

THE HIGH COURT

[2014 No. 5323 P]

BETWEEN

KIERAN WALLACE AND MARK ETHERINGTON

PLAINTIFFS

AND

FRANCIS DAVEY

DEFENDANT

JUDGMENT of Ms. Justice Murphy delivered on the 16th day of May, 2017.

1. The plaintiffs are receivers, initially appointed by Ulster Bank Ireland Limited and now acting on behalf of Promontoria (Aran) Limited in respect of certain properties mortgaged to Ulster Bank Ireland Limited and subsequently transferred to Promontoria (Aran) Limited.

2. The defendant has resisted the receivers since the time of their appointment on 17th September, 2013. At first he claimed that because he had proceedings extant against Ulster Bank Ireland Limited, that acted as a bar to the receivers. In these proceedings, the defendant has resisted the actions of the receivers on the grounds that a deficiency in a facility letter dated 28th May, 2007 invalidates their appointment and/or on the grounds that the transfer of the ownership of the security and loans by Ulster Bank Ireland Limited to Promontoria (Aran) Limited in the course of the proceedings was not properly exercised such as to preserve the rights of the receivers to act.

3. The plaintiffs claim various reliefs restraining the defendant from impeding the receivership and mandatory orders directing him to comply with requests of the receivers.

Background

4. The defendant, Mr. Davey was at all material times, a client of Ulster Bank Ireland Limited. The plaintiffs in the action are receivers, appointed by Ulster Bank Ireland on 17th September, 2013 on foot of mortgages entered into by the defendant with Ulster Bank Ireland Limited. The secured properties in issue are as follows:-

- (1) **335 Blackhorse Avenue** - date of mortgage: 30th January, 2008 (mortgage registered on 1st February, 2008)

"ALL THAT AND THOSE the premises and hereditaments known as 335 Blackhorse Avenue, Dublin 7 being the property more particularly described in Folio DN33169F of the Register of Freeholders County Dublin"

- (2) **Apartment 45, The Steeples** - date of mortgage: 15th January, 2008 (registered on 12th May, 2008)

"ALL THAT AND THOSE the premises and hereditaments known as Apartment 45 The Steeples, Dublin Road, Navan, Co. Meath together with car parking space number 45 The Steeples, Dublin Road, Navan, Co Meath more particularly described in Folio 47833F of the Register of Freeholders County Meath"

- (3) **Units 1-7 The Mall** - date of mortgage: 30th January, 2008

"ALL THAT AND THOSE the hereditaments and premises situate in the town of Kilcock, Barony of Ikeathy and Oughterany and County of Kildare being premises more particularly described and outlined in red on the Map annexed to the Deed of Conveyance and Assignment dated the 21st November, 1985, and made between Anne Doherty as Administratrix of the Estate of William Anthony Hegarty deceased of the First Part and David Cox as Administrator of Estate of Louis Ryan Hannan deceased, Catheryn F. Hughes deceased, Edward G. Gleeson, James Ryan and Richard Ryan as Executors in the Estate of James R. Ryan deceased of the second part and the Borrower of the third part"

- (4) **The Canal Turn Pub ("Davey's Pub")** - date of mortgage: 13th May, 2004 (registered 26th August, 2004)

"ALL THAT AND THOSE the licensed premises known as The Canal Turn, Bridge Street, Kilcock, County Kildare, being the property described in 19540F of the Register of Freeholders, County Kildare"

- (5) **Niles House** - date of mortgage: 29th January, 2007

"ALL THAT AND THOSE the piece or plot of ground with the premises and out offices thereon situate at Bridge Street in the Town of Kilcock, Parish of Kilcock, Barony of Ikeathy and Oughterany and County of Kildare held in fee simple"

- (6) **Frasier House** - date of mortgage: 16th October, 2007 (registered on 21st July, 2008)

"ALL THAT AND THOSE the hereditaments and premises situate at Bridge Street in the town of Kilcock, Barony of Ikeathy and Oughterany and County of Kildare, shown outlined in red on the map attached to Indenture of Conveyance made 13 July 2001 and made between David Cox, James Ryan and Richard Ryan of the one part and the Borrower of the other part held in fee simple, being the premises now comprised in Folio 59542F of the Register of Freeholders County Kildare"

5. As already stated, the defendant has resisted the actions of the receivers on the grounds that a deficiency in a facility letter dated 28th May, 2007 invalidates their appointment and/or on the grounds that the transfer of the ownership of the security and loans by Ulster Bank Ireland Limited to Promontoria (Aran) Limited in the course of the proceedings was not properly exercised such as to preserve the rights of the receivers to act.

6. Mr. Davey, whose main business appears to be auctioneering, obtained facilities from Ulster Bank Ireland Limited between 2002 and 2009.

7. By 26th March, 2013, €5,149,481.45 was due and owing under a facility letter of 6th August, 2009. Ulster Bank Ireland Limited issued letters of demand on 26th March, 2013 and 2nd May, 2013.

8. Mr. Davey's immediate response to the letters of demand was to issue proceedings against Ulster Bank Group Ireland Limited on 13th May, 2013 (2013/4745P) in which he claimed damages for breach of contract; damages for failure to allow him exercise his right of redemption; damages for libel and slander; damages for breach of trust; and damages for nervous shock. Those proceedings were ultimately served on Ulster Bank Ireland Limited in October, 2013.

9. On 17th September, 2013, Ulster Bank Ireland Limited appointed the plaintiffs as receivers over each of the secured properties by deeds of appointment. The receivers accepted each of the appointments on 23rd September, 2013. In these proceedings, the defendant has taken no issue with the deeds of appointment or the execution thereof but contends that the appointment is otherwise invalid.

10. Between 24th September, 2013 and 11th November, 2013, the receivers sent letters to the tenants of the mortgaged properties informing them of the receivership.

11. Immediately upon his appointment on 23rd September, 2013, Mr. Etherington attempted to contact Mr. Davey by telephone and by letter of the same date he informed Mr. Davey of his appointment along with Kieran Wallace as joint receivers over the six secured properties and enclosing copies of the deeds of appointment. On 24th September, 2013, Mr. Etherington travelled to Kilcock, Co. Kildare to attend at the Canal Turn Pub/Davey's Pub and again attempted to contact Mr. Davey without success. By email dated 26th September, 2013, Mr. Etherington wrote to Mr. Davey advising of his acceptance of his appointment as joint receiver on 23rd September, 2013 and informing Mr. Davey that he had written to the tenants advising them of his appointment. He sought a meeting with Mr. Davey.

12. On 26th September, 2013, Mr. Davey responded by email asking Mr. Etherington under what legal authority he had a right to interfere with his property. He stated that he would be opposing any such interference.

13. On 27th September, 2013, AMOSS solicitors, on behalf of the receivers, replied to Mr. Davey's email. They indicated that they were satisfied that the deeds of appointment dated 17th September, 2013 and accepted by their clients on 23rd September, 2013 validly appointed their clients as receivers over the properties. Accordingly, their clients would continue to act as lawfully appointed receivers unless and until they were discharged by Ulster Bank Ireland Limited. Copies of the deeds of appointment were enclosed.

14. By letter also dated 27th September, 2013, Mr. Davey replied to the receivers demanding they withdraw alleged defamatory letters which they had sent to his tenants and calling upon them to immediately desist from any further defamatory action. Mr. Davey further indicated that he expected a proposal within 14 days to compensate him for the alleged defamation. Mr. Davey stated that he would have no option but to bring the matter before the courts if the receivers failed to comply. AMOSS solicitors, on behalf of the receivers, replied to the defendant's letter of 27th September, 2013, rejecting Mr. Davey's allegation of defamation and insisting that they had been validly appointed as receivers and would continue to act as lawfully appointed receivers. They stated that there was no basis for suggesting that their clients could be in contempt of court, there being no court orders in being directing their clients to desist from their functions as receivers over the properties. They again stated that their clients had been validly appointed.

15. On 1st October, 2013, Mr. Davey wrote to Ulster Bank seeking various documentation and details relating to his mortgages and facilities. Mr. Davey repeated his opposition to the appointment of the receivers.

16. By letter dated 8th October, 2013, Mr. Davey wrote to AMOSS solicitors informing them that he had issued a High Court plenary summons against Ulster Bank dated 13th May, 2013. He asserted that this acted as a stop on the receivership. He threatened that unless the receivers desisted, he would issue contempt proceedings. No such proceedings were issued. On 10th October, 2013, Mr. Davey wrote again to the receivers putting them on notice that he had issued proceedings against Ulster Bank and stating that they were in contempt of court and that he would be issuing proceedings to that effect. Notwithstanding the strident tone of the letter, no such proceedings were issued. On 11th October, 2013, Mr. Davey wrote again to Ulster Bank Ireland Limited imploring them to deal with the issue fairly and to appoint an agent to sell the properties in respect of some of which he believed there was a cash buyer.

17. In reply to Mr. Davey's various letters, AMOSS again insisted that the receivers had been validly appointed and that their clients were not in contempt of court. AMOSS requested copies of all leases on the properties and requested Mr. Davey to confirm that all rents received by him since the appointment of the receivers on 23rd September, 2013 would be immediately remitted to the receivers.

18. On 23rd October, 2013, the Master of the High Court gave Mr. Davey liberty to amend his original plenary summons issued on 23rd October, 2013 by substituting "*Ulster Bank Ireland Limited*" for "*Ulster Bank Group Ireland Limited*".

19. On 1st November, 2013, Arthur Cox solicitors on behalf of Ulster Bank Ireland Limited entered an appearance to Mr. Davey's proceedings (2013/4745P).

20. By letter dated 19th November, 2013, AMOSS wrote to Mr. Davey pointing out that despite requests, Mr. Davey had not provided copies of the leases, nor had he remitted rent collected since the date of the appointment of receivers. AMOSS stated that they were instructed that Mr. Davey had interfered with the receivers' appointment by directly contacting tenants demanding rent and threatening certain of those tenants that their tenancies would be terminated. AMOSS called upon Mr. Davey to cease and desist in this action and asked him to note that in the event that he continued to interfere, their clients would have no option but to issue proceedings against him. They requested that Mr. Davey furnish the lease documents and/or rental monies where applicable, together with confirmation of cooperation. This letter was copied to Mr. Davey's then legal advisor, a Mr. Fearghal de Feu.

