[2019] IEHC 651

THE HIGH COURT

[2018 No. 5913 P.]

BETWEEN

SHANE MCCARTHY

PLAINTIFF

AND

GREGORY (ALSO KNOWN AS GREG) LANGAN, DAVID LANGAN AND BEN GILROY

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 1st day of October, 2019

Introduction

1. This action was commenced by plenary summons issued on 29th June, 2018 by which the plaintiff claimed a number of injunctions restraining Mr. David Langan and Mr. Ben Gilroy from impeding or obstructing the plaintiff in his efforts to sell two properties of which he had been appointed, or purportedly appointed, as receiver. It was not suggested that Mr. Gregory Langan had been party to any of the activity complained of, but he was joined in case he might later be.

2. Having issued his summons, the plaintiff moved immediately for interlocutory relief. Messrs. David Langan and Gilroy contested the validity of the charges over the properties and the validity of Mr. McCarthy's appointment as receiver but acquiesced in the making of interlocutory orders on the basis that the action would be brought swiftly to trial.

3. A statement of claim was delivered on 29th July, 2018; the defence of all three defendants on 15th August, 2018; and a reply on 31st August, 2018. The defence admitted the addresses and descriptions of the first and second defendants and that the defendants had tried to stop the sale of the properties (which was said to have been unlawful) but otherwise traversed.

4. The action was tried on 28th, 29th and 31st May, 2019 in the presence of counsel for the plaintiff and the second and third defendants, personally. The first defendant did not appear and was not represented.

5. On the first day of the trial Mr. Gary McCarthy S.C. (having previously given notice of his intention to do so) applied for an order pursuant to O. 26, r. 1 of the Rules of the Superior Courts giving liberty to the plaintiff to discontinue. The two properties, it was said, had been sold; the action, it was said, was moot; and the plaintiff was willing to pay the defendant's expenses. That application was resisted by the second and third defendants and I refused it on the grounds that the effect of the order sought would have been to dissolve the plaintiff's undertaking as to damages - which had been given as a condition of the making of the interlocutory orders - without a final determination of the issue as to the validity of the plaintiff's appointment. While it was by no means clear to me what loss either the second or third defendants, and especially the third defendant, might have suffered by reason of the making of the interlocutory orders, I was not persuaded that leave to discontinue could safely be granted without a risk of injustice to

them. See *Joint Stock Company Togliattiazot v. Eurotaz Limited* (Unreported, High Court, 3rd May, 2019, Noonan J.) [2019] IEHC 342.

The evidence

6. On 23rd March, 2006 Mr. David Langan borrowed from ACC Bank plc the sum of €671,675 on the terms and conditions set out in a facility letter dated 8th February, 2006 on which Mr. Langan had endorsed his acceptance on 17th February, 2006. The purpose of the loan was to assist in the purchase of residential investment property at "*The Cedars*", Channel Road, Rush, Co. Dublin over which ACC bank plc was to have a first legal mortgage and charge.

7. On 19th October, 2006 Mr. David Langan and Mr. Gregory Langan borrowed from ACC Bank plc the sum of €210,000 on the terms and conditions set out in a facility letter dated 18th September, 2006 on which the Messrs. Langan had endorsed their acceptance on 4th October, 2006. The purpose of that loan was to assist in the purchase of a residential investment property at Dromod, Co. Leitrim, over which ACC Bank plc was to have a first legal mortgage and charge.

8. Each of the loans was expressed to be payable on demand, but until demand might be made, by monthly instalments over 25 years, of interest only in the first five years, and thereafter of combined principal and interest.

9. On 13th April, 2006 Mr. David Langan executed a deed of charge over the Rush property and on 25th October, 2006 the Messrs. Langan executed a charge over the Leitrim property. The charge over the Rush property was duly registered on 17th May, 2006 on Folio 9071, Co. Dublin, and the charge over the Leitrim property was duly registered on 19th November, 2010 on Folio 14490F, Co. Leitrim.

10. The repayment instalments were not made in accordance with the loan agreements. On 24th February, 2014 the balance outstanding on the Rush loan was €743,543.65 and the balance outstanding on the Leitrim loan was €223,966.68. By separate letters dated 24th February, 2014 ACC Bank plc demanded payment of those outstanding balances.

11. The evidence of Mr. Paul Shaw, who had been a credit and commercial senior manager with ACC Bank, who gave evidence in respect of the loan, the security, the default, the balances and the demands was unchallenged.

12. The original facility letters were not produced but there was no objection taken in the course of the evidence to the proof of copies, and no issue was raised as to the fact, acceptance or terms of the loan offers, or of the default, the balances, or the demands.

13. Ms. Karen Pearson, who was employed as a solicitor by ACC, gave evidence that ACC Bank plc re-registered as a private limited company and changed its name to ACC Loan Management Limited ("*ACCLM*") on 27th June, 2014, and was converted to a designated activity company on 23rd August, 2016.

