THE HIGH COURT

CHANCERY

[2017 No. 4686 P]

BETWEEN

JAMES MCGARRY and LOUISE MCGARRY

PLAINTIFFS

AND

TOM O'BRIEN

DEFENDANT

JUDGMENT of the Hon. Ms. Justice Stewart delivered on the 12th day of December, 2017.

1. The plaintiffs in these proceedings seek a number of reliefs, including interlocutory relief against the defendant restraining him and his agents from dealing in any way with two properties in Co. Sligo and from interfering in the plaintiffs' ownership and quiet possession of same. Said reliefs are set out in the plaintiffs' ex parte docket and notice of motion, both dated 24th May, 2017. The defendant purports to act as a receiver on behalf of Havbell DAC, who claim to be the successor-in-title to the mortgagee's interests in the relevant loan agreements created between the plaintiffs and Permanent TSB.

2. The application is grounded upon the affidavit of James McGarry, dated 22nd May, 2017, in which he avers that the above loan agreements were entered into on 5th March, 2006, and were secured by a charge arising from a deed of mortgage dated 1st June, 2009. That charge operates over two properties and was registered in favour of Permanent TSB. Mr. McGarry avers that the mortgage incorporates the Permanent TSB Mortgage Conditions 2002 and that neither of these documents contain a standalone power to appoint a receiver; instead, they rely on a modified version of the statutory powers outlined in the Conveyancing Acts 1881 – 1911. Mr. McGarry avers that these powers do not include a power to possess the properties, sell the properties or run any business operating out of the properties. He avers that Irish Life & Permanent Plc, its successors and its assigns have the power to possess and sell the properties but not a receiver, whose powers relate to the income from the properties. He avers that a company known as Havbell Ltd (now Havbell DAC) claims to have been assigned the security interest in the 2009 mortgage and, on that basis, purported to appoint the defendant as receiver over the properties. He avers that, following said appointment, the defendant sent him a letter dated 1st March, 2017, in which he stated that he had taken possession of the properties and demanded that the plaintiff either remove all items from the properties within seven days or expect the receiver to avail of his rights under the mortgage deed to deal with the goods as his client sees fit. Mr. McGarry disputes the receiver's right to take such steps under the mortgage. He avers that his solicitors have sent correspondence to the defendant requesting documentation to evidence the defendant's entitlements over the property and have yet to be provided with same. He refers to multiple incidents in April, 2017, in which he and the second-named plaintiff discovered that agents of the defendant has forced their way into one of the properties. He refers to one particular incident, in which he observed these agents removing furniture from one of the properties and even damaging same. He avers that these men stated that they were legally entitled to act in this manner and that the defendant was preparing the property for sale. This belief was reiterated in correspondence sent from the defendant's solicitors to the plaintiffs. Mr. McGarry is also aware that the defendant has instructed an auctioneer to place one the properties for sale on the open market. Correspondence is exhibited between the parties, in which the plaintiffs repeatedly demand that possession of the properties be returned, the defendant reiterates that he was validly appointed and both sides threaten legal proceedings. Mr. McGarry highlights that the defendant is acting as a receiver and not as a mortgagee in possession or as a receiver over income. The plaintiff offers to make the usual undertaking as to damages.

3. Karl Smith, a director of Havbell, swore an affidavit dated 31st May, 2017, in which he sets out the background facts, as he believes them to be, that led to the creation of the mortgage and the assignment of the mortgagee's interest to Havbell. He avers that the plaintiffs continually failed to make repayments on the loan, with the result that the loan became immediately repayable and a receiver was eventually appointed. He then exhibits the documents empowering him to appoint a receiver on behalf of Havbell. Even if these documents did not vest him with the requisite power of attorney, Mr. Smith avers that he remained empowered to appoint the defendant by virtue of his position as a company director of Havbell.