21. By letter dated 25th November, 2013, Mr. Davey wrote to the tenant of a dry cleaning business in Bridge Street. A handwritten "without prejudice" heading has been placed over the body of the letter. It reads as follows:-

"I refer to your installation of the new machine which as you are aware was not installed properly resulting in vermin entering the remaining and other parts of the property.

I feel that you should have any installation you put in properly sealed to prevent any future damage to the remainder of

the property.

If you attend to this matter I see no reason why your tenancy can not continue in a mutually satisfactory way and I am in the process of furnishing full details of your lease to the receiver."

The last paragraph of this letter suggests that at that point Mr. Davey accepted the fact of the receivership and may have been willing to comply with the requests of the receivers.

22. By letter dated 16th January, 2014 and received by fax on 18th January, 2014, headed "*Certain Assets of Francis Davey (in Receivership)*", Mr. de Feu wrote to Mr. Etherington referring to letters dated 10th January, 2014 which had been sent to tenants at certain properties. Mr. de Feu stated that several of Mr. Davey's properties were tenanted and several comprised the main residence or family home of the tenant. He stated that the purported appointment of the receivers had been challenged and that in particular, the schedule to the purported appointment did not include certain of the properties to which the receivers had written. He stated that as certain of the tenants were funded or assisted by the Department of Social Welfare in relation to rents payable, any attempted change of locks would be an infringement of statutory rules, regulation and protection under which such tenants have rights. Mr. de Feu further stated that the receivers' letter to the tenants was "*in-appropriate if not illegal at this time*".

23. By letter dated 22nd January, 2014, AMOSS responded to Mr. de Feu. They again rejected the alleged invalidity of the appointment of the receivers. They confirmed that Mr. Etherington was willing to attend a meeting as requested by the defendant. They asked Mr. Davey to note that the receiver and his legal advisors would not be discussing the validity of the receivers' appointment at that meeting. They further asked him to note that the bank would not be represented at the meeting and that any proposals which Mr. Davey wished to make to the bank should be put in writing and directed to the bank.

24. Correspondence with tenants from October, 2013 through to March, 2014 shows contact from Mr. Davey with tenants informing them that he was objecting to the receivership. The tenants' engagement with the receivers was mixed. Some tenants showed unwillingness to engage with the receivers. There was confusion among others whether to deal with Mr. Davey or the receivers. Some acknowledged that rent was due to the receivers and began paying them. Two tenants appear not to have paid either the receivers or Mr. Davey. In February, 2014, the receivers attempted to compel compliance by the tenants by serving notices of forfeiture on those tenants who had not paid rent for in excess of four months.

25. On 14th February, 2014, AMOSS wrote to Mr. de Feu in response to his email of 6th February, 2014, asking who he and Mr. Davey intended to bring to a proposed meeting and the capacity in which each person would be attending. AMOSS noted that Mr. de Feu had advised Mr. Davey to complete his statement of affairs and declaration, but that same had not yet been furnished to the bank. AMOSS again stated that a bank representative would not attend any meeting and asked for Mr. Davey to furnish tenant details and copies of all of the leases.

26. By document dated 7th March, 2014, Mr. Davey gave the following notice:-

"NOTICE

REMOVAL OF IMPLIED RIGHT OF ACCESS

Notice is hereby given that all implied rights of access to the property know as NILES HOUSE, BRIDGE STREET, KILCOCK, CO. KILDARE, are removed in respect of the following:

Any employee or agent or principal or any other person acting on behalf of the CORPORATE COURTS, LOCAL COUNCILS and,

Any employee or agent or any other person on acting of behalf of any bailiff or bank or credit union or receiver or other debt collection agency.

Please also take notice that the land known as Ireland is a Common Law Jurisdiction and any transgression of this Notice will be dealt with according to Common Law. Without ill-will, vexation or frivolity.

Dated: 7/3/2014

Francis Davey

WITHOUT PREJUDICE (all natural inalienable rights reserved) Warning – Failure to comply with this notice – without excuse or claim of right will be deemed common law trespass and you would have agreed to waive all your rights in any dealings with the (freeholder): and dishonour will be enforced. Claim of ignorance of this lawful Notice will be deemed no lawful excuse. So this is the offer to contract, by pressing my doorbell will be deemed your acceptance."

At the hearing, Mr. Davey expressed regret for the service of this notice and accepted that its service was ill-advised.

27. On 12th March, 2014, Mr. Davey delivered his statement of claim in his proceedings against Ulster Bank Ireland Limited (2013/4745P) seeking:-

"1. Damages for negligence and breach of duty, including breach of statutory duty;

2. Damages for breach of contract and breach of fiduciary duty.

3. Damages for Libel, Slander and Defamation.

4. Damages for the unlawful dissemination of his personal and confidential information,

5. Damages for personal injuries.

6. Interest pursuant to Section 22 of the Courts Act, 1981 and

7. *The costs of this action.*”

28. By letter dated 25th April, 2014, AMOSS wrote to Mr. Davey, a copy of which was also sent to Mr. de Feu. This letter was in effect a letter of claim which set out the continued obstruction of and interference with the receivers. AMOSS sought undertakings that Mr. Davey would refrain from entering onto the properties; refrain from collecting rents; remit any rents received from 17th September, 2013, the date of appointment, to the receivers; and give the receivers any lease or licence relating to the properties. AMOSS warned Mr. Davey that the receivers would issue proceedings seeking orders in that regard if necessary.

Chronology of Proceedings

29. By plenary summons dated 16th June, 2014, the plaintiffs issued the within proceedings (2014/5323P).

30. By notice of motion dated 14th July, 2014, the plaintiffs sought:-

1. *an injunction restraining the defendant, his servants or agents or anyone acting in concert with him or anyone having notice of the order howsoever from attempting to carry on, manage, or otherwise interfere with the exercise by the plaintiffs of their functions as receivers over the secured properties;*
2. *an order directing the defendant, his servants or agents or any person having notice of the order howsoever to deliver up to the plaintiffs forthwith the keys, alarm codes, locks and all other security and access devices and equipment or information in respect of the secured properties;*
3. *an order directing the defendant, his servants or agents to deliver up forthwith to the plaintiffs all books and records held by them relating to the secured properties to include, without prejudice to the generality of the foregoing, copies of all leases and licence agreements in respect of the secured properties and a schedule of all tenants and licensees setting out the rent (or licence fee) payable by them and the terms on which they occupy the properties;*
4. *an order directing the defendant to account forthwith to the plaintiffs for rents and/or licence fees received by the defendant, his servants or agents from the tenants and/or licensees of the secured properties since the date of the appointment of the plaintiffs as receivers over the secured properties;*
5. *an order restraining the defendant, his servants or agents or anyone having notice of the order from preventing, impeding and/or obstructing the plaintiffs, their servants or agents, from collecting the rents and licence fees associated with the secured properties;*
6. *such further or other relief as to the court may [deem] necessary or appropriate; and*
7. *an order providing for the costs of the application*

31. The matter came before the Court on a number of occasions from June, 2014 and was adjourned from time to time.

32. In a replying affidavit dated 10th October, 2014, Mr. Davey averred that he was challenging the validity of the mortgages as they were “*wanting in consideration and fail to create legal relations*”. In a further affidavit dated 13th October, 2014, Mr. Davey outlined that he was endeavouring to reach a negotiated settlement with Ulster Bank Ireland Limited.

33. In September and October, 2014 there was correspondence between “*The Negotiators*” on behalf of Mr. Davey, and Ulster Bank seeking a meeting with the aim of reaching an amicable solution.

34. On 10th December, 2014, Gilligan J. heard the application for injunctive relief. Having heard submissions from the parties and on the basis of an agreement between the parties, Gilligan J. ordered a meeting take place at 2 pm on 6th January, 2015 pursuant to the terms agreed between Mr. Davey and the receivers. The injunction application was adjourned to 13th January, 2015. A meeting did take place on 6th January, 2015.

35. On 12th January, 2015, Ulster Bank Ireland Limited delivered its defence and counterclaim to Mr. Davey’s proceedings (2013/4745P).

36. On 13th January, 2015, Gilligan J. adjourned this matter for mention to 27th January, 2015 to allow Mr. Davey time to write to the tenants directing them to pay the rent to the receivers (2014/5323P).

37. On 19th January, 2015, Mr. Davey wrote to AMOSS outlining that significant information had been handed over to the receivers at the meeting of 6th January, 2015. He repeated his request for documentation from Ulster Bank Ireland Limited. He once again stated that he did not accept that the receivers were validly appointed.

38. On 22nd January, 2015, AMOSS wrote to Mr. Davey:-

- i. alleging that he was resiling from his agreement to write to the tenants directing that rent be paid to the receivers;
- ii. reminding him that he had indicated to the Court on 10th December, 2014 that his intention was to cooperate with the receivers;
- iii. stating that he had acknowledged that he had continued to demand and was paid rent in respect of a number of properties over which the receivers were appointed;
- iv. stating that Gilligan J. had noted that Mr. Davey should provide vouching documentation to the receivers in respect of any overheads incurred;
- v. stating that the meeting on 6th January, 2015 between Mr. Davey, Mr. Ben Gilroy and Mr. Etherington with a representative of AMOSS was productive and amiable and that Mr. Davey had provided various documentation including vouching documentation in relation to overheads discharged;
- vi. stating that Mr. Davey had committed to furnish a draft letter which was to be agreed for transmission to the tenants who were continuing to remit rent to Mr. Davey;

vii. noting that Mr. Davey had confirmed that he intended to submit a written proposal to Ulster Bank Ireland Limited and sought documentation from the bank and that that correspondence would be replied to separately to the receivers matter;

viii. noting that Mr Davey appeared to still be receiving rental income from tenants;

ix. informing him that the suggestion of an escrow account was not acceptable to the receivers;

x. informing him that in the absence of confirmation on or before 27th January, 2015, that he would immediately write to the tenants directing them to cease payment and to direct all rental payments to the receivers; that he would remit the balance of any rental income received since the appointment of the receivers less a deduction to be agreed in respect of vouched overheads; and that the receivers would have no option but to request the Court to reopen the hearing of the receivers' application for various orders.

39. By global deed of transfer dated 12th February, 2015, Ulster Bank Ireland Limited transferred the defendant's loans and securities to Promontoria (Aran) Limited. Mr. Davey has not challenged the transfer but has questioned the legal effect of same on the receivership.

40. By deed of novation also dated 12th February, 2015, Promontoria (Aran) Limited was substituted for Ulster Bank Ireland Limited as a party to the receivership agreement.