14. Ms. Pearson identified two deeds of appointment of receiver dated 23rd February, 2016 by which Mr. Shane McCarthy was appointed, or purportedly appointed, to be receiver over all of the assets of Mr. David Langan referred to and comprised in the deed of mortgage and charge dated 13th April, 2006 and of all the assets of Greg Langan and David Langan referred to and comprised in the deed of mortgage and charge dated 25th October, 2006.

15. The two deeds of appointment were each sealed with the embossing seal of ACCLM and were signed Josephine Fitzgerald, person authorised to authenticate the seal. Ms. Pearson gave evidence that Ms. Fitzgerald was one of four solicitors on her team in the legal department of ACCLM at the time, and she identified the signature on the deeds as that of Ms. Fitzgerald.

16. Ms. Pearson produced to the court an extract from the articles of association of ACCLM and drew attention in particular to Articles 97 and 98. These provided:-

> *"97. Use of Seal. The Directors shall ensure that the Seal (including any official securities seal kept pursuant to the Acts) shall only be used by the authority of the Directors or of a committee authorised by the Directors.*
>
> *98. Signature of Sealed Instruments. Every instrument to which the Seal shall be affixed shall be signed by two Directors, or by a Director and the Secretary, or by any person appointed by the Directors for the purpose save that as regard any certificates for shares or debentures or other securities of the Company, the Directors may by resolution determine that any such signatures shall be dispensed with, printed thereon or affixed thereto by some method or system of mechanical signature."*

17. Ms. Pearson produced to the court an extract from the minutes of a meeting of the board of directors of ACCLM held on 17th December, 2014 when the board resolved that the seal of the company might be affixed to, *inter alia*, deeds of appointment of receivers by, *inter alios*, a solicitor in the legal department of the company.

18. The evidence of Ms. Pearson was unchallenged.

19. Ms. Tara Glynn, who was head of legal and company secretary of ACCLM at the time, confirmed that the extract from the articles of association was a true copy, and that the extract from the minutes of the board meeting of 17th December, 2014 was a true and accurate copy, and that the copy had been stamped and signed by her.

20. The evidence of Ms. Glynn was not challenged.

21. In cross-examination by Mr. Gilroy, Ms. Glynn confirmed that the resolution of the board had not been registered in the Companies Registration Office. Mr. Gilroy asked Ms. Glynn whether Table A (presumably Table A to the Companies Act, 1963) was optional: which it was.

22. Mr. Gilroy pointed out to Ms. Glynn that on the first page of the extract from the articles of association which had been filed in the Companies Registration Office a printed line "(*adopted by Special Resolution of the Company passed on 27th June, 2014*)" had been struck through or, as Mr. Gilroy put it, "*scribbled out*". Mr. Gilroy asked whether this indicated that the articles of association, although filed in the Companies Registration Office might not have been adopted by the company. Ms. Glynn confirmed that this was not so.

23. Mr. Shane McCarthy gave evidence that he is a partner in KPMG. He identified his signatures on the deeds of appointment.

24. Mr. McCarthy gave evidence of two attempts to sell the Rush property, the first in September, 2017 and the second in April, 2018. On the first occasion the property was withdrawn because of "*legal threats*" and on the second because of a threat made in an e-mail of 27th April, 2018 that there would be a protest at a planned auction of a number of properties unless the Messrs. Langan's property was withdrawn. The e-mail of 27th April, 2018 was sent by Mr. Gilroy, with the authority of Mr. David Langan, to Mr. McCarthy's solicitors.

25. Mr. McCarthy gave evidence that the Rush property was derelict at the time of his appointment and that in about June, 2018 had been partially demolished by a digger.

26. Mr. McCarthy gave evidence that following a transfer of the loans and security by ACCLM to Coöperatieve Rabobank U.A., his appointment was novated by deed dated 17th December, 2018 and that a sale of the Rush property was completed in March or April, 2019. That sale was said to have been effected by the mortgagee as mortgagee in possession.

27. As to the Leitrim property, Mr. McCarthy gave evidence that the locks were changed four times. He said that contractors he appointed to secure the property *"would have been intimidated*" and that he withdrew them. Mr. McCarthy said that a sale agreed in 2017 had been lost but that a sale agreed in 2019 had been completed in the week before the trial of the action, which was at the end of May, 2019. Again, the sale of the Leitrim property was said to have been made by Coöperatieve Rabobank U.A., as mortgagee in possession, to overreach a number of judgment mortgages which had been registered on the folio.

28. The evidence of Mr. McCarthy was unchallenged.

29. While Mr. McCarthy gave evidence that various attempts to sell the properties had been frustrated, he did not offer any evidence of loss. While there was evidence that the Rush property had been partially demolished and that there had been some interference with the Leitrim property, he did not clearly identify any of the defendants as having been responsible for the damage. Nor did he offer evidence that the prices ultimately realised were any less than he could have achieved if he had managed to sell the properties when he first attempted to.

30. Mr. Gilroy tried to get Mr. McCarthy to accept that he had been appointed as receiver only, and not as a receiver and manager. Unsurprisingly, Mr. McCarthy would not agree: and in any event the effectiveness of the deeds of appointment is an issue of law.