4. Tom O'Brien swore an affidavit dated 2nd June, 2017, in which he avers that he was appointed on 23rd September, 2016, to act as receiver over the properties in question and exercise all the relevant powers that come with that position under the mortgage agreement. He avers that the plaintiffs have consistently frustrated the proper administration of the receivership, notwithstanding their awareness of the circumstances of Mr. O'Brien's appointment and their failure to make proper repayments on the loan. He then offers an explanation for the failure to provide the plaintiffs with the documents they requested. Mr. O'Brien disputes the plaintiffs' characterisation of his attempts to gain possession of the properties and of the plaintiffs' attempts to frustrate same. The allegation that Mr. O'Brien's agents damaged chattels is denied. Mr. O'Brien also highlights the repeated requests made by him of the plaintiffs to remove their items from the premises, which have continually gone unheeded.

5. On 14th July, 2017, Mr. Smith swore a second affidavit, to which he exhibits a redacted version of the mortgage sale agreement. He then sets out the reasoning for those redactions and avers that none of the redacted material is relevant to the plaintiffs' case. He also exhibits documentation that remedies an administrative error made when filing exhibits to his first affidavit. Finally, he sets out the details of other loans owed by the plaintiffs to Havbell, which are not involved in these proceedings but remain in default.

6. On 19th July, 2017, Mr. McGarry swore a second affidavit, in which he challenges the statement in the defendant's outline submissions that Havbell intends to discharge the defendant and enter the properties as mortgagee in possession once the defendant has adequately prepared the properties for sale. He exhibits various documents to evidence the suggestion that, contrary to the above submission, the defendant has gone beyond the preparation stage and is actually selling the property.

7. Elaine McNally, a solicitor for the defendant, swore an affidavit on 20th July, 2017, to which she exhibits a copy of Havbell's memorandum and articles of association as they existed in August, 2016, when, on her account, Mr. Smith executed the deed appointing a receiver.

The Plaintiffs' Submissions

8. The plaintiffs submit that the receiver lacks the requisite powers of possession, sale and disposal. They submit that the receivers' powers are set out in the Conveyancing Acts 1881 – 1911, save where those powers are modified by Clause 6.2 of the 2002 Mortgage Conditions. It is alleged that neither the statutory provisions nor the contractual modifications thereto empower a duly appointed receiver to take possession of, sell or dispose of the properties. In making this argument, the plaintiffs set out the provisions of s. 19 of the Conveyancing Act 1881 and s. 108 of the Land and Conveyancing Law Reform Act 2009. In construing those provisions, the plaintiffs rely on Gilligan J.'s decision in The *Merrow Ltd. v. Bank of Scotland Plc* [2013] IEHC 130.

9. The plaintiffs submit that, as their rights over land are being infringed by a trespass, they have a prima facie entitlement to injunctive relief that can only be refused in exceptional circumstances. In making this argument, they rely on Feeney J.'s decision in *McKeever v. Hay* [2008] IEHC 145. In particular, it is submitted that no relevance can be found in the responsible party's willingness and ability to pay damages. In this regard, they rely on Clarke J.'s decision in *AIB v. Diamond* [2012] 3 I.R. 549 and Finnegan J.'s decision in *Dellway Investments v. NAMA* [2011] 4 I.R. 1. Finally, the plaintiffs reiterate that they are putting the defendant on strict proof of the transfer of security to Havbell, the amount of the mortgage money that is due and the validity of the defendant's appointment.

The Defendant's Submissions
10. The defendant particularises the various documents provided by the defendant over the course of these proceedings to evidence the transfer of interest and the validity of his appointment. He further notes that, while the plaintiffs appear to be challenging the validity of the events, what little payments they have made since the transfer were made to Havbell (with no further payments being made since the defendant was appointed). The defendant relies on s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 and the conditions distilled from it in *O'Rourke v. Considine* [2011] IEHC 191. He further relies on the decisions in *English v. Promontoria [Aran] Ltd No. 1* [2016] IEHC 662 and No. 2 [2017] IEHC 322, noting in particular the ongoing confusion in those proceeding and the contrasting clarity through which he has carried out his business.