41. In his affidavit of 4th March, 2015, Mr. Davey maintains his position that the receivers were not validly appointed in the first place and independently of that, questioned their status arising from the fact that his mortgages had been transferred to a third party. In particular at para. 17 he states:-

"I am unsure what standing the plaintiffs believe they have. I don't know if there is in place a deed of novation for the plaintiffs or if their alleged receivership has collapsed, notwithstanding I do not believe that they were validly appointed in the first place"

42. The matter came before Gilligan J. again on a number of occasions. Following a number of adjournments in early 2015, the interlocutory application was heard on 15th April, 2015 and Gilligan J. granted the plaintiffs an interlocutory injunction in the following terms:-

"Upon Motion of Counsel for the Plaintiffs made pursuant to Notice of Motion herein dated the 16th June 2014 and on reading said Notice wherein the Plaintiffs seeks interlocutory injunctions and the grounding affidavit of Mark Etherington the further affidavits filed herein and the exhibits referred to in said Affidavits

And on hearing said Counsel and hearing the Defendant in person

AND on the Plaintiffs' undertaking to retain all rents collected by them in respect of the Secured Properties pending the determination of the action and not to sell the Secured Properties pending the determination of the action,

The Court Doth Order:

(i) The Defendant to account forthwith to the Plaintiffs for all rents and/or licence fees received by the Defendant, its servants or agents from the tenants and/or licensees of the Secured Properties since the date of the appointment of the Plaintiffs as Receivers of the Secured Properties; and

(ii) That the Defendant, his servants or agents or anyone having notice of the said Order, is hereby restrained from preventing, impeding and/or obstructing the Plaintiffs, their servants or agents from collecting the rents and licence fees associated with the Secured Properties pending the determination of the action and

(iii) The Plaintiffs are entitled to enter the Secured Properties to make direct contact with the tenants in the event that any of the rent payable is not paid forthwith to the Receivers

The Court Doth require the Defendant to undertake and noting the Defendant's undertaking on oath to the Court that:

(i) He will direct all tenants at the Secured Properties to forthwith pay all rent and/or licence fees associated therewith to the Plaintiffs; and

(ii) He will expedite the proceedings in which he is a Plaintiff, namely "Francis Davey v. Ulster Bank (Ireland) Limited" 2013 4745P to ensure that same are heard as soon as possible

And the Court doth list the within proceedings and the proceedings of "Francis Davey v. Ulster Bank (Ireland) Limited" 2013 4745P for mention before it on the 17th April, 2015

And the Court doth reserve the costs of the application."

43. On 17th April, 2015, both Mr. Davey's proceedings against Ulster Bank Ireland Limited and the plaintiff's proceedings herein returned before Gilligan J. who made orders regarding the exchange of pleadings and discovery and adjourned both sets of proceedings to 14th July, 2015.

44. On 25th April, 2015, Mr. Davey delivered an amended statement of claim to Ulster Bank Ireland Limited (2013/4745P) claiming:-

"1. Damages for negligence and breach of duty, including breach of statutory duty;

2. Damages for breach of contract and breach of fiduciary duty.

3. Damages for Libel, Slander and Defamation.

4. Damages for the unlawful dissemination of his personal and confidential information,

5. Damages for personal injuries.

6. Damages for fraudulent accounting and fraudulent miscalculation of interest rates.

7. Interest pursuant to Section 22 of the Courts Act, 1981 and

8. The costs of this action."

45. On 27th April, 2015, the receivers delivered a statement of claim seeking permanent orders in respect of the interlocutory relief granted and further reliefs as pleaded in the plenary summons being damages for unlawful interference with economic interests; damages for breach of contract; and damages for negligence and breach of duty including breach of fiduciary duty. They sought additional relief being:-

"(6.) An Order directing the Defendant to pay to the Plaintiff all rents and/ or licence fees which he has collected from the tenants and/ or licensees at the Properties"

46. The defendant served an undated defence and counterclaim which he ultimately amended shortly prior to the hearing. In the defence before the Court in these proceedings (2014/5323P), a number of admissions were made, a number of matters were put in issue and certain substantive matters were pleaded. These are as follows:-

"4. It is denied that each of the mortgage deeds provided that at any time following demand for payment of monies outstanding to the Bank, the Bank was entitled to appoint a receiver or receivers under the Conveyancing Act 1881 to the properties.

5. It is denied that the Plaintiffs have been properly appointed over the properties for the following reasons:

(a) The facility letter dated 28th May 2007 is fraudulent by reason of having an acceptance page purportedly signed by the Defendant attached to the said facility letter where the Defendant had not signed the acceptance page, leading to the Mortgage Deeds, executed by the Defendant after 28th May 2007 in respect of the properties referred to in the said facility letter as securities for the loan, being invalidated and the appointment of the Plaintiffs as receivers over the said properties, on foot of conditions implied into the said mortgage deeds by the Conveyancing Act 1881, being void and of no effect.

(b) The appointment of the Plaintiffs as receivers over the property mortgaged by the Defendant by Deed of Mortgage dated mortgage deed dated 29th January 2007 by reason of lack of precision and identifiability of the mortgaged property as described in the said Deed of Mortgage and Deed of Appointment of the Receivers.

[...]

10. The Defendant for the reasons stated in paragraph 5 above deny that the Plaintiffs have been properly appointed as receivers and so are not entitled to the permanent injunctions and other reliefs sought.

[...]

13. The Plaintiffs claims in the proceedings herein ought to fail by reason of the Plaintiffs failure, in their Statement of Claim, to make any reference to the sale and transfer of the Defendant's loans to Promontoria Aran Limited on 15th February 2015, more than two months prior to the date of delivery of the Plaintiffs' Statement of Claim herein, where Ulster Bank Ireland Limited, Promontoria Aran Limited and the Plaintiffs had by Deed of Novation dated 15th February 2015 agreed that Promontoria Aran Limited take over the role of Ulster Bank Ireland Limited in respect of the relationship had by Ulster Bank Ireland Limited as appointors of the receivers with the Plaintiff as appointees, and where Promontoria Aran Limited have become the registered owners of the charges of the four properties comprised in Land Registry folios over which mortgages have been executed by the Defendant in favour of Ulster Bank Ireland Limited, and where, for the purpose of enforcement of those charges, the party seeking to enforce a mortgage must be registered as owner of the charge, including where, as in this case, the charge is being enforced by way of appointment of receivers for the purpose of collecting rents arising from the charged properties."

47. For a period of time from June, 2015 both sets of proceedings, those of Mr. Davey against Ulster Bank Ireland Limited (2013/4745P), and those of the plaintiffs against Mr. Davey (2014/5323P), travelled together.

48. On 1st June, 2016, Gilligan J. listed these proceedings (2014/5323P) for hearing on 13th July, 2016.

49. On 13th July, 2016, the matter came before this Court for hearing (2014/5323P). The Court heard evidence from Mr. Michael Evans (former director of Global Restructuring division of Ulster Bank) and Mr. Mark Etherington (joint receiver) on behalf of the plaintiffs. On behalf of the defendant, the Court heard evidence from Mr. David Madden (document examination specialist), Mr. John Flynn (tenant of Niles House, Bridge Street, Kilcock, Co. Kildare) and the defendant, Mr. Francis Davey. On 20th July, 2016, the oral hearing concluded, directions were given in respect of submissions and was adjourned for mention to 4th October, 2016 (2014/5323P).

50. On 17th January, 2017, the matter returned before this Court for legal submissions (2014/5323P).

Issue Paper

51. During the course of the proceedings and the submissions, an issue paper was agreed on the relevant issues to be determined by the Court. It is as follows:-

"(1.) Whether the Facility Letter of the 28th May, 2007 is valid;

(2.) If the Facility Letter of the 28th May, 2007 is found to be invalid, whether said invalidity invalidated the Deeds of Mortgage and Charge referred to therein;

(3.) In the event that the court concludes at (2.) above, that the appointment of the Receivers over the Secured

Properties was valid, whether the Defendant has obstructed the Receivers in the discharge of their duties by:

- (a.) Purporting to collect rents from tenants at the Secured Properties;*
 - (b.) Failing to pay or remit those rents to the Receivers;*
 - (c.) Informing the tenants at the Secured Properties that the Receiver have no authority to act or to collect rents and that the rents should be paid to the Defendant;*
 - (d.) Failing to write to the tenants at the Secured Properties to notify them that all rents payable on the Secured Properties should be paid to the Receivers; and*
 - (e.) Failing to provide to the Receivers copies of all leases or licences applicable to the Secured Properties.*
- (4.) What effect, if any, does the transfer of the loans mortgaged/charged against, and of the mortgagee's/ chargee's interest in, the Secured Properties to Promontoria Aran Limited ("Promontoria") dated the 15th February, 2015, in the course of the proceedings have upon the Receivership;*
- (5.) Whether the description of the Secured Property described in the mortgage deed dated the 29th January, 2007 precludes the Receivers from exercising their powers over that Secured Property, as is alleged by the Defendant; and*
- (6.) In light of the court's findings at (3.) above, whether the Plaintiffs are entitled to the relief claimed which includes:*
- (a.) Judgment in the amount of €77,625.00;*
 - (b.) An order directing the Defendant to account to the Plaintiffs for all rents or licence fees which he has received or collected in respect of the Properties since the date of the Plaintiffs' appointment as Receivers;*
 - (c.) An order restraining the Defendant and anybody else having notice of the Order from preventing, impeding or instructing the Plaintiffs or their agents from collecting the rents or the licence fees associated with the Properties pending the determination of the action;*
 - (d.) An order directing the Defendant to within 14 days of the date hereof produce evidence that he has notified in writing all tenants at the Secured Properties to forthwith pay all rent and/or license fees associated therewith to the Plaintiffs;*
 - (e.) An order directing the Defendant to produce to the Plaintiffs all leases or licenses applicable to Apartment 45, The Steeples, Dublin Road, Navan, Co. Meath; and*
 - (f.) An order directing the Defendant to disclose to the Plaintiffs his PPS Number, on the Plaintiffs' strict undertaking only to use this information for the purposes of enforcement proceedings against tenants at the Secured Properties."*

Issue 1 - Validity of the facility letter of 28th May, 2007

Facts on Issue 1

52. Mr. Davey, having sought all relevant documents from Ulster Bank Ireland Limited, was furnished by the bank with copies of his facility letters from 2002 to 2009. The copy of facility letter of 28th May, 2007 furnished by the bank to Mr. Davey has a signature page apparently signed by Mr. Davey. The facility letter was for the amount of €1,200,000 for the purpose of refinancing the existing variable rate loan facilities on to a fixed rate of interest. The facility letter, which has a number of notes written thereon, lists the security held by the bank which includes all of the mortgages in respect of which the receivers have been appointed.