31. Mr. McCarthy agreed with Mr. Gilroy that the deeds of appointment did not have a schedule of properties. He also agreed that the deeds of charge did not appear to have been executed by ACC Bank plc.

32. Mr. Langan and Mr. Gilroy each declined to call evidence or to give evidence.

33. I am satisfied by the evidence of Ms. Tara Glynn that the directors of ACCLM were authorised by the articles of association to appoint any of the solicitors in the legal department of the company to witness the affixing of the seal to an instrument appointing a receiver: and that they did so.

34. I am satisfied by the evidence of Ms. Pearson that Ms. Josephine Fitzgerald was on 23rd February, 2016 a solicitor in the legal department of ACCLM, and that the signatures on the deeds of appointment are hers. Ms. Fitzgerald was not a person authorised to bind the company generally, and in any event, there was no need to register the resolution of the board passed on 17th December, 2014 in Companies Registration Office.

The issue

35. Written submissions were filed on both sides after the evidence had concluded.

36. It was submitted on behalf of the plaintiff that the only issue remaining between the parties was "*whether the plaintiff was validly appointed as receiver over the properties and exercised an unlawful power of sale*." The evidence, it was argued, clearly established that the properties had been sold by the mortgagee, so that there was no requirement to consider whether the plaintiff was validly appointed or exercised a power of sale as he did not sell the properties.

37. The second and third defendants, more or less following the plaintiff's analysis, submitted that the only issues remaining were whether the plaintiff had been validly appointed as receiver and, even if he had been validly appointed, "*did he exercise an unlawful transfer or power of sale over the property."*

38. It seems to me that the only issue on the pleadings is as to the validity of the plaintiff's appointments as receiver. The practical effect of the interlocutory orders was to put the first and second defendants out of possession, and the issue to be determined following the trial is whether the plaintiff was validly appointed. If he was not, an issue might then arise as to what, if any, loss was suffered by the defendants by reason of the making of the interlocutory orders. For the reasons I gave when refusing the plaintiff's application for leave to discontinue, the fact that the properties may later have been sold does not mean that the issue of the validity of the plaintiff's appointment is moot.

39. The second issue identified by the parties is directed to the validity and effectiveness of the sale of the loans by ACCLM to Coöperatieve Rabobank UA; the novation of the

plaintiff's appointment as receiver; and the sale of the properties by Coöperatieve Rabobank U.A. as mortgagee in possession. The suggestion was that Coöperatieve Rabobank U.A. could not validly have sold the properties without a deed of transfer from the plaintiff.

40. The sale of the loans by ACCLM, the novation of the plaintiff's appointment, and the sales of the properties all occurred after the pleadings had closed. Pleadings apart, even if there was any substance to them, the court could not possibly entertain arguments as to the validity of the sales without notice to the parties to those transactions.

41. It does rather appear that the interlocutory orders may have facilitated a sale by the mortgagee which might not otherwise have taken place, but it seems to me that any legitimate complaint about the sale must depend on the issue as to whether the interlocutory orders ought not to have been made.

The relevant documents

42. The deeds of charge are in standard printed form. They each provide:-

"*APPOINTMENT AND POWERS OF RECEIVER*

9.1 At any time after the security hereby constituted has become enforceable or at any time after the Borrower so requests the Bank may from time to time appoint under seal or under hand of a duly authorised officer or employee of the Bank any person to be receiver and manager or receivers and managers (herein called 'Receiver' which expression shall where the context so admits include the plural and any substituted receiver and manager or receivers and managers) of the Secured Assets or any part or parts thereof and from time to time under seal or under hand of a duly authorised officer or employee of the Bank remove any Receiver so appointed and may so appoint another or others in his stead. If the Bank appoints more than one person as Receiver of any of the Secured Assets, each such person shall be entitled (unless the contrary shall be stated in the appointment) to exercise all the powers and discretions hereby or by statute conferred on Receivers individually and to the exclusion of the other or others of them.

9.2 The foregoing powers of appointment of a Receiver shall be in addition to and not be to the prejudice of all statutory or other powers of the Bank under the Conveyancing Acts 1881 to 1911 (and so that any statutory power of sale shall be exercisable without the restrictions contained in Section 20 of the Conveyancing Act, 1881) or otherwise and so that such powers shall be and remain exercisable by the Bank in respect of any part of the Secured Assets notwithstanding the appointment of a Receiver thereover or over any other part of the Secured Assets.

9.3 A Receiver so appointed shall at all times and for all purposes be the agent of the Borrower and the Borrower shall be solely responsible for his acts, default and remuneration.

9.4 A Receiver so appointed shall have and be entitled to exercise all powers conferred by the Conveyancing Acts, 1881 to 1911 in the same way as if the Receiver had

been duly appointed thereunder and shall furthermore, but without limiting any powers herein before referred to, have power to do the following things either in his known name or in the name of the Borrower: -

9.4.1 Take possession:

To take immediate possession of, get in and collect the Secured Assets or any part thereof;

9.4.2 Deal with Secured Assets:

To sell, transfer, assign etc. etc. and otherwise dispose of or realise the Secured Assets etc. etc."

