the course of the receivership. However, that was a matter between the receiver, IBRC and Kenmare and had nothing to do with the plaintiffs. While the execution of the Deeds of Novation might have some potential bearing on when Kenmare succeeded to the position of IBRC in receivership they could have no bearing at all on the question of the continuing validity of the Receiver's appointment over the secured assets.

36. Accordingly, the provisions of s. 58(9) of the Asset Covered Securities Act 2001 afford the plaintiffs with no basis for their challenge to the lawfulness of the Receiver's appointment.

37. Whilst strictly speaking unnecessary in light of my aforementioned findings, I feel I should nonetheless also state that I reject the plaintiffs' submission that the Deeds of Novation are invalid because there is no provision in the Mortgage Deeds providing for novation. I agree with the High Court judge that in circumstances where the Mortgage Deed provides for the appointment of a receiver with the power of sale it is axiomatic that the lender would be entitled to enter into a novation agreement.

38. I would also observe that insofar as the plaintiffs seek to challenge the conclusion of the trial judge concerning the execution of the Deeds of Novation she had more than ample evidence upon which she was entitled to conclude, notwithstanding the evidential difficulties to which she referred in her judgment, that the three Deeds of Novation had been properly executed. She referred in particular to the evidence of the Receiver, whom the plaintiffs' themselves had called to give evidence, and also to the evidence in chief of Ms. de Lacy Murphy who had produced the original two Deeds of Novation and a third deed that had been re-executed by all three parties. These were findings of fact which, it would appear, were supported by credible evidence. That being so, having regard to the principles advised in *Hay v. O'Grady* [1992] 1 I.R. 210) they cannot be disturbed by this court.

39. As for the Deed of Confirmation and Acknowledgement of the 14th July 2015, quite frankly I find it hard to see how this document could ever have been material to the plaintiffs' challenge to the validity of the appointment of Mr. McGreal as receiver or his continued entitlement to act as receiver with a power of sale. Nonetheless, I would make a number of observations regarding this deed.

40. First, it is clear that the provisions of s. 58(9) of the Asset Covered Securities Act 2001 simply do not apply to the Deed of Confirmation and Acknowledgement. It is not a deed which seeks to transfer any obligations, business or assets previously owned by IBRC (in special liquidation) to any third party. The deed does no more that confirm that the plaintiffs' loans were earlier sold to Kenmare in the Loan Sale agreement of the 28th March 2014 and declares that because of the commercial sensitivity of that agreement, an un-redacted version could not be proved in evidence.

41. Second, it seems to me that it is legitimate for IBRC (in special liquidation) to say by way of deed that it has transferred its interests in a particular property to another; it is a form of proof. It is not that the new deed is transferring the property; it is a mode whereby the transferor or may confirm in a formal manner what has happened previously. I do not see anything wrong with that. The mistake is to consider it to be a transfer of property. I see no reason why a vendor could not, in the event of a challenge to some transaction, execute a deed which would not purport to transfer the property but which would confirm the earlier transfer and the terms pursuant to which it was transferred. Therefore, I cannot see any legal objection available to the plaintiffs in this regard. They are clearly entitled to raise challenges, as they did here, when they objected to the redacted Loan Sale agreement being admitted into evidence. They can hardly, in light of that objection, deny the mortgagee the entitlement to seek to establish by other means, on the balance of probabilities, that their loans and all of the powers formerly held by IBRC (in special liquidation) were transferred to the purchaser.

42. Third, insofar as it may be relevant, the High Court judge concluded, on the basis of credible evidence, that the said Deed of Confirmation and Acknowledgment was signed and sealed by IBRC (in special liquidation) and also by Kenmare. She made this finding based on the evidence of Ms. de Lacy Murphy who, as an alternate director of Kenmare, was entitled to execute the deed. Once again by reason of the principles advised in *Hay v. O'Grady* this finding cannot be interfered with.

Central Bank Code of Conduct and Consent

43. The plaintiffs submit that the court erred in law in failing find that IBRC (in special liquidation) had breached the Code of Practice on the Transfer of Mortgages 1991.

44. Clause 1 of the code provides as follows:-

> "1. A loan secured by the mortgage of residential property may not be transferred without the written consent of the borrower. When seeking consent from either an existing or a new borrower the lender must provide a statement containing sufficient information to enable the borrower to make an informed decision….."

45. Clause 4 provides that when the borrower's consent is sought to the transfer of his or her mortgage the lender is to provide the borrower with certain information which includes a description of the intended transferee and also confirmation that in the absence of a specific consent the existing arrangements will continue to apply.

46. The plaintiffs state that the code was not followed or implemented in the case of the transfer of their securities which are in respect of both residential and commercial properties. They rely also on s. 117 of the Central Bank Act of 1989 which is the section that permits the bank to draw up, amend or revoke a code of practice concerning dealings with any class or classes of persons and requires that such a code of practice be followed by any licence holder.