53. Mr. Davey has given sworn evidence that he never signed the facility letter of 28th May, 2007. When pressed on the issue, he stated that he had no memory of signing it, yet the bank has purported to furnish him with a copy of his signature on the agreement. Mr. Davey had the said signature page professionally analysed by Mr. David Madden, document examination specialist. Mr. Madden has concluded that in fact, the purported signature page of the facility letter of 28th May, 2007 is a photocopy of the signature page of an earlier facility letter of 8th March, 2007. The Court is persuaded on the balance of probabilities that Mr. Madden is correct in his analysis, particularly having regard to a pen mark at the top of the page which appears identical on both signature pages.

54. On this evidence, Mr. Davey contends that since he did not sign the facility letter, the contract is not valid and the mortgages entered into subsequent to that letter, (being the mortgages of 335 Blackhorse Avenue mortgaged 30th January, 2008; 45 The Steeples mortgaged 15th January, 2008; and Units 1-7 The Mall, mortgaged 30th January, 2008) are similarly invalid.

55. The content of the earlier facility letter of 8th March, 2007, the validity of which is not contested by Mr. Davey, is of significance. On 8th March, 2007, Mr. Davey agreed with Ulster Bank Ireland Limited an overdraft facility of €70,000 and a loan facility of a €1,054,000 which represented an increase of €120,000 in an existing loan facility which was for the purpose of completing the restaurant over Davey's Pub, Kilcock, Co. Kildare. In that facility letter Mr. Davey, under the heading "*Additional terms and conditions applicable to all facilities*", agreed to give a first legal charge over 335 Blackhorse Avenue, 45 The Steeples and Units 1-7 The Mall.

Submission of the plaintiffs on Issue 1

56. The plaintiffs argue that the status of the facility letter of 28th May, 2007 has no bearing upon the validity of the appointment of the plaintiffs as receivers. The plaintiffs submit that they were appointed by deeds of appointment which Ulster Bank Ireland Limited issued under six deeds of mortgage/charge by which the defendant mortgaged the secured properties as security for a series of loans which Ulster Bank Ireland Limited advanced to the defendant between 2002 and 2009. These loans were all refinanced by three facility letters dated 17th June, 2009; 22nd July, 2009; and 6th August, 2009 which were secured against the secured properties.

The plaintiffs submit that crucially, the defendant does not dispute that he signed and agreed to each of the deeds of mortgage/charge or that he signed and agreed to the terms of the 2009 facility letters. The plaintiffs did not seek to rely upon the 28th May, 2007 facility letter and did not seek to enter it into evidence.

57. The plaintiffs observe that the defendant's plea at para. 5(a) of his amended defence that the facility letter was "fraudulent" is not supported by any evidence given in the trial.

58. The plaintiffs submit that the operative term of the facility letter of 28th May, 2007 was that Ulster Bank Ireland Limited agreed to make available to the defendant a fixed rate loan of €1,200,000 for the purposes of "*refinancing the existing variable rate loan facilities onto a fixed rate of interest: (i.) Refinance of debt on Canal Turn Pub and restaurant.*" The plaintiffs point to the fact that the only evidence the defendant gave on the facility letter was that "*I did not sign the document of 28th May*". The plaintiff argues that the defendant's evidence was carefully worded and that he did not give evidence that there was no refinancing agreement, that there was no pre-existing debt which needed to be refinanced, or that the pre-existing debt was not in fact refinanced. He had accepted in evidence that the facility letter of 28th May, 2007 was the only loan agreement which he was challenging.

59. The plaintiffs submit that it is difficult to see how it can be alleged that the facility letter of 28th May, 2007 was "fraudulent" given that the defendant does not dispute that he entered into the loan agreements which it purported to refinance, nor that there was an agreement to refinance those loans, nor that those loans were in fact refinanced. The plaintiffs point out that Mr. David Madden, the document examination specialist called by Mr. Davey, did not address those points either. His evidence solely related to the signature page of the facility letter.

Submissions of defendant on Issue 1

60. The defendant submits that the facility letter of 28th May, 2007 is invalid. He states that he cannot remember signing the facility letter of 28th May, 2007. He argues that the signature page of the facility letter is not an original document. He suggests that it is in fact a photocopy of the facility letter of 8th March, 2007, both pages having similar signatures and a blot mark as identified by the defendant's document examination specialist, Mr. David Madden, or at its highest, that the signatures and blotted indentation were copied from that letter as a forgery; that it could have been a sloppy copy but equally it could have been a deliberate attempt to mislead. The defendant submits that it is for the plaintiffs to prove their case and they have not adduced any evidence in respect of this allegation. Therefore, the defendant submits that the plaintiffs have failed to prove the liability of the defendant under any facility letter.

Rejoinder submissions of plaintiffs on Issue 1

61. In their rejoinder submissions, the plaintiffs state that the defendant has mischaracterised their position in stating "*The Plaintiffs have relied upon this facility letter dated the 28th May, 2007...*". The plaintiffs stated that they were at pains, both in the hearing and in their closing submissions, to make clear that they do not rely on the facility letter of 28th May, 2007. They stated that the point they had consistently made is that irrespective of whether there is any invalidity in the facility letter, it is not disputed that each of the deeds of mortgage/charge were expressly stated to be "*all sums due*" mortgages and that the defendant himself agreed that all of the loans other than that provided for in the facility letter of 28th May, 2007 were secured against the secured properties; that the plaintiffs were appointed as receivers by reason of the defendant's failure to repay the liabilities the subject of the 2009 facility letters only and again, that there is no question but that those liabilities were secured against the secured properties.

Decision of the Court on Issue 1

62. The only evidence before the Court on the issue of the validity of the facility letter is that Mr. Davey did not sign or can not remember signing that facility letter. The Court has no evidence that he did not request the facility and/or agree to the facility. The Court has had no evidence from Ulster Bank Ireland Limited on the matter. The Court is satisfied on the balance of probabilities on the basis of the evidence of Mr. David Madden, document examination specialist, that the signature page to the facility letter of 28th May, 2007 furnished by Ulster Bank Ireland Limited is a photocopy of the signature page of the earlier facility letter of 8th March, 2007. The appending of the wrong signature page of itself does not render the facility letter invalid, as depending on the evidence ultimately adduced, it might simply have arisen as the result of an error. The furnishing of the wrong signature page for the facility of 28th May, 2007 is a matter which may be explored by Mr. Davey in the context of his claim against Ulster Bank Ireland Limited. Should Mr. Davey ultimately satisfy a court that the appending of a photocopy signature page from another facility letter resulted from some nefarious motives on the part of Ulster Bank Ireland Limited, then clearly serious consequences will flow for Ulster Bank Ireland Limited. However, the Court can not determine its validity or otherwise in these proceedings, where it has heard no evidence from Ulster Bank Ireland Limited and where no reliance has been placed on this facility letter by the plaintiff receivers.

63. The Court therefore makes no finding on the validity of the facility letter of 28th May, 2007.

Issue 2 - Effect of the invalidity of the facility letter on 28th May, 2007 on deeds of mortgages and charge

64. For the purposes of dealing with the arguments on this issue, the Court is assuming the facility letter of 28th May, 2007 to be invalid.

Submissions of defendant on Issue 2

65. The defendant's argument is that the invalidity of the facility letter of 28th May, 2007 in turn invalidates all deeds of mortgage/charge dated subsequent to the facility letter. These are: 45 The Steeples; 335 Blackhorse Avenue; Units 1-7 The Mall; and Frasier House. The defendant submits, relying on *ACC Bank Ireland Plc v. Fahey & Ors.* [2010] IEHC 41, that the security terms set out in the facility letter of 28th May, 2007 are terms which cannot be relied upon and that the appointment of receivers to the affected mortgages is invalidated. Counsel on behalf of Mr. Davey conceded that any invalidity only affected mortgages executed after 28th May, 2007. There is no dispute regarding the deeds of mortgage/charge for the Canal Turn Pub. The defendant made a separate argument, dealt with below, in relation to the Niles House property.

Submissions of the plaintiffs on Issue 2

66. The plaintiffs submit that it is not disputed that each of the deeds of mortgage/charge were expressly stated to be "*all sums due*" mortgages and the defendant in his own evidence accepted that the only loan agreement he challenged was the facility letter of 28th May, 2007 and that it had been agreed that all of the other loans about which there was no dispute were to be secured against the secured properties under the deeds of mortgage/charge.

67. The plaintiffs submit that Mr. Davey accepted that the letters of demand dated 26th March, 2013 and 2nd May, 2013, on foot of which the receivers were appointed, sought repayment of the loans advanced by the facility letters of 17th June, 2009; 22nd July, 2009; and 9th August, 2009; that each of those facility letters required as a condition of the facilities which were to be advanced thereunder that the liabilities would be secured against each of the secured properties. In the facility letter of 28th May, 2007 and in subsequent facility letters, the mortgages of the properties in issue are stated to be held by the bank.

68. The plaintiffs submit that as it was agreed that each of the deeds of mortgage/charge would operate to mortgage/charge each of the secured properties as security for all of the defendant's liabilities to Ulster Bank Ireland Limited, both present and future, that even if the facility letter of 28th May, 2007 is invalid, there is no doubt that the defendant entered into loan agreements both prior to and after the facility letter of 28th May, 2007 under which he agreed that the loans referred to therein would be secured against the secured properties. The plaintiffs point further to the fact that there is no dispute that the letters of demand on foot of which the receivers were appointed concerned the defendant's liabilities under the 2009 facility letters and that it was a term of the letters that they would be secured under the deeds of mortgage/charge.

69. The plaintiffs refer to the evidence of Mr. Michael Evans, representative of Ulster Bank Ireland Limited, which evidence was not disputed, that the 2009 facility letters refinanced pre-existing loans which Ulster Bank Ireland Limited had advanced to the defendant; that the letters of demand had been issued on foot of the liabilities due under the 2009 facility letters; that the liabilities due under the 2009 facility letters had not been repaid following service of the letters of demand; that he had personally signed each of the deeds of appointment; and that he had been authorised to sign each of the said deeds of appointment by a power of attorney dated 21st June, 2013.