43. The deeds of appointment of Receiver were mutatis mutandis in identical terms.

"*DEED* OF APPOINTMENT OF RECEIVER

In pursuance of the powers contained in a Deed of Mortgage/Charge dated 13th April, 2006 ("the 'Security Document') between (1) David Langan (the 'Chargor') and (2) ACC Bank plc (company number 7652, now known as ACC Loan Management Limited and hereinafter referred to as 'ACCLM'), we, ACCLM, having our registered office at Charlemont Place, Dublin 2 do hereby appoint Shane McCarthy, of KPMG, having its registered office at 1 Stokes Place, Dublin 2, (the "Receiver") to be receiver of all the assets of the Chargor referred to and comprised in and charged by the Security Document and the Receiver shall have and be entitled to exercise the powers conferred upon him by the Security Document and by law."

44. The deeds of appointment were dated and timed and executed under seal on behalf of ACCLM, and signed and delivered as a deed by Mr. McCarthy.

45. Each of the deeds of charge dealt at clause 12 with the position of the Bank as mortgagee/chargee in possession. Clause 12.2 provided: -

"12.2 All or any of the powers, authorities and discretions which are conferred by this Mortgage/Charge (either expressly or impliedly) upon any Receiver will be exercised after the security hereby created has become enforceable by the Bank in relation to the whole of the Secured Assets or any part thereof without first appointing a Receiver of the Secured Assets or any part thereof or notwithstanding the appointment of a Receiver of the Secured Assets or any part thereof."

The authorities

46. Both sides rely on the decision of Gilligan J. in *The Merrow Limited v. Bank of Scotland* (Unreported, High Court, Gilligan J., 22nd March, 2013) [2013] IEHC 130 ("*The Merrow*") where a purported appointment of a receiver which was not done under seal, as required by the terms of the debenture, was held to be invalid.

47. Both sides also rely on the decision of Cregan J. in *McCleary v. McPhilips* (Unreported, High Court, Cregan J., 31st July, 2015) [2015] IEHC 591 in which, again, the central issue was whether the plaintiff had been validly appointed as receiver under a deed of mortgage and charge. Cregan J. distilled from the decision of Gilligan J. in *The Merrow* eight principles of law.

> *"1. Tthe receiver's authority to act is derived from the contracts, or mortgages, or deeds of charge, entered into between the Bank and the borrower.*
>
> *2. The receiver is to be appointed according to the terms of the contract between the parties.*
>
> *3. Because a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument.*
>
> *4. The consequences of non-compliance with the formalities for the appointment of a receiver, in accordance with the terms of the instrument, is that the appointment is void.*
>
> *5. If the instrument provides that the appointment is required to be by deed, or under seal, that formality must be observed.*
>
> *6. If the instrument requires that the appointment is to be made in writing under hand, that formality must also be observed.*
>
> *7. An invalidly appointed receiver may be a trespasser on company property.*
>
> *8. Considerations of basic fairness and contractual interpretation mean that the Bank should be obliged to comply with the terms it chooses to impose in the instrument involved."*

48. In *McCleary v. McPhillips* Cregan J. held to be invalid a purported appointment under the seal of the bank, where the debenture required writing under hand.

49. Both sides point to the decision of McDonald J. in *McCarthy v. Moroney* (Unreported, High Court, McDonald J., 29th June, 2018) [2018] IEHC 379. This, say the defendants, is highly supportive of their argument. The plaintiff on the other hand, urges that it is distinguishable, that it was a decision on an interlocutory motion, and that it was wrong.

50. In *McCarthy v. Moroney* McDonald J. gave a long judgment on six applications in two sets of proceedings (one by a receiver against the borrowers, and the other by one of the borrowers against the Property Registration Authority, the lender, and the receiver) the first of which was an application by the receiver for interlocutory injunctions restraining the borrowers from impeding or preventing him from taking possession of the secured property. The relevant part of the judgment commences at para. 120.

51. The lender in *Moroney v. McCarthy* was Bank of Scotland Ireland Limited and the terms of the charge in that case were substantially the same as those of the ACC Bank plc form. Specifically, the charge there, as here, created a power, in the event of default, to appoint "*any person or persons to be receiver and manager or receivers and managers (herein called 'Receiver') which expression shall where the context so admits include plural and any substituted receiver and manager or receivers and managers of the Secured Assets".*

52. The borrower in that case, as in this, relied strongly on the decision of Gilligan J. in *The Merrow* in which the court, by reference to a number of authorities, had stressed the importance of observing any formalities in the debenture or deed of mortgage in connection with the appointment of a receiver. The authorities referred to by Gilligan J. in *The Merrow* included *Wrights Hardware v. Evans* (1988) 13 A.C.L.R. 631, to which I shall come, and the decision of the Supreme Court for the Northern District of New Zealand in a case of *R. Jaffe Ltd. (in liquidation) v. Jaffe (No. 2)* [1932] N.Z.L.R. 195. *R. Jaffe Ltd*. was a case in which a debenture holder had purportedly appointed a receiver without observing a requirement for writing. Smith J. said: -