11. Regarding the plaintiffs' challenge to the receiver's power to take possession, the defendant submits that the power to take possession is implied into Clause 6, as the inability to take possession would completely undermine the receiver's ability to perform his duties as receiver of income, rents and profits. In making this argument, the defendant relies on, *inter alia*, Laffoy J.'s decision in *Kavanagh v. Lynch* [2011] IEHC 348. The defendant then reiterates his submission that the receiver is empowered to prepare the property for sale before the mortgagee enters into possession and actually completes the sale. In that context, the marketing of the properties is an obvious step taken in preparing a property for sale. In oral submissions, the plaintiffs distinguished *Kavanagh*, and cases like it, on grounds that the issue of receivers' powers was subsidiary to a suite of other arguments presented by the borrower and determined by the Court. They also argue that Laffoy J.'s judgment fails to account for all the legal authorities on the issue, but particularly the precise wording and limiting effect of s. 19(1) of the 1881 Act. On those bases, it was submitted that the question of the receiver's powers had not been definitive determined. With regard to the defendant's reliance on *McAteer v. Sheahan* [2013] 2 I.R. 328, the plaintiffs submit that O'Malley J.'s conclusions only apply to receivers who have been given the power to let and manage the relevant property, which the defendant has not. In response, the defendant submits that his powers under Clause 6.2(c) of the Mortgage are broadly analogous to the power to manage a property and that O'Malley J.'s decision in *McAteer* outlines no serious distinction between her views on a receiver's powers and Laffoy J.'s views in *Kavanagh*. It is also submitted that this Court is bound by the *Kavanagh* decision and that the facts of this case do not come within one of the three scenarios outlined in *Re Worldport Ireland Ltd* [2005] IEHC 189, which would enable the Court to depart from an otherwise binding decision.

12. In light of the above, the defendant submits that the plaintiffs have failed to set out a fair question to be tried and have therefore failed to satisfy the first limb of the test for the grant of interlocutory relief.

13. Regarding the adequacy of damages, the defendant submits that matters are not as absolute as the plaintiffs contend them to be. While he acknowledges the general rule of thumb that damages are not an adequate remedy for a trespass, he also relies on Keane J.'s decisions in *Szabo v. Kavanagh* [2013] IEHC 491 and *Tennant v. McGinley* [2016] IEHC 325, in which he advocates for a fact-based approach. As an example, the defendant relies on McGovern J.'s decision in *Donore Garages Ltd v. Tennant* [2017] IEHC 178, in which the status of the properties as commercial investments, rather than familial residences, was one of the reasons that damages were deemed to be an adequate remedy. Conversely, the defendant questions how the plaintiffs can make the requisite undertaking as to damages when they are already in significant debt. In this regard, the defendant further relies on Keane J.'s decision in *Szabo*.

14. Regarding the balance of convenience, the defendant submits that it is best served by maintaining the *status quo*. In this case, it is submitted that the *status quo* is the receiver's peaceful possession of the properties. The defendant also highlights that Havbell holds a power of sale, so there is a viable alternative through which to conclude matters.

Supplemental Submissions
- Implied Right of Possession and Power of Sale

15. The plaintiffs maintain that the defendant is acting beyond his powers in possessing and preparing the properties for sale before Havbell completes the sale as mortgagee in possession. It is submitted that the defendant's activities would be within his powers if he were preparing the property for rent, as that has a clear connection to his powers to manage the income from the properties. It is alleged that preparing the properties for sale is an encroachment upon the powers conferred on the mortgagee and defeats the purpose of s. 19 of the 1881 Act and Clause 6.4 of the General Conditions 2002. By contrast, the plaintiffs highlight the powers afforded to the receiver in McAteer, who, unlike the defendant, was explicitly empowered to potentially exercise a power of sale because such a power was not available to him under the 1881 Act.

16. For his part, the defendant submits that the plaintiffs' characterisation of the receiver's position flies in the face of legal authority, as expressed in *Mooreview Developments Ltd v. First Active Plc* [2009] IEHC 214, and good commercial sense, as expressed in *Bula v. Crowley* [2002] IEHC 4. It is further submitted that s. 24(3) of the Conveyancing Act 1881 clearly outlines the receiver's power to recover income to the full extent of the interest the mortgagor could dispose of. It is submitted in the alternative that Havbell implicitly delegated its power of sale to the receiver in the deed of appointment and that the defendant's appointment remains valid regardless of whether he holds the power to sell and/or market the properties.