70. In summary, the plaintiffs argue that despite any alleged invalidity in the facility letter dated 28th May, 2007, there can be no serious doubt that the deeds of mortgage/charge are all valid and that the appointments of the plaintiffs as receivers under those deeds were also valid.

Decision of the Court on Issue 2

71. Accepting for the limited purpose of argument that the facility letter of 28th May, 2007 is invalid, the Court is not persuaded that any such invalidity renders the mortgages subsequently executed invalid. While the plaintiffs have focused primarily on the facility letters of 2009, being the facilities upon which their appointment is based, the Court finds that in fact prior to 28th May, 2007, the defendant had already agreed to mortgage each of the properties in issue in return for agreed facilities. In the earlier facility agreement of 8th March, 2007, in consideration for the bank advancing him an overdraft facility of €70,000 and a facility amount of €1,054,000 being an increased amount of €120,000 to fund completion of a restaurant over Davey's Pub, Kilcock, Co. Kildare, the defendant specifically agreed to mortgage 335 Blackhorse Avenue, 45 The Steeples and Units 1-7 The Mall. The subsequent facility letter of 28th May, 2007 refers to these mortgages as already being held by the bank. It appears to the Court that the mortgages in question were agreed and pledged prior to 28th May, 2007, though executed after that date, and were thereafter repeatedly confirmed as being security held by the bank in later facility letters. Such mortgages can not be said to be rendered invalid because of any deficiency in the facility letter of 28th May, 2007.

72. The Court therefore finds that the issue of validity of the letter of 28th May, 2007 is irrelevant to the validity of the mortgages in issue.

Issue 3 - Obstruction of the receivers

Submissions of the plaintiffs on Issue 3

73. During the hearing of the action, Mr. Mark Etherington gave evidence that following his appointment, the defendant had obstructed the receivers in the discharge of their duties by:-

- (i) declining to provide them with information concerning the identity of the tenants or with copies of the leases;
- (ii) collecting rents from the tenants and retaining those monies for himself; and
- (iii) failing to remit the monies which he had collected as rent to the receivers.

Mr. Etherington also gave evidence that in order to address these acts of obstruction, it had been necessary to obtain interlocutory injunctive relief from the High Court and despite the fact that such orders had been made, the defendant had still not paid to the receivers the monies which he had collected as rents from the tenants nor had he fully accounted for the rents which he had received. The plaintiffs further submit that it appears from the evidence that had been furnished that the defendant has purported to waive rental obligations in respect of certain tenants during the course of the receivership.

74. Counsel for the plaintiff further notes that Mr. Etherington was not cross-examined on the factual content of any part of his evidence and instead it was suggested to him that despite what had occurred, the defendant could not be said to have actually "obstructed" the receivers. The plaintiffs submit that, more importantly, Mr. Davey accepted most of the factual content of Mr. Etherington's evidence and further admitted that he had represented to the tenants that he was the landlord of the secured properties and that the rent should be paid to him in that capacity.

75. The plaintiffs contend that the defendant has obstructed them in the discharge of their duties as set out in 3(a) to (e) of the issue paper.

76. The plaintiffs' position is that the legal basis on which they contend that they were empowered to act is as follows. Ulster Bank Ireland Limited exercised their power to appoint the plaintiffs as receivers under s. 19(1)(ii) of the Conveyancing Act 1881, which provision authorises a mortgagee to appoint a receiver to collect the income arising from the mortgaged property. The receiver, and only the receiver, has the power to demand payment of the income arising from the mortgaged property pursuant to s. 24(3) of the 1881 Act. The receiver is entitled to payment of all arrears of rent which exist at the date of his appointment and which accrue thereafter. In *Hollier v. Hedges* (1853) 2 Ir. Ch. R. 370, it was held that the mortgagor who takes the benefit of the rents prior to the appointment of the receiver must pay the rents over to the receiver immediately upon having notice that the receiver has been appointed. Laffoy J. cited *Hollier v. Hedges* with approval in this jurisdiction in *Re Ronan & Ors.* [2013] IEHC 386. The plaintiffs note that there is no dispute that the defendant was aware from shortly after the date of appointment, that the plaintiffs were the receivers of the secured properties and that they were seeking payment of the rent due from the tenants.

77. The plaintiffs point to the receivers' duty to enforce the terms of the leases which bind the tenants at the properties over which he has been appointed as per para. 23 of *Silven Properties Limited v. Royal Bank of Scotland plc* [2003] EWCA Civ. 1409. They state that the first step in discharging that duty is to obtain a copy of the lease from the mortgagor and that in this regard, the defendant accepted in evidence that he was the only person from whom the plaintiffs could have obtained the leases for the secured properties.

78. The plaintiffs submit that Mr. Etherington gave detailed evidence of obstruction which the defendant not merely did not dispute, but with much of which he agreed.

(a.) Purporting to collect rents from tenants at the Secured Properties

There is undisputed evidence that the defendant purported to and did in fact collect rent from tenants at the secured properties following the appointment of the receivers. Following court orders dated 10th December, 2014 and 15th April, 2015 requiring him to do so, he produced two schedules which confirmed that he had collected substantial amounts of rent. The first schedule which was provided at the meeting between the parties on 6th January, 2015 showed that the defendant had collected €65,680.00 from 1st January, 2014 to 31st December, 2014. The second schedule furnished on 13th May, 2015, showed that the defendant had collected €11,945 in rent from 1st January, 2015 to 10th April, 2015.

(b.) Failing to pay or remit those rents to the Receivers

On the evidence, there is no dispute that the defendant did not pay over the rents which he had collected to the receivers. The plaintiffs point out that he had suggested in a letter dated 19th January, 2015 that the plaintiffs would pay any rents collected into an escrow account until a satisfactory outcome to the entire matter could be found. They further point out that the defendant did not follow this course himself, but rather gave evidence that the rent which he has collected has been spent by him.

(c) Informing the tenants at the Secured Properties that the Receivers have no authority to act or to collect rents and that the rents should be paid to the Defendant

The plaintiffs submit that it follows as a matter of logic that if the defendant was collecting rent from tenants, he must have informed them that it was he rather than the receivers who had authority to collect the rent. The defendant, in his evidence in essence confirmed that this is in fact what had occurred. He had told the tenants that he did not accept the validity of the receivership; that he was landlord of the properties; and that they should pay the rents to him as landlord. These discussions were confirmed by the evidence of Mr. John Flynn, a tenant at Niles House, who on the basis of those representations, made a decision not to pay any rent to the plaintiffs. The plaintiffs drew attention to the fact that not only did Mr. Davey represent to the tenants that they were required to pay rent to him, he told at least one of them that they were under no obligation to pay any rent at all. The plaintiffs instance the schedules provided by the defendant which show that the rent of 45 The Steeples was waived for at least March and April, 2015. This decision was clearly made during the currency of the receivership. The plaintiffs also drew attention to the fact that the defendant admitted in his evidence that this could cause the plaintiffs difficulties in collecting rent in the future.

(d) Failing to write to the tenants at the Secured Properties to notify them that all rents payable on the Secured Properties should be paid to the Receivers

At the hearing of the plaintiffs' application for interlocutory injunctive relief on 15th April, 2015, the defendant gave an undertaking noted in the order that he would "*direct all tenants at the Secured Properties to forthwith pay all rent and/or licence fees associated therewith to the Plaintiffs*". Mr. Etherington gave evidence that he had not seen any evidence that the defendant had sent any such correspondence to the tenants. This evidence was not disputed. Mr. Davey himself produced no evidence that any such correspondence had been sent. On this basis the plaintiffs contend that he is in breach of his undertaking.

(e) Failing to provide to the Receivers copies of all leases or licences applicable to the Secured Properties.

The plaintiffs point to the fact that the defendant had accepted that he was the only person from whom the plaintiffs could obtain leases for the properties and that he had consciously decided not to give the plaintiffs the information they sought. The plaintiffs contend that while he has now furnished leases for all of the properties save for 45 The Steeples, this only occurred as a consequence of the court order of 10th December, 2014, which Mr. Davey accepted was the only way in which the receivers could have received the information from him.

Submissions of defendant on Issue 3

79. The defendant describes the plaintiffs' submissions in regard to the issue of obstruction as "*a telescoping of the evidence tendered by Mr. Etherington*" and that no effort is made to identify a true chronology of events. Counsel for the defendant argues that a distinction should be drawn between the compliance of Mr. Davey prior to the order of Gilligan J. on 15th April, 2015 and his compliance post that date. He further submits that it is quite clear that after the order of Gilligan J. all monies received were transferred to the receivers' accounts and not that of Mr. Davey. He alleges that it is also clear that Mr. Davey gave oral evidence to the effect that he instructed the tenants after that order to put the money into the receivers' account.

80. He argues that it is also clear that Mr. Davey prior to that date and from January, 2015 onwards held meetings with the receivers where he suggested that given the ongoing dispute, the monies should be put into an escrow account pending the outcome of the litigation, which suggestion was ultimately acceded to and ordered by Gilligan J.

81. The defendant submits that Mr. Etherington gave evidence that Mr. Davey was conciliatory and cooperative, and thus to characterise his conduct, at least post January, 2015 as obstructive is simply wrong.

82. In relation to events prior to that date, the defendant submits that Mr. Davey whether rightly or wrongly, did not perceive the receiver as having any legal entitlement to the monies and intimated on many occasions that the matter would have to be ultimately resolved by the courts; that thus from his point of view, he was not being obstructive, merely engaged in a process of contesting the receivership's legal entitlements.

83. The defendant submits that there is a "*telescoping*" in that post 15th April, 2015, and indeed from January, 2015, Mr. Davey was in point of fact acting with admirable conciliation and compromise to secure that the monies be put into an escrow account pending the outcome of this litigation and this in effect was the order of Gilligan J.

84. The defendant states that prior to those dates, he may have committed the acts specified by the plaintiffs but only did so on the basis that he believed that the receivers were invalidly appointed and sought to contest the validity of that appointment. Thus, he argues, that it is not obstruction *per se* but the exercise of his valid right and choice to contest the validity of the appointment of the receiver. The defendant states that his evidence since 15th April, 2015, was that he has asked the tenants to pay rent to the receiver and Mr. Etherington gave evidence that he has collected monies in that respect. The defendant states that counsel for the

plaintiffs sought to infer that as certain tenants were not paying, perhaps some of the money was being collected by Mr. Davey. He notes that the clear evidence of Mr. Flynn was that he was not paying either Mr. Davey or the receivers given the ongoing litigation.