> *"The importance of the strict observance of these requirements is shown, I think, by other considerations. A receiver is not an officer of the Court, but, if he is duly appointed, his title is superior to that of a person interfering with the assets under his control and the Court will then grant an injunction. Palmer (13th edn., part III, page 146). If a receiver were unable to prove his title according to the terms of his contract, then I doubt whether he would be entitled to an injunction. Furthermore, while the company is a going concern, a receiver, if the conditions of the debenture so provide, may be the agent of the company and the company will then be responsible for his contracts. This is particularly important if the debenture holder has power to appoint not merely a receiver but a receiver and manager. Under such circumstances, the company must be entitled to insist, I think, upon the fulfilment of the terms of appointment as a condition of its liability."*

53. The judgment of McDonald J. in *Moroney v. McCarthy* shows that he was not referred to any authorities on that issue other than the judgment of Gilligan J. in *The Merrow*. McDonald J. was independently aware of the decision of Cregan J. in *McCleary v. McPhillips* and he set out the summary of the applicable principles which I have previously set out.

54. The first thing to be said of the decision in *Moroney v. McCarthy* is that McDonald J. did not decide the point. Rather, applying the *Maha Lingam* test on an application for orders in the nature of mandatory relief, McDonald J. said that he was not convinced by the arguments made on behalf of the plaintiff that he had made out a sufficiently strong case that that he had validly appointed. While observing that Mr. McCarthy might have an uphill struggle at trial, McDonald J. emphasised that he was doing the best he could with such arguments as had been made and such authorities to which he had been referred and (at para. 170) made it very clear that Mr. McCarthy might ultimately succeed at trial.

55. At para. 165 of his judgment, McDonald J. set out the three arguments made on behalf of the receiver. These were: -

(a) that nothing of legal significance turns on any of the labels used, which were just a "*drafting technique",*

(b) that one must look at what the deed of appointment actually does, in particular, the appointment to take possession of the property and to exercise all of the powers of a receiver given by the mortgages, by statute, or otherwise, and

(c) that *McCarthy v. Moroney* was not "*an industrial case*" so that - so the argument went - it was not immediately obvious what might turn on Mr. McCarthy being a "*manager*".

56. McDonald J. was at pains to say that he was not saying that there was no substance to those arguments, merely that he had not been persuaded that Mr. McCarthy had a strong and clear case.

57. It seems to me that since *McCarthy v. Moroney* did not decide the substantive point, there can be no question of any need to distinguish it, still less of the decision having been wrong.

58. Mr. McCarthy S.C. now argues that all of the case law relied on by McDonald J. related to flaws in procedural requirements, whereas, he says, the issue in this case *"was simply a terminological flaw".* This, with respect, appears to me to be a restatement of the "*drafting technique*" argument which failed to convince McDonald J. I am bound to say that I find the restated or recast "*terminological flaw*" argument no more immediately attractive than McDonald J. did.

59. The legal principles laid down by Cregan J. in *McCleary v. McPhillips* and Gilligan J. in the *Merrow* are clear. While it is true that those cases concerned a failure to comply with procedural requirements, I see nothing in them to suggest that the principles are confined to cases of procedural failure. Mr. McCarthy's object in seeking to distinguish these cases appears be to have the court apply a different, presumably a less exacting, test to a case of "*terminological flaw*", but he does not suggest what that other or less exacting test might be. If the importance of strict observance of the requirements of the deed of mortgage is, and it is, to enable a receiver to clearly prove his title and the extent of his powers according to the terms of the contract, the substance of the deed of appointment can be no less important than the form.

60. It seems to me that the issue as to whether the deeds of appointment in this case were a valid exercise of the power conferred by clause 9 of the deeds of charge is an issue of substance and not of drafting, and that in principle, as well as on the authorities, the borrower is entitled to insist on strict compliance with the terms of the power.

61. One of the cases referred to by Gilligan J. in *The Merrow* was a decision of the Supreme Court of Western Australia in *Wrights Hardware v. Evans* (1988) 13 A.C.L.R. 631. That

was a case in which Franklyn J. found the purported appointment of receivers and managers to have been invalid. It is now said to have been a "*procedural*" case in which the flaw was "*the appointment of more receivers than was permissible*". I do not think that it is an accurate characterisation. In *Wrights Hardware* the deed of charge allowed the appointment of a receiver, or receiver and manager, and the appointment of additional receivers, or receivers and managers. Franklyn J. construed the deed as authorising the appointment of joint receivers and managers but not, as the lender had purportedly done, joint and several receivers and managers. In my view, *Wrights Hardware* was a case of substantive rather than procedural flaw. The purported appointment was invalid because the deed of charge did not permit the lender to do what it had purported to do, rather than by reason of any procedural omission in the exercise of a power.