- Power of Attorney

17. Regarding the power of attorney exhibited by Mr. Smith, the plaintiffs submit that this power operates in relation to a master servicing agreement between Havbell and a third party, which is directly referenced in the power of attorney document itself. As that agreement has no bearing on these proceedings and the plaintiffs' mortgage, it is submitted that Mr. Smith lacks the power of attorney to act in this context and the appointment of the defendant is invalid. It is further submitted that this power of attorney

document does not satisfy the standard set out in the Powers of Attorney Act 1996, and, in particular, s. 16 thereof. In making that argument, it was submitted that any valid power of attorney must comply with the 1996 Act. The defendant relies on MacKenzie's "*The Law of Powers of Attorney and Proxies*" in rebutting that argument.

18. The defendant submits that, while the power of attorney was granted on foot of the master servicing agreement, its form and substance are sufficient to vest Mr. Smith with the requisite power to appoint the defendant. The defendant further submits that, as this was not a general power of attorney, s. 16 of the 1996 Act has no application and the failure to refer thereto does not vitiate the express intent of the parties to vest Mr. Smith with power of attorney. Regardless of the effectiveness of the power, the defendant highlights that Mr. Smith is a director of Havbell and, per s. 158(1) of the Companies Act 2014, he has a general entitlement to exercise all its powers. Thus, it is submitted that the challenge to the validity of the defendant's appointment is without basis.

- Failure to comply with Stamp Duty Requirements

19. Regarding the deed dated 19th June, 2015, (i.e. the mortgage sale agreement) which is exhibited to Mr. Smith's affidavit of 14th July, 2017, the plaintiffs submit that it does not appear to have been stamped in accordance with the Stamp Duties Consolidation Act 1999 and, under the provisions of s. 127 of that Act, cannot be relied upon in evidence. In the absence of that deed, it is submitted that there is no evidence before the Court that Havbell is entitled to appoint a receiver.

20. The defendant submits that, per s. 100 of the Finance Act 2007, the deed does not attract stamp duty and can be relied upon as evidence in the normal course. He highlights that the same argument was made in *English (No. 2)* and *Tyrell v. Mahon* [2017] IEHC 400, to no avail. Regardless of whether the deed is admissible, the defendant submits that there is an abundance of material before the Court evidencing the transfer to Havbell.

Decision
21. As this is an interlocutory application, the Court may only assess whether or not a fair question to be tried has been established. In terms of stamp duty requirements, much like in *English No. 2* and *Tyrell*, the Court is satisfied that a proper construction of s. 100 of the Finance Act 2007 and the Stamp Duties Consolidation Act 1999 makes it clear that this deed is not liable for stamp duty. This point was not pressed at hearing and the Court is satisfied that no fair question to be tried exists under this heading.

22. With regard to the validity of the transfer and amount of money due, Clause 6.7 of the Permanent TSB Mortgage Conditions 2002 states that Permanent TSB may transfer the benefit of the mortgage to any person at any time without the consent of the mortgagor. The mortgage sale agreement dated 17th June, 2015, and deed of transfer dated 19th June, 2015, make it clear that just such a transfer occurred between Permanent TSB and Havbell. The charge has also been properly transferred into the name of Havbell and the plaintiffs were duly notified of the change in circumstances at all the relevant stages. Clause 7.1 of the 2002 Conditions states that the total debt owed becomes payable where the mortgagor defaults in the making of two monthly repayments. Such defaults have occurred and the plaintiffs were duly served with letters of demand dated 20th May, 2016, and 23rd May, 2017. The latter of these states that €436,833.56 was due and owing to Havbell. This amount, along with any interest that has accrued on the debt since that date, constitutes the mortgage monies due by the plaintiffs. Following the 2016 letter of demand, the statutorily-required three months passed and the power to appoint a receiver became exercisable by Havbell thereafter. Therefore, there is no fair question to be tried under any of these headings.