85. The defendant takes issue with the plaintiffs' suggestion that Mr. Davey intimated to his tenants that as he was the landlord the money should go to him and not the receiver. They rely on the quote:-

"I can't really recall, but I would have said it to them, you know, that I am opposing the receivership, I am opposing the receivership, and that I am the landlord, you know, and that's where the rents come, you know.

You asserted that you were the landlord?

Yes, that I was the landlord, and if they said 'look we are going to go with the receivers', that's it, I didn't obstruct them."

The defendant argues that in this context, it is clear what Mr. Davey is saying is that he was opposing the receivership and the tenants could in effect choose to pay him or the receiver, a slightly different characterisation than the plaintiffs make in their submissions.

Rejoinder submissions of plaintiffs on Issue 3

86. In their rejoinder submissions, the plaintiffs in response to the defendant's assertion that his conduct could not amount to obstruction because his dominant position had not been to obstruct the plaintiffs but rather to protect his position, submit that there is no legal authority to the effect that a mortgagor will not be liable to legal sanction where he engages in conduct which actively prevents a receiver from exercising his lawful powers simply because he merely wishes to protect his position. They repeated their previous submission that the receivers held the sole entitlement to collect and retain the rents. The plaintiffs argue that the fact that the defendant by his own admission collected money which he had no entitlement to collect and refused to pay it over to the party who had legal authority to receive it of itself constitutes obstruction to the receivership.

87. The plaintiffs contend that the defendant's descriptions of the evidence are wholly inaccurate, identifying the following examples:-

(a) In relation to defendant's submission that *"it is quite clear that after the Order of Judge Gilligan all monies ever received were transferred to the Receivers' accounts and not that of Mr. Davey"*, the plaintiffs submit that this suggests that at some stage after the orders made by Gilligan J. on 10th December, 2014 and 15th April, 2015, Mr. Davey transferred rent he had collected from the tenants to the receivers' account. The plaintiffs state that this is not the case and that Mr. Davey had accepted that he had collected rent from the tenants, spent that rent and never remitted it to the receivers.

(b) In relation to the defendant's submission that from January, 2015 onwards, Mr. Davey held meetings with the receiver *"where he suggested that given the ongoing dispute the monies were to be put into an escrow account pending the outcome of the litigation. This suggestion was ultimately acceded to in an Order by Judge Gilligan"*, the plaintiffs state that again, this is not the case and Gilligan J. did not make such an order. He instead directed that the receivers should have authority to continue to collect the rent and should hold the rent in their own account.

(c) In relation to the defendant's submission that *"Evidence was extracted from Mr. Etherington that through this discrete process Mr. Davey was conciliatory and cooperative. Thus to characterise the conduct of Mr. Davey at least post-January 2015 as obstructive is simply wrong"*, the plaintiffs point to Mr. Etherington's evidence that Mr. Davey's approach at the meeting of 6th January, 2015 had been conciliatory but pointed out that his attitude had changed immediately following the meeting.

88. The plaintiffs identify the essence of the defendant's position as being:-

1. Irrespective of the defendant's conduct prior to the order of 10th December, 2014, following that order he fully cooperated and was conciliatory with the receivers; and
2. whereas at the time the defendant may have refused to accept the authority of the receivers, and consequently acted as if he continued to be the landlord, this was a position that he was entitled to adopt because he did not accept the receivers' authority and he was simply trying to protect his position.

89. In relation to point 1, the plaintiffs contend that whereas the defendant's legal advisors now appear to accept that he did not cooperate with the receivers prior to 10th December, 2014, it is indisputable that he continued in his campaign of non-cooperation and obstruction after the order was made. The plaintiffs point to the following in support of this:-

(a) The defendant accepted that from 1st January, 2015 to 10th April, 2015 he had collected rent from the tenants and instead of remitting it to the receivers or keeping it in a separate or distinct account, he had spent it.

(b) On 13th May, 2015 the defendant *"waived"* the rent due on 45 The Steeples and accepted that he or a family member acting on his behalf had informed the tenant of the property that they were not obliged to pay any more rent. This is despite the fact that only the receivers have the power to collect rent or to give any discharge with regard to the obligation to pay it.

(c) Despite being ordered to do so, the defendant has not provided or furnished copies of the lease for 45 The Steeples. He has consistently failed to identify the tenant living there and this is the property for which he has waived the obligation to pay rent.

(d) The defendant has failed to provide any evidence that he wrote to the tenants to notify them that all rents payable should be paid to the receivers. It is not disputed that pursuant to Gilligan J.'s order of 15th April, 2015 the defendant undertook that he would *"direct all tenants at the secured properties to forthwith pay all rent and/or licence fees associated therewith to the Plaintiffs"*.

The receiver testified that he had not seen any evidence that the defendant had sent any such communication to the tenants and that despite attempting to collect the outstanding rent, they were still not receiving rents from a number of

the tenants including John O'Dwyer and John Flynn.

The plaintiffs point to the conflict between the defendant's submission that Mr. Davey gave evidence that he had told the tenants of their obligation to pay rent to the receivers and the evidence given by Mr. Flynn (a witness called by Mr. Davey) that he was not paying any rent to the receivers and did not intend to do so. They point also to the fact that Mr. Davey's position that he had informed tenants that they should pay rent to the receivers had never previously been asserted either in correspondence or in his defence. Thus, despite these assertions which were made for the first time under cross-examination, there is no evidence that Mr. Davey has in fact complied with the undertaking which he gave to the Court and he has not, for example, produced any tenant to give evidence to the effect that he was told by Mr. Davey to pay rent to the receivers. The only tenant who gave evidence is Mr. Flynn who has asserted his entitlement not to pay rent to the receiver because of the conversations he had with Mr. Davey.

The plaintiffs submit that it is important to bear in mind that as Mr. Davey's conduct may have altered somewhat since 15th April, 2015, this is because he was by then subject to two High Court orders. Prior to those orders being made, he had fundamentally obstructed the receivers in the conduct of their duties by, for example, collecting rents from tenants; informing tenants that the receivers had no authority to act or collect rents; and failing to pay or remit those rents to the receivers. The plaintiffs state that prior to the commencement of the within action, the defendant made clear his intention to oppose the receivers at every stage and under cross-examination he accepted that this was his intention throughout. The plaintiffs submit that it is clear that if the orders had not been made, the defendant would have continued to obstruct the receivers and that if the orders were not to be continued, there can be no serious doubt that he would resume his campaign of obstruction. The plaintiffs state that it is crucial to note that the defendant has at no stage offered any undertaking to the Court that he will in lieu of injunctive relief, cooperate with the receivers.

90. In relation to point 2, the plaintiffs state that the defendant asserts that he was entitled not to cooperate with the receivers because of his belief that they were not validly appointed. The plaintiffs repeat their earlier submissions in respect of the point that there was no legal authority to support the position that a mortgagor was entitled to obstruct a receiver in the conduct of his duties and prevent him from collecting rents where the mortgagor's dominant purpose had been to "*protect his position*". The plaintiffs note that the defendant's submissions made no reference to any legal authority which supports this proposition. The plaintiffs submit that the suggestion that a mortgagor is entitled to ignore the statutory powers conferred upon an insolvency official simply because he did not believe the official has been validly appointed is an extraordinary proposition and is akin to suggesting that the director of a company is entitled to simply ignore the fact that a liquidator has been appointed to his company on the application of an unpaid creditor simply because he is not happy with the fact that the liquidator has been appointed, or to suggest that creditors of a company can ignore the fact that an examiner has been appointed to a company and may continue to pursue enforcement actions against that company simply because they do not accept the validity of the appointment.

91. The plaintiffs submit that the fact that Mr. Davey did not accept the validity of the receivers' appointment, acting as if they were not validly appointed and telling others that they were not validly appointed, indicates not only that he in fact obstructed the receivers in the conduct of their duties but also that he intended to do so.

Decision of the Court on Issue 3

92. The Court accepts that the evidence is overwhelming that Mr. Davey has at all material times been intent on resisting the receivership of his properties. The fact that since the appointment of the receivers he has collected and spent at least €77,000 in rent which should have been applied to the discharge of his debt speaks volumes for his attitude. While he has been somewhat more cooperative since the making of court orders on 10th December, 2014 and more particularly the granting of an interlocutory injunction on 15th April, 2015, the Court is particularly concerned with the absence of evidence to show that he complied with the undertaking given by him on oath to the Court that he would direct all tenants at the secured properties to forthwith pay all rent and/or licence fees associated therewith to the plaintiffs. The evidence of Mr. Flynn, called on behalf of Mr. Davey, that following discussions with Mr. Davey he is not paying rent to either Mr. Davey or the receiver, and the evidence of Mr. Davey that in May, 2015 the rent in respect of 45 The Steeples was waived, are clear evidence of non-compliance with his undertaking. That, taken together with his behaviour prior to court orders where he resisted the receivership, first, on the basis that he had instituted proceedings against Ulster Bank Ireland Limited, and second, in asserting that the receivership was a trespass in what he termed in his notice of 7th March, 2014, as his "*common law right to remove implied right of access*" persuades the Court that unless enjoined by court order, Mr. Davey will continue to resist and obstruct the receivers in the exercise of their function.

Issue 4 - Effect of transfer to Promontoria (Aran) Limited on the receivership

93. This issue arises from the somewhat dense plea in the defendant's amended defence at para. 13:-

"The Plaintiffs claims in the proceedings herein ought to fail by reason of the Plaintiffs failure, in their Statement of Claim, to make any reference to the sale and transfer of the Defendant's loans to Promontoria Aran Limited on 15th February 2015, more than two months prior to the date of delivery of the Plaintiffs' Statement of Claim where Ulster Bank Ireland Limited, Promontoria Aran Limited and the Plaintiffs had by Deed of Novation dated 15th February 2015 agreed that Promontoria Aran Limited take over the role of Ulster Bank Ireland Limited in respect of the relationship had by Ulster Bank Ireland Limited as appointors of the receivers with the Plaintiff as appointees, and where Promontoria Aran Limited have become the registered owners of the charges of the four properties comprised in Land Registry folios over which mortgages have been executed by the Defendant in favour of Ulster Bank Ireland Limited, and where, for the purpose of enforcement of those charges, the party seeking to enforce a mortgage must be registered as owner of the charge, including where, as in this case, the charge is being enforced by way of appointment of receivers for the purpose of collecting rents arising from the charged properties."