62. Both sides rely on the explanation by Sir George Jessel M.R. in *Re Manchester and Milford Rly Co.* (1880) 14 Ch D 645 of the difference between the functions of a receiver and a manager, which was reproduced in the introductory chapter of the second edition of *Picarda The Law Relating to Receivers, Managers and Administrators* as the classic definition of the terms. The Master of the Rolls is reported, at p. 653, as having said:-

> *"A 'receiver' is a term which was well known in the Court of Chancery, as meaning a person who receives rents and other income paying ascertained outgoings, but who does not, if I may say so, manage the property in the sense of buying or selling or anything of that kind. We were most familiar with the distinction in the case of a partnership. If a receiver was appointed of partnership assets, the trade stopped immediately. He collected all the debts, sold the stock-in trade and other assets, and then under the order of the Court the debts of the concern were liquidated, and the balance divided. If it was desired to continue the trade at all, it was necessary to appoint a manager, or a receiver and manager as it was generally called. He could buy and sell and carry on the trade."*

63. *Picarda*, having quoted the passage from *Re Manchester and Milford Rly Co*, continued:-

> *"Despite the careful distinction drawn by Sir George Jessel M.R. between a receiver and a receiver and manager, it has become common place to refer to the latter as a receiver simpliciter. A debenture holder's 'receiver' is almost invariably a receiver and manager. Moreover, this legal shorthand is reflected in the section in the Supreme Court Act, 1981 dealing with the court's jurisdiction to appoint a receiver: there is no specific reference to the power to appoint a manager. ….*
>
> *A similar blurring of terminology occurs in the case of extra-curial or privately appointed receivers. It has always been the case that a statutory receiver, that is, one appointed under what is now the Law of Property Act 1925, has power only to receive income. Such a receiver is a receiver pure and simple, and in no way a manager. But debentures usually contain a power for the receiver to carry on business. A receiver so empowered is usually termed a receiver although he is in effect a 'receiver and manager'. Sometimes, of course, he is specifically constituted*

as a receiver and manager. If the debenture provides that a receiver and manager may be appointed, the debenture holder may not appoint a non-managing receiver. Conversely, where the debenture authorises the appointment of a receiver it is not open to the lender to appoint a receiver and manager, unless of course the debenture clearly authorises him to carry on the business of the company."

64. In the footnotes to this passage, reference is made to the fact that the relevant title in Halsbury is "*Receivers*" and to the "*telescoping*" of the term in the standard text books, including *Kerr on Receivers* and *Snell's Principles of Equity*. I think that it is fair to say that the blurring of terminology identified in *Picarda* goes back to at least 1880 when Sir George Jessel M.R., to explain the distinction, had to recall a time in which it was well known and understood.

65. As Mr. McCarthy correctly points out, the power in s. 28(8) of the Supreme Court of Judicature Act (Ireland), 1877 to appoint a "*receiver*" extends to the appointment of a manager.

66. The issue, or at least the arguability of the issue, now before the court was recently considered by the Supreme Court in a decision in *Charleton v. Scriven* (Unreported, Supreme Court, 8th May, 2019) [2019] IESC 28.

67. That was an appeal from a decision of Keane J. who had granted an injunction against a borrower in favour of receivers. The provision of the mortgage deeds was identical to this case. The deed of appointment was a little different, in form at least. It provided that:-

"'In pursuance of the powers contained in a Mortgage and Charge … made between Gerard Scriven and Bank of Scotland (Ireland) Limited, Bank of Scotland plc does HEREBY APPOINT LUKE CHARLETON AND MICHAEL COTTER of EY, EY Building, Harcourt Centre, Harcourt Street, Dublin 2 to be the RECEIVERS of the whole of the property and assets referred to, comprised in, mortgaged and charged by the Mortgage including the property described in the Schedule hereto, to enter upon and take possession of the same and in the manner specified in the Mortgage and such receivers shall have and be entitled to exercise the powers conferred on them by the Mortgage and by the law."

68. Clarke C.J. (with whom O'Donnell and O'Malley JJ. agreed) considered the decision of McDonald J. in *McCarthy v. Moroney*. The court noted the observation of McDonald J. that the receiver in the proceedings before him would "*have an uphill struggle in persuading the court at trial that he had been validly appointed*" but immediately went on to observe that McDonald J. appeared to have been concerned that that issue had not been argued as thoroughly as he might have liked. At para. 6.7 Clarke C.J. said:-

"However, it seems to me that, in seeking to assess the strength of the Receivers' case with the benefit of full argument in these proceedings, it is important to have regard to the fact that the mortgage deeds themselves defined the persons who

were to be appointed as 'receivers and managers' as the 'receivers'. It is true that that definition was stated to be for the purposes of the mortgage deeds themselves. But it is at least arguable that the use of the term 'receiver' in documents which are contemplated by the mortgage deeds themselves (being the documents whereby the Receivers were appointed) would carry that same definition. In other words, it is arguable that the appointment of the Receivers in the form in which it occurred in this case was, as a matter of construction of the documents concerned, an appointment as both receivers and managers, having regard to the way in which the term 'receiver' was defined in the mortgage deeds themselves."