23. Turning now to the actual appointment of the defendant and the power of attorney issue, before addressing the validity of the power, the Court will first examine whether the power's form and substance were sufficient to empower Mr. Smith to appoint the defendant in the first place. If not, then the question of its validity under the 1996 Act is irrelevant. According to Clause 1, the power was granted in the context of a master servicing agreement between Havbell and Lapithus Management S.a.r.l. This master servicing agreement has not been exhibited. The Court has not been informed as to what specific services Lapithus provide and what role they played over the course of the events that transpired between the plaintiffs, Permanent TSB, Havbell and the defendant. Such information is of vital importance if the Court is to form a view of the process involved. While the power does allow Mr. Smith to appoint a receiver, Clause 1(a) states Mr. Smith has been appointed to carry out acts:-

> "…necessary or desirable in connection with the services (as defined in the Master Servicing Agreement) to be carried out in relation to the assets (as defined in the Master Servicing Agreement),…"

I am of the view that the exhibited power of attorney is insufficient to grant Mr. Smith a power to appoint receivers in general; rather it empowers him to appoint receivers where such an appointment is necessary or desirable in connection with the services outlined in the master servicing agreement. In the absence of any information as to the contents of that agreement, the Court is not in a position to determine the scope of the power conferred on Mr. Smith and whether it would have enabled him to appoint the defendant.

24. The Court is being asked to determine whether a fair question to be tried exists with regard to the validity of the appointment of the defendant. I have already concluded that it is questionable whether the power of attorney was sufficient to enable Mr. Smith to appoint the defendant. However, the defendant is also arguing that his appointment is valid on foot of Mr. Smith's powers as a director, as set out in s. 158(1) of the Companies Act 2014. The Court notes that Mr. Smith executed the deed of appointment while "acting as lawfully appointed attorney of Havbell Limited". The plaintiffs did not argue that this specification, in and of itself, prevents Mr. Smith from relying on his status as a director to execute the defendant's appointment. In the absence of a point of dispute between the parties with regard to the capacity in which Mr. Smith was acting, the Court will move on and consider whether s. 158 of the 2014 Act is sufficient to obviate any fair question to be tried regarding the validity of the defendant's appointment.

25. Section 158(1) of the Companies Act 2014, which was the applicable law in September, 2016, when the defendant was appointed, states as follows:-

> "158. (1) The business of a company shall be managed by its directors, who may pay all expenses incurred in promoting and registering the company and may exercise all such powers of the company as are not, by this Act or by the constitution, required to be exercised by the company in general meeting, but subject to—
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> (a) any regulations contained in the constitution;
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> (b) the provisions of this Act; and
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> (c) such directions, not being inconsistent with the foregoing regulations or provisions, as the company in general

meeting may (by special resolution) give."

There seems to be some general confusion in the affidavits with regard to the dates of various events. In her affidavit of 20th July, 2017, Ms. McNally exhibited the memorandum and articles of association for Havbell Limited. She avers that these documents reflect the constitution of the company that existed when the defendant was appointed in August, 2016. However, she is clearly mistaken in that regard. The Instrument of Appointment of Receiver clearly states that it was executed on 23rd September, 2016. In his affidavit of 31st May, 2017, Mr. Smith averred that Havbell Ltd converted to Havbell DAC on 16th September, 2016. However, the exhibited Certificate of Incorporation on Conversion to a DAC states that the conversion occurred on 29th September, 2016. It is important that a factually accurate sequence of events is established because it determines which constitution the Court must examine for the purposes of s. 158(1)(a), that of Havbell Ltd or Havbell DAC. The constitution of Havbell DAC has not been put before the Court, so the Court would be unable to make any determinations as to its impact on the operation of s. 158. In light of the inaccuracies contained in the affidavits, the Court accepts the objective evidence outlined in the deed of appointment and the Certificate of Incorporation. The defendant was appointed on 23rd September and the conversion occurred on 29th September. Therefore, it is the constitution of Havbell Ltd that was in force at the time Mr. Smith executed the deed of appointment. The Court is satisfied that none of the provisions contained in s. 158(1) (a - c) would have undermined the directors' power to exercise the company's power to appoint the defendant.