The gist of the plea appears to be that the plaintiffs' claim should fail because of the plaintiffs' failure to refer in their statement of claim to the transfer of the defendant's loans and securities mid-proceedings. There is no challenge to the transfer itself nor to the novation of the benefit of the receivership to Promontoria (Aran) Limited.

Submissions of the plaintiffs on Issue 4

94. The plaintiffs submit that the transfers of the loans and deeds of mortgage/charge from Ulster Bank Ireland Limited to Promontoria (Aran) Limited had no effect on the receivership and that the deed of novation contains a number of clauses which operate to transfer all legal rights and liabilities of Ulster Bank as mortgagee in the receivership to Promontoria (Aran) Limited:-

- Clause 200.1 provides that from the 12th February, 2015, Promontoria as transferee is substituted in place of Ulster Bank as transferor "*as party to the Receiver Agreements and that the Receiver Agreements shall be treated in all respects as if the Transferee were the original party to the Receiver Agreements instead of the Transferor*";

- Clause 200.3 provides that the receivers as continuing party “shall perform and discharge all liabilities and obligations whatsoever from time to time to be performed or discharged by him by virtue of the Receiver Agreements in all respects as if the Transferee were the original party to the Receiver Agreements instead of the Transferor”; and

- Clause 200.4 provides that “the Transferee hereby accepts with effect from the Effective Date the benefits and liabilities of the Transferor under the Receiver Agreements and that it shall perform and discharge all liabilities and obligations ... to be performed or discharged by it by virtue of the Receiver Agreements in all respects as if the Transferee were the original party to the Receiver Agreements instead of the Transferor.”

The plaintiffs submit that the intention of those provisions is to transfer all the rights and liabilities which Ulster Bank Ireland Limited had in the receivership as if it were the case that Promontoria (Aran) Limited had always been the appointing mortgagee under the deeds of appointment and that there is simply no legal basis for the submission that the transfer of the mortgagee's interest in the loans and the deeds of mortgage/charge had any effect on the receivership.

Submissions of the defendant on Issue 4

95. The defendant accepts that there was a deed of novation. The defendant submits that the plaintiffs made no effort or attempt to amend their pleadings to clarify that the receivers, appointed by Ulster Bank Ireland Limited were now acting on behalf of Promontoria (Aran) Limited. The defendant contends that the plaintiffs should have reinitiated proceedings and sought a separate appointment from Promontoria (Aran) Limited because the bank following the transfer of the loans to Promontoria (Aran) Limited/deed of novation retained no interest in the proceedings. The defendant asserts that by reason of the plaintiffs' failure to refer to the transfer of the loans to Promontoria (Aran) Limited in their statement of claim despite issuing that statement of claim subsequent to the transfer of the loans and their failure to furnish evidence in relation to same creates a gap in their evidential proofs particularly in light of the registration of Promontoria (Aran) Limited as registered owners of the charges on the properties.

96. The defendant submits that s. 62(2) and s. 62(6) of the Registration of Title Act 1964 imposed an obligation on Promontoria (Aran) Limited to become the registered owner of the charges registered against the properties and that without such registration, the plaintiffs would not have been in a position to enforce the mortgages, including the collecting of rents.

97. The defendant states that Promontoria (Aran) Limited became registered as owners of the charges on 9th April, 2016 and submits that by reason of the plaintiffs' failure to refer in the statement of claim to the transfer of the loans by Ulster Bank Ireland Limited to Promontoria (Aran) Limited leading to the registration of its ownership on the said Land Registry folios, there is a gap in the plaintiffs' required proofs in respect of the plaintiffs' entitlement to enforce the mortgages/charges against the properties on behalf of Promontoria (Aran) Limited.

98. The defendant states that the transfer of the loans from Ulster Bank Ireland Limited to Promontoria (Aran) Limited took place on 12th February, 2015 and that Promontoria (Aran) Limited was not registered as owner of the charges until 9th April, 2016. The defendant submits that the plaintiffs were not entitled to the reliefs obtained from Gilligan J. in April, 2015 while the registration of Promontoria (Aran) Limited as owner of the charges had not taken place. In support of this, the defendant relies on the decision of Laffoy J. in *Kavanagh v. McLaughlin* [2015] IESC 27 and also the decision of Baker J. in *Harrington v. Gulland Property Finance Limited* [2016] IEHC 447.

99. The defendant also refers to sections 1, 3 and 4 of the Central Bank of Ireland Code of Practice on the Transfer of Mortgages on residential property, stating that a loan may not be transferred without the borrower's consent and that the lender is required to provide certain information to the borrower in relation to the transfer. The defendant submits that such consent was sought in writing from the defendant on a number of occasions by both Ulster Bank Ireland Limited and Promontoria (Aran) Limited, and that such consent was emphatically denied to both companies on several occasions. The defendant alleges that there has been an attempt by the plaintiffs to paint Mr. Davey in a bad light, with unclean hands. The defendant refers to s. 117(1) of the Central Bank Act 1989, stating that it provides that every such code shall be observed by the licence holder. The defendant further refers to the decision of Hogan J. in *Irish Life and Permanent v. Duff* [2013] IEHC 43. The defendant submits that if unclean hands are at issue, they lie with the plaintiffs' appointers and assignees.

100. The defendant submits that he put the legitimacy of the appointment of the receivers on 17th September, 2013 by Ulster Bank Ireland Limited into question and that the fact that Ulster Bank Ireland Limited transferred the loans to Promontoria (Aran) Limited on 15th February, 2015 is crucial. He states that the receivers' pleadings make no reference to the fact that the bank is no longer the legal owner of the loans, and thus there is no mention in the statement of claim of the new registered owners of the loans and charges on properties registered in the Land Registry and that surely those new owners should have given their permission before the institution of proceedings.

Rejoinder submissions of the plaintiffs on Issue 4

101. In their rejoinder submissions, the plaintiffs reject the defendant's submission that the receivers were required to amend their statement of claim following the transfer of the loans and chargee's interest in the properties to Promontoria (Aran) Limited on 15th February, 2015. The plaintiffs state that no legal authority has been provided to support this contention. They state that the receivers were validly appointed by Ulster Bank Ireland Limited, then the holder of the chargee's interest and began these proceedings of their own volition and in exercise of their own powers. The plaintiffs state they were under no legal obligation to plead as to the transfer of the loans or the chargee's interest in their statement of claim and did not do so, the receivers' obligation being to fulfil their statutory powers, for which proceedings are brought to enable them to achieve this aim.

102. In reply to the defendant's reference to s. 62(2) of the Registration of Title Act 1964 and the decisions in *Kavanagh v. McLaughlin* and *Harrington v. Gulland Property Finance Limited*, the plaintiffs distinguish those cases in that they involved a situation where as part of the transfer of a loan portfolio, the mortgagee's interest in particular secured properties was transferred to a new mortgagee and that mortgagee, prior to being registered as the owner of the charges, purported to appoint a receiver over the secured properties in question. In *Gulland*, Baker J. found that the receiver had not been validly appointed because the chargee who purported to appoint him had not been registered as holder of the charge; that s. 62(2) provided that until the owner of the charge was registered, it would not hold any interest in the land and any attempt by an unregistered charge holder to purport to appoint a receiver was invalid. The plaintiffs submit that this case is different as the receivers were already validly appointed by the holder of the registered charge, Ulster Bank Ireland Limited at the time of transfer and the fact that the chargee's interest has now transferred to Promontoria (Aran) Limited does not affect the fact that the receivers were validly appointed nor does it affect their entitlement to maintain this action. The plaintiffs note that no legal authority to the contrary has been identified by the defendant.

103. In response to the defendant's submissions in relation to the Central Bank of Ireland Code of Practice on the Transfer of Mortgages that the defendant's consent to the transfer ought to have been obtained, the plaintiffs note that apart from the fact

that this point was not made in pleadings and was not raised in evidence, it has no legal basis for two reasons. First, the document is a voluntary code of practice and is not a code of conduct which was the instrument considered by Hogan J. in *Irish Life & Permanent plc v. Duff*. Second, the code refers only to a “mortgage of residential property” whereas all of the secured properties are commercial properties and were treated as such by Mr. Davey.

Decision of the Court on Issue 4

104. The Court finds that the defendant’s submissions on this issue are fundamentally misconceived. The plaintiffs were duly appointed by the mortgagee of the defendant’s properties and were appointed pursuant to the mortgage contract. At the time of the transfer to Promontoria (Aran) Limited, the plaintiffs were thus lawfully appointed receivers to the defendant’s properties. By virtue of the deed of novation, they simply continued as lawfully appointed receivers in respect of the rights and entitlements of the new mortgagee, Promontoria (Aran) Limited. The validity of their appointment did not depend in any respect on the registration of the charge pursuant to s. 62(2) of the Registration of Title Act 1964. The Court can see no grounds for the assertion that there was any duty on the transferee of the mortgages to execute a new deed of appointment in respect of the receivers and to initiate fresh proceedings thereafter.

105. As to the defendant’s submission in relation to the Central Bank of Ireland Code of Practice, quite apart from the fact that the point had not been raised in pleadings or evidence, the Court is satisfied that it has no application to the current case for the reasons set out in the plaintiffs’ submissions.

Issue 5 - Description of the secured property in mortgage deed of 29th January, 2007

106. The description in issue is in relation to the secured property referred to as “Niles House”. It is described in the mortgage deed of 29th January, 2007, in the following language:-

“ALL THAT AND THOSE the piece or plot of ground with the premises and out offices thereon situate at Bridge Street in the town of Kilcock, Parish of Kilcock, Barony of Ikeathy and Oughterany and County of Kildare held in fee simple”

Submissions of the plaintiffs on Issue 5

107. The plaintiffs submit that the description of the secured property in the deed of mortgage/charge dated 29th January, 2007 did not preclude the receivers from exercising their powers over that secured property. They state that Mr. Etherington gave evidence that he had identified each of the secured properties by visiting them individually, that he had collected rents from tenants in the property referred to in the deed of 29th January, 2007 and that he had not encountered any difficulties in obtaining rents from the tenants at that property by reason of the description given of the property in the deed. The plaintiffs point to the fact that Mr. Etherington’s evidence that the plaintiffs had not been hampered in exercising their powers and duties with regard to Niles House by virtue of the description given to the property in the deed of mortgage/charge of 29th January, 2007 was not challenged in cross-examination.