69. The decision in *Charleton v. Scriven* is quite nuanced. On the one hand the court acknowledged that it had had the benefit of full argument, and it appeared to identify an important argument which had not been made, or at least developed, in *McCarthy v. Moroney.* On the other hand, it was said that because the arguments concerning the validity of the appointment of the receivers were sufficiently complex, it would be difficult to suggest that a sufficiently strong case had been made out to justify the granting of mandatory relief. Because, on the facts, the court was able to isolate those aspects of the interlocutory reliefs which concerned the entitlement to receive the rents, which it thought were necessary, from the right to sell the property *pendente lite*, which it thought was not, the court did not need to go further than to find that there was a fair case to be tried.

The arguments

70. The substantial issue in this case is whether the appointment by the plaintiff as "*Receiver*" was a valid exercise by ACCLM of the power in clause 9 of the deeds of charge to appoint a "*receiver and manager or receivers and managers*". The defendant's argument, pithily put, is that the failure to use the words "and manager" is fatal.

71. The second and third defendants argue that the plaintiff was not properly appointed as receiver and manager pursuant to the alleged deeds of appointment; nor was the appointment in strict compliance with the deeds of mortgage; nor was the alleged authorised signature to the affixing of the seal of ACCLM to the deeds of appointment registered in the Companies Registration Office; nor was there any property identified in any schedule to the deeds of appointment.

72. It is irrelevant that the deeds of charge were not executed by ACC Bank plc. It is uncontested that they were executed by the borrowers.

73. As I have said, I am satisfied that the seal of ACCLM was affixed to the deeds of appointment by Ms. Josephine Fitzgerald, who was a solicitor employed by the company, and who had been duly authorised by a resolution of the board to do so.

74. Each of the deeds of appointment refers by date and the parties to the deed of charge relied on in support of the appointment. The secured properties are not described in a schedule (or elsewhere) in the deeds of appointment but they are in the deeds of charge,

and the appointments are expressly made over "*the assets of the Chargor referred to and comprised in and charged by"* the deeds of charge. The appointments are not invalid by reason of the absence in them of a description of the properties.

The effect of the deeds of appointment

75. There is a clear distinction in law between a receiver, strictly so called, and a manager, strictly so called. It is well established that a power to appoint a receiver and manager cannot be used to appoint a receiver who is not a manager, and vice versa. The decision of the Supreme Court of New South Wales in *Harold Meggitt Ltd. v. Discount and Finance Ltd.* (1938) WN (N.S.W.) 56 relied upon by *Picarda* as authority for that proposition was cited by Franklyn J. in Wrights Hardware.

76. The description of an appointee as "*receiver*" or "*receiver and manager*" is not something that can be dismissed as mere nomenclature, or terminology, or drafting technique, or labelling. The difference is substantial.

77. For the reasons already given, I believe that the test to be applied in determining an issue as to whether an appointment or purported appointment made mortgagee or debenture holder comes within the power conferred by the deed is no different to, and no less exacting than, the test to be applied in assessing whether there has been compliance with any procedure or formality prescribed for the exercise of a power.

78. In my view the correct approach to the deeds of appointment in this case is to construe the documents as a whole, rather than to focus on the use or omission of any particular word or words. That is not, of course, to say that the use or omission of any word or words is to be overlooked or ignored, or, that the meaning of the words used to be strained by reference to other language in the deed.

79. It seems to me that the correct approach to a contested deed of appointment is to examine what it does. That was the second of the three arguments made in *Moroney v. McCarthy* and was identified by McDonald J. as by far the most important argument. But in that case, it was sandwiched between the "*mere labelling*" argument and the argument that it was not "*an industrial case*". In this case, there was the further potential distraction of the argument that the requirement for compliance with the requirements of the deed of charge was limited to procedural compliance.

80. In this case, as in *McCarthy v. Moroney*, there is no power given to a "*receiver*", strictly so called. That is unsurprising because the deeds do not contemplate the appointment, or create a power to appoint, a receiver who is not also a manager. I respectfully agree with the view expressed by McDonald J. that the natural meaning of clause 9.1 is that the appointee must be appointed as a receiver and manager, and that it is only someone so appointed who will have the powers conferred by clause 9.4.

81. Where I respectfully diverge from the view taken by my colleague is in his provisional view that the language used in the deed of appointment simply purports to appoint him only as "*receiver*", strictly so called. On the face of it, I fully agree, there is nothing in

the language of clause 9 of the mortgage which suggests that the mortgagee is entitled to appoint anything other than a receiver and manager, but I am persuaded to focus more on the deeds of appointment than the deeds of charge.

82. The power invoked by the deeds of appointment is the power conferred by the relevant deed of charge. That is a power to appoint a receiver and manager, and does not permit the appointment of a mere receiver. The deed of appointment refers to the appointee as "*the 'Receiver'*", which is the description applied by the deed of charge to a receiver and manager. The deed of appointment confers on the appointee, or confirms that the appointee is to have and to be entitled to exercise, the powers conferred by the security document and by law. While the deed of appointment does not expressly say that the appointee is to be invested with all of the powers conferred by the deed of charge and by law, I can see no warrant for limiting them to those of a statutory receiver. If the appointee is invested with all of the powers conferred by the deed of charge, he has power to manage as well as to receive income and so he is a receiver and manager.