47. Whilst the Receiver contends that this issue was never pleaded and should for that reason not be considered on the appeal, it is nonetheless clear that the trial judge engaged with this issue at first instance, as is apparent from the conclusions set out at para. 118 and 119 of her judgment. That being so I can see no basis upon which the plaintiffs can be precluded from challenging those findings.

48. The High Court judge concluded that the Code of Practice on the Transfer of Mortgages was one which applied only to residential properties and that the borrower was only entitled to be asked for his or her consent if they were actually residing in the property to which the mortgage to be transferred applied. It is to be inferred from her judgment that she considered that the mortgages the subject matter of these proceedings did not fall within the code as the plaintiffs were not living in any of the properties which might otherwise be classified as residential in nature. She also concluded, based upon the judgment of Clarke J. in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46, that, regardless of whether or not it applied any breach of the code would not afford the plaintiffs any basis upon which they might challenge the receiver's appointment or continued entitlement to deal with their properties. She relied, in particular, upon the following statement of Clarke J. which appears at para 5.24 of his judgment:-

> "5.24 It does not seem to me, therefore, that the statutory policy of the 1989 Act and the Code-making powers contained therein is such that same is intended to, as it were, by the backdoor, create a whole new jurisdiction for the courts in which the court would be required to assess in some detail the type of engagement entered into between a financial institution and a borrower who is in sufficient arrears to enable that financial institution, as a matter of law, to seek possession."

49. While the facts and the code of conduct under consideration in the aforementioned judgment are clearly different from those under consideration here, the reasoning is equally applicable to the breach of the code of conduct relied upon in the present case and could thus never afford the plaintiffs any basis upon which they might challenge the appointment of the Receiver or his continued entitlement to act as receiver and manager over the properties.

50. However, as the Receiver rightly contends, the fatal flaw in the plaintiffs' submission is that the Code of Practice on the Transfer of Mortgages is in any event different from other Central Bank codes. It is a voluntary code for credit institutions, so they do not have to comply with it. Thus its breach could never afford the plaintiffs with any basis upon which they might support any of their claims against the receiver.

51. Notwithstanding these conclusions I should nonetheless observe that it appears to me that the Code of Practice on the Transfer of Mortgages would apply to any loans secured by a mortgage of residential property and is not limited to private dwelling houses (*i.e.* it applies to loans secured by residential investment properties) and that in this regard I find myself in disagreement with the trial judge. Nonetheless, she is of course correct that, as a matter of law, breach of the Code of Practice on the Transfer of Mortgages does not provide any basis upon which the plaintiffs might advance any of their claims against the receiver.

C: Evidence Redaction, Deployment and Retraction,
52. This next section of the plaintiffs' submission concerns what they describe as efforts on the part of the Receiver and Kenmare to keep secret the terms of the Loan Sale from IBRC (in special liquidation) to Kenmare and instead to impermissibly rely upon the Deed of Acknowledgment and Confirmation of the 14th July 2015 to prove the transfer of their loans to Kenmare.

53. The principal submission made by the plaintiffs in this regard is that the trial judge impeded the plaintiffs' ability to challenge the validity of Mr. McGreal's appointment as receiver over their properties insofar as she permitted the receiver prove the transfer of their loans to Kenmare by relying upon the Deed of Confirmation and Acknowledgment of the 14th July 2015. They submit that in circumstances where the Receiver had introduced into evidence the redacted Loan Sale agreement of the 28th March 2014 that they were entitled to have a copy of the un-redacted version of that document. They claim that the judge was obliged to apply the best evidence rule and was not correct in law when she permitted the Receiver to withdraw the redacted Loan Sale agreement and then seek to prove the transfer of their loans from IBRC (in special liquidation) by relying upon the Deed of Confirmation and Acknowledgment.

54. Having considered this submission I am satisfied that it must be rejected. As was stated by Charleton J. in *Ulster Bank v. O'Brien* [2015] IESC 96 at p. 13,

> "The best evidence rule has, since that time, (the 1870s), weakened and ultimately, it has ceased to exist in favour of a test as to whether the evidence offered is admissible or inadmissible. Whether there might be better evidence of an event or transaction merely goes to the weight that might be given particular testimony. No one now argues that because there is a video recording of a transaction that the participants so recorded cannot give evidence, whereas it was once argued that a note as to what tombstone read could not be admitted because the tombstone had not been physically produced."

55. I am satisfied that there is no rule of law that required the trial judge to direct the production of the un-redacted Loan Sale agreement in the present case. There was, it would appear, very good reasons for its redaction. Clearly there was a commercial sensitivity to the information contained in it. Indeed, I would have taken a different view than that of the trial judge as to the entitlement of the receiver to rely upon the redacted document once satisfied that the matters redacted were not relevant to the matters at issue and that they had been redacted to protect issues of confidentiality. However, the Deed of Confirmation and Acknowledgment of the 14th July 2015, which was introduced into evidence by Ms. de Lacy Murphy, was more than sufficient admissible evidence to prove that the plaintiffs' loans had been transferred to Kenmare.