Submissions of the defendant on Issue 5

108. The defendant argues that the description refers neither to an address, nor to measurements, nor to a map of the property, and that as such, it is not identifiable. Therefore, the defendant argues, the property is not saleable or transferable nor, is it possible to formally appoint a receiver over such a vaguely and unidentifiably described property. The defendant submits that the ability of the receivers to collect rent from the tenants of that property does not mean that the plaintiffs have been appointed as receivers over a property which is not identifiably described. The defendant points to the fact that Mr. Etherington referred to the property as “Niles House” in his evidence but that reference is not used in the deed of appointment or the deed of mortgage.

109. The defendant characterises the plaintiffs’ position on this issue as being that the receivers knew which property to go to exercise their powers. He argues that that is beside the point. The description in the deed of mortgage and deed of appointment is not sufficiently precise and lacks sufficient clarity to identify the property over which the receivers seek to exercise their powers as receivers. The defendant states that Mr. Davey gave evidence that there were other business premises on Bridge Street which could be captured by that opaque description.

Decision of the Court on Issue 5

110. The fact is, the property has been identified, and Mr. Etherington’s evidence before the Court has not been challenged. He has attended at the property. He has collected rents at the property. Mr. Etherington’s evidence has not been challenged in this regard, nor has Mr. Davey given evidence that the property identified as the mortgaged property by Mr. Etherington is not the mortgaged property.

Issue 6 - Entitlement of Plaintiffs to reliefs (a)-(f) in the issue paper

Submissions of the plaintiffs on Issue 6

111. The plaintiffs identify that the defendant’s principal opposition to the receivership fluctuated during the course of the hearing. At one point the defendant suggested that he was entitled to frustrate the plaintiffs in the discharge of their duties and powers as receivers because he had never consented to their appointment. At other times he suggested that the receivers’ appointment was not valid until a court order had been made confirming their appointment. The plaintiffs submit that neither suggestion is true.

112. The plaintiffs state that the receivers were appointed by Ulster Bank Ireland Limited under s. 19 of the Conveyancing Act 1881 which provides that a mortgagee may appoint a receiver of the income of the mortgaged property “when the mortgage money has become due”. They state that there is no dispute that payment was demanded of the loans due under the 2009 facility letters and that each of these liabilities remain due.

113. The plaintiffs state that the deeds of appointment of 17th September, 2013 are each in written form and signed by the lawfully appointed attorneys of Ulster Bank Ireland Limited, in compliance with s. 24(1) of the Conveyancing Ireland Act 1881. They further submit that the deeds meet the threshold in *Trustee Solutions Limited v. Dubery* [2006] EWHC 1426 (Ch) that an instrument “under someone’s hand is an instrument that he has signed”. They state that as the deeds of appointment were validly executed, there is no doubt as to the validity of the plaintiffs’ appointment as receivers; that neither s. 19 nor s. 24 of the Act of 1881 provide that the mortgagor’s consent must be obtained before a receiver is appointed and it would as a matter of logic be strange if a mortgagee was first required to obtain the consent of the mortgagor before taking enforcement action against him.

114. The plaintiffs further submit that there was never any requirement for the plaintiffs to obtain a court order confirming their appointment as the defendant appeared to suggest they were required to do. As long as the deeds of appointment complied with the provisions of the Conveyancing Ireland Act 1881, they were valid on their face. The plaintiffs state that they were correct in

asserting that they were validly appointed in their correspondence to the defendant of 27th September, 2013. They state that Mr. Davey must bear the consequences of not taking legal advice, of choosing wilfully to ignore the letter which explained the validity of the appointment and of choosing to adopt a conscious policy of opposing the receivership. The plaintiffs state that it is this deliberate and unwavering policy to oppose the receivership which underpins the need for the granting of injunctive relief. The plaintiffs state that the defendant has made clear his intention to oppose the receivership at every stage and the only reason for some limited cooperation with the plaintiffs was due to the court orders of 10th December, 2014 and 15th April, 2015.

(a) Judgment in the amount of €77,625.00

The plaintiffs submit that only the receivers are entitled to collect the rent from the tenants at the secured properties and that the defendant is required to remit all rents to them from the moment he receives notice of their appointment. The plaintiffs identify that not only did the defendant collect rents and represent to tenants that they were obliged to pay those rents to him, he has declined to remit those monies to the plaintiff and instead has spent them. The plaintiffs therefore submit that they are entitled to judgment for all monies which the defendant has collected by way of rent.

(b) An order directing the Defendant to account to the Plaintiffs for all rents or licence fees which he has received or collected in respect of the Properties since the date of the Plaintiffs' appointment as Receivers

The plaintiffs submit that the defendant, although already required to furnish this information by the order of 15th April, 2015, has only furnished schedules which deal with rent collected for the calendar year 2014 and for the period January to April, 2015. The defendant has not provided any account of rent collected in the period 23rd September, 2013 to 31st December, 2013. The plaintiffs also seek accounts for the period after 15th April, 2015 despite the fact that the defendant has asserted that he did not collect rent after that time. They state that they have no way of knowing whether this is true in circumstances where the defendant has not fully complied with the original order of 15th April, 2015.

(c) An order restraining the Defendant and anybody else having notice of the Order from preventing, impeding or instructing the Plaintiffs or their agents from collecting the rents or the licence fees associated with the Properties pending the determination of the action

The plaintiffs ask for the interlocutory relief granted by Gilligan J. on 15th April, 2015 to be continued, in circumstances where the evidence is that the defendant collected rent from the tenants and although he now contends that he has stopped collecting rent, the plaintiffs have no way of knowing whether this has stopped but do know that many tenants continue to refuse to pay rent to them and the defendant has failed to fully account to the plaintiffs for all rent he has received. The plaintiffs further point to the defendant's opposition to the receivership, his concession that he has only cooperated because of the court orders, and his failure to give or offer to give an undertaking to fully cooperate and refrain from impeding the receivership.

(d) An order directing the Defendant to within 14 days of the date hereof produce evidence that he has notified in writing all tenants at the Secured Properties to forthwith pay all rent and/or licence fees associated therewith to the Plaintiffs

The plaintiffs submit that the defendant pursuant to the court order of 15th April, 2015 gave that undertaking but has so far failed to produce any evidence of compliance.

(e) An order directing the Defendant to produce to the Plaintiffs all leases or licences applicable to Apartment 45, The Steeples, Dublin Road, Navan, Co. Meath

The plaintiffs point to the defendant's failure to give the name of any tenant who had rented the property and that he has been equivocal about whether there was ever a written lease for that property: "Yes. I don't think there was a lease for that. You know, it wasn't there anyway, so I couldn't find it". The plaintiffs suggest that a direct order requiring the defendant to produce the missing lease would likely lead to the lease being found, or in the event that the lease remains missing, the defendant should be required to give clear and unequivocal statement on affidavit as to whether the lease ever existed and if it did, where it was last located.

(f) An order directing the Defendant to disclose to the Plaintiffs his PPS Number, on the Plaintiffs' strict undertaking only to use this information for the purposes of enforcement proceedings against tenants at the Secured Properties and to provide written consent to those proceedings

The plaintiffs refer to Mr. Etherington's evidence that in order to bring enforcement proceedings against recalcitrant tenants, it is necessary to provide details of the original lessor's PPS number and a written form from him consenting to the bringing of the proceedings to the Residential Tenancies Board. The plaintiffs state that it is unclear as to whether the defendant disputes this as no objection appears to have been made. The plaintiffs submit that it is appropriate that Mr. Davey be ordered to provide this material to allow the receivers enforce the terms of the lease, in circumstances where the only way that enforcement proceedings can be brought is if the defendant cooperates and provides the information to the plaintiffs.

Submissions of the defendant on Issue 6

115. In response to the various orders sought by the plaintiffs under this heading, the defendant repeats in essence, his earlier arguments as to the invalidity of the mortgage deeds by reason of the invalidity of the facility letter of 28th May, 2007 and the failure to adequately describe the Niles House property all of which arguments have already been disposed of earlier by this Court in the course of this judgment. The defendant suggests for the first time in submissions that the deeds of appointment have not been executed by the mortgagee by writing under hand and are defective by reason thereof.

116. The defendant replies to the plaintiffs' submission that under s. 24(1) of the Conveyancing Ireland Act 1881 and *Trustee Solutions Limited v. Dubery*, the deeds of appointment of 17th September, 2013 are valid, by arguing that the deeds of appointment have not been executed by the mortgagee "by writing under hand". The submits that in the case of a company a deed of

appointment must be executed in accordance with the provisions for executing documents set out in the articles of association of the company (in this case Ulster Bank Ireland Limited) and not by an attorney on foot of a power of attorney. The defendant refers to *Merrow Limited v. Bank of Scotland plc*. [2013] IEHC 130, where Gilligan J. held that a receivers' authority was derived on the instrument under which he was appointed and that the appointment is not valid unless it is made in accordance with the terms of that instrument. He states that this was affirmed by Laffoy J. in *McCann v. Halpin & Anor* [2016] IESC 11 and *Crossplan Investments Limited v. McCann* [2013] IEHC 205.

Rejoinder submissions of the plaintiffs on Issue 6

117. In their rejoinder submissions, the plaintiffs state that the defendant has not explained how it is contended that the deeds of appointment were not made in writing under hand. They point out correctly that none of the authorities referred to have been dealt with or discussed by the defendant. The plaintiffs state that the deeds of appointment are clearly each in written form and each was signed by the lawfully appointed attorneys of Ulster Bank Ireland Limited, one of whom, Mr. Michael Evans, gave evidence in relation to this, evidence which was not challenged by the defendant in cross-examination. The plaintiffs state that the defendant appears to make the case that Mr. Evans was not properly authorised to execute the deeds of appointment but no basis is advanced to explain why it is said that is so. The plaintiffs submit that contrary to what is suggested in the defendant's reference to *Merrow*, Gilligan J. held that a signatory of a deed of appointment who had been authorised to execute deeds of appointment by way of a power of attorney was validly authorised to appoint a receiver in this manner.

Decision of the Court on Issue 6

118. The submissions of the defendant on these issues are in essence a restatement of arguments already advanced and rejected by the Court. As to the deeds of appointment of the receivers, the defendant has not pleaded any invalidity in those deeds of appointment. Each deed is in written form and each was signed by the lawfully appointed attorneys of Ulster Bank Ireland Limited. Michael Evans, one such attorney gave evidence of the execution of the deeds which was not challenged in cross-examination. It seems to the Court, on the evidence, that the plaintiffs are entitled to the reliefs sought at (a) to (f), such orders being necessary for the proper discharge of the receivers' functions.

Conclusion

119. The Court will hear from the parties as to the orders now to be made.