83. Mr. McCarthy points to a number of differences between the deeds of appointment in this case and that in *McCarthy v. Moroney*. The deed of appointment in Moroney invoked, besides the power in the deed of mortgage, "*all other powers conferred upon it by statute or otherwise."* The deed of appointment in *Moroney* referred to the appointee as "*the Receiver*" (definite article, capital "*R"*) but the powers conferred on him were "*all the powers of a receiver*" (indefinite article, lower case "*r*"), which it is suggested is different to the powers conferred in this case on "the Receiver" (definite article, capital "*R*"). For the reasons given, I do not believe that it is necessary to distinguish *McCarthy v. Moroney*, but I am not immediately convinced of the materiality of the differences which have been identified. On my analysis, if there is no power to appoint anything other than a receiver and manager and the appointee is to have the powers conferred by the security document and by law, it is difficult to see how the use of the indefinite article could make any difference. Since the deed of charge and the deed of appointment both refer to the appointment of a "*RECEIVER*" (all capital letters, bold type), it is difficult to see how the validity of the appointment could turn on the use of a capital or lower case "*r*".

84. Against the possibility that the court might not accept the argument as to the construction of the deed of appointment, an alternative argument was made that the appointment of the plaintiff in this case ought to be viewed at the very least, as a valid appointment of a statutory receiver pursuant to the Conveyancing Acts, 1881 to 1911, in which case, it is said, the plaintiff would in any event have been entitled to possession against the defendants. That argument was made in *McCarthy v. Moroney* to McDonald J., who was not convinced. In the first place, he said, the mortgagee had not invoked the Conveyancing Acts. Secondly, he said, there was no express statutory power given to a receiver under the Conveyancing Acts to take possession. In this case, Mr. McCarthy seeks to engage with McDonald J.'s second reason, arguing that his analysis of the judgment of Laffoy J. in *Kavanagh v. Lynch* (Unreported, High Court, Laffoy J., 31st August, 2011) [2011] IEHC 348 was overly restrictive, but he does not engage with the first reason. The case pleaded by the plaintiff is fairly and squarely and exclusively

based on the validity of the plaintiff's appointment pursuant to the power in the deeds of charge. As in *McCarthy v. Moroney*, the deeds of charge in this case do not invoke or purport to exercise any statutory power. The basis upon which the interlocutory orders were sought and obtained in this case was that the plaintiff had been validly appointed under the deeds, and not under the Conveyancing Acts. If it had come to it, I would have rejected the alternative argument.

85. In the further alternative, reliance was placed on clause 13 of the deeds of mortgage by which the borrower appointed the bank, and separately the receiver, to be his or their attorney, to execute all such deeds and documents and to do all such acts and things as might be required for the full exercise of any of the powers conferred by the deed or which might be deemed expedient by any receiver or by the bank, in connection with any sale, disposition, realisation or getting in of the secured assets. It was said to be noteworthy that the clause referred to "*any*" receiver, and not simply a receiver appointed pursuant to clause 9. It my firm view, the reference in clause 13 to any receiver can only have been to a receiver who was validly appointed. In any event, the argument was not developed, and I do not understand what it is the bank or the plaintiff are supposed to have executed or to have done which might have validated an otherwise invalid appointment, or justified the granting of interlocutory orders which the court might otherwise have found should not have been granted.

Summary and conclusions

86. The only substantive issue in this case is the validity of the appointment of the plaintiff as receiver of the first defendant's property at Rush, Co. Dublin, and the first and second defendants' property at Dromod, Co. Leitrim.

87. While evidence was given of a sale of the first and second defendants' loans and the security held for them; the novation of the plaintiff's appointment by the purchaser of the loans and security; and the sale by that purchaser of the properties, there was no issue before the court as to the validity of those transactions.

88. The evidence established that the deeds of appointment of the plaintiff were validly executed under seal, as was required by the deeds of charge. The seal of the bank was affixed by a solicitor employed by the bank, who had been duly authorised in that behalf by a resolution of the board, passed in accordance with the articles of association. It was not necessary that the solicitor who had affixed the seal should have given evidence.

89. The evidence tendered on behalf of the plaintiff as to the issuing and acceptance of the facility letters, the advance of the loans, the execution of the charges over the properties, the default in payment, the demands for payment, and the non-payment was not contested. No point was taken at the time as to the production of copies, rather than the originals of, the facility letters and there was no suggestion that the copies put into evidence were not true copies.

90. For the reasons given, I have come to the conclusion that the appointment of the plaintiff was valid. Although he is described in the deeds of appointment as "*Receiver*", he was

appointed by the valid exercise of a power to appoint a receiver and manager and was invested with the powers of a receiver and manager. The crucial question is not how he is described, but what he was. The omission from the deeds of appointment of the words "*and manager*" was not fatal.

91. There being no evidence of loss and the plaintiff having no further interest in the properties, I will hear the parties as to what orders ought to be made.