D: Prejudice
56. There are a number of complaints under this heading concerning the manner in which the trial judge conducted the hearings before her. However, there is nothing revealed in the submissions made by the plaintiffs that gives me any reason to be concerned about the fairness of the process of the trial. One of the objections raised by the plaintiffs relates to Mr. Spillane's questioning of Mr. McGreal concerning the power of sale and in particular what power he considered himself to have. In my view the fact that the judge interfered with this line of examination was entirely appropriate. What Mr. McGreal as receiver believed his powers to be, was immaterial to the court's consideration. The question was, as a matter of law, what power did he in fact enjoy? If Mr. McGreal did not have a power of sale, independent of the Conveyancing Act 1881, then the bank was confined to its statutory remedy. If he was not confined to the statutory remedy then he was free to act in accordance with the contractual provisions in Clauses 8.3 and 10.4 of the mortgage deeds respectively. That was a matter of law, not a matter of Mr. McGreal's opinion or a matter of anybody else's opinion.

57. I have considered all of the other complaints relied upon by the plaintiffs in the written submissions and reject them as groundless.

Land Registry
58. This is a complaint that the plaintiffs were never presented with or signed a Form 56 from the Land Registry. This is, however, part of the same argument earlier made that IBRC (in special liquidation) did not seek their consent to the sale of their loans to Kenmare. It is not necessary to re-visit this issue a second time.

59. Insofar as the plaintiffs seek to challenge the lawfulness of the Receiver's appointment by reference to arguments concerning the securitisation of their loans and the existence of two floating charges entered into by Anglo on the 15th February 2008, there is simply nothing in these submissions.

60. The trial judge found as a fact, based on Mr. Wigglesworth's evidence, that there was insufficient evidence to prove, on the balance of probabilities, that the plaintiffs' loans had been securitised. Indeed, she inferred from the fact that the evidence had established that Kenmare had bought the plaintiffs' loans that the rights over those loans had remained with Anglo / IBCR (in special liquidation) regardless of the creation of the floating charges in favour of the Irish Central Bank in February 2008.

61. The High Court judge was also correct as a matter of law when she concluded that even if the plaintiffs' loans had been securitised this would not have put an end to the lender's contractual rights and her reliance on this regard upon the decision of Peart J. in *Wellstead v. Judge White* [2011] IEHC 1 was well placed. It is clear from this decision that even if the plaintiffs' loans had been the subject of the floating charges granted in favour of the Central Bank, that would not of itself invalidate Anglo's / IBRC's security rights. A floating charge does not affect the grantor's rights to deal with the assets so charged in its ordinary course of business. All the grantee gets is an equitable interest. For these reasons there is no basis either evidentially or legally for this aspect of the plaintiffs' appeal.

Conclusion

62. This is a case in which the plaintiffs accept that they were granted very significant loan facilities by Anglo and that the sums so loaned remain unpaid. Neither do they dispute that they mortgaged their properties to Anglo to secure their liabilities and that it enjoyed the right to transfer or assign their loans and security.

63. When the plaintiffs commenced these proceedings in the High Court on 14th October, 2013 they sought, *inter alia*, to challenge first the validity of the appointment of Mr. McGreal as receiver and manager over their properties and second his right to sell those properties. Whilst the plaintiffs were clearly entitled to adopt such an approach, it is hard to believe that they considered that there was any real merit in the multitudinous additional technical arguments which they chose to advance in the court below concerning, as they did, documents generated and transactions completed after their proceedings had been commenced (my emphasis). I am of course here referring to the Loan Sale between IBRC (in special liquidation) and Kenmare, the Deeds of Novation and the Deed of Confirmation and Acknowledgment. It is also perhaps worth stating that the plaintiffs did not assert that they had been prejudiced in any way by the sale of their loans to Kenmare or by the fact the receiver chose to prove the transfer of their loans from IBRC (in special liquidation) to Kenmare by reference to the Deed of Acknowledgment and Consent.

64. On this appeal the plaintiffs have pursued what I consider to be a catalogue of legal and procedural objections which are wholly without merit or legal foundation. They do a disservice to an extremely clear and well crafted judgment in which the High Court judge addressed even those arguments which were so belatedly made that they were not captured by the amended statement of claim. The plaintiffs submissions to this court smacked of a hopeless attempt on their part to avoid the consequences of the terms on which they agreed to borrow substantial sums from Anglo and their failure to repay them. For the reasons earlier outlined in this judgment I have rejected, with one minor and insignificant exception, all of the grounds of appeal advanced by the plaintiffs.

65. It is further regrettable that, outside of the parameters of the proceedings, the plaintiffs have elected to conduct themselves in a manner designed to obstruct and impede Mr. McGreal in his role as receiver such that the High Court judge considered it necessary to grant the receiver the restraining orders sought on his counter claim.

66. For all of the reasons earlier stated I would dismiss the plaintiffs' appeal.