26. Section 158 states that "the directors" can exercise the company's powers. It does not state that each individual director is, by virtue of s. 158, vested with the powers of the company and can act independently of his fellow directors. This construction of the law is reflected in the 4th Ed. of Courtney's "*The Law of Companies*", which states at para. 13.163:-

> "Section 158(1) of the Act delegates the powers to the 'directors', making no mention of the board of directors. However where a company has more than one director, the directors will generally act by majority (s 160(2) of the Act) and the fact that s 158(1) delegates powers to the 'directors', plural, means that the delegation is to the board of directors…"

The Court is given to understand that Mr. Smith was not the sole director of Havbell at the time the defendant was appointed. An examination of the paperwork indicates that at least three other people hold or have held the position of company director of Havbell. Certainly, if Mr. Smith was the sole director of Havbell in September, 2016, that fact was not put on affidavit and Mr. Smith never referred to himself as the sole director at any point.

27. The only construction of the law that would allow Mr. Smith to unilaterally appoint the defendant without any indication of approval from the majority of the board (save where some legal instrument is eventually put before the Court confirming same) would be where s. 18(a) of the Interpretation Act 2005 were applied in the context of the plural importing the singular. Such a position would rely on the fact that s. 11 of the 2014 Act provides no guidance as to how references to "the board of directors" and "the directors" are to be construed in the current context. This construction would mean that the powers of the company vest in each director individually and not just in the board. It could be argued that this construction has some merit because various other provisions of the 2014 Act refer to the board of directors, as opposed to just "the directors", and s. 158 does not. However, it has long been the position that the provisions of the 2005 Act are dis-applied where such application would result in a radical/unworkable result and/or a result that is contrary to clear intent of the affected legislation. In this case, their application would mean that individual directors are empowered to exercise the powers of the company with complete disregard to the will of the majority. This approach would be unworkable in practice and would render s. 160 of the 2014 Act a nullity.

28. It should be highlighted that the facts of this case are distinguishable from the facts in a recent decision delivered by this Court, *Hogan v. Deloitte & Ors* [2017] IEHC 673. In that case, the plaintiff made various challenges, including challenges to the appointment of the receiver by a director, Mr. Hennessy. The Court found that there was no fair question to be tried on this issue. In the case of Shoreline Ltd. (the company that had appointed the receiver in that case), there were only two directors, Mr. Hennessy and Mr. Johnston. Mr. Johnston swore an affidavit clearly stating that Mr. Hennessy could bind the company and that he supported the decision to appoint a receiver. Thus, it was clear that a majority of the board approved the exercise of the company's powers, an exercise that Mr. Hennessy had formally carried out by executing the deed of appointment of receiver. It could be argued that best practice would be for a formal decision to be recorded in the minutes of a meeting of the board. However, the Court also notes that s. 160 is optional in its language and affords companies significant latitude in organising their affairs. In any event, that is not a question that needs to be determined on the facts of this case. The facts in Hogan can be distinguished from the case currently before the Court, where the Court has been given no indication as to the views of the board and whether they approved the appointment of the defendant.

29. In light of all of the above, I am of the view that there is a fair question to be tried regarding the validity of the appointment of the defendant.

30. Turning to the issue of the receiver's powers, the following provisions of the Conveyancing Acts 1881 are relevant to the issues that the Court must determine:-

> "19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):
>
> (i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and,
>
> …
>
> (iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and

…

> (2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

…

24.—(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same."

The following provisions of the Permanent TSB Mortgage Conditions 2002 are relevant to the issues that the Court must determine:-

"6.2 The statutory powers of sale and appointment of appointment of a receiver conferred by and incidental provisions contained in the Conveyancing Acts 1881 and 1911 shall apply to this security with the following modifications and additions that is to say:

…

(c) Any receiver shall have power in the name of the Mortgagor to give notice to quit and bring and take actions or proceedings for ejectment or recovery of possession of any tenancy or otherwise and to re-let or let the Property or any part thereof from time to time to such person or persons as he shall think fit for any term of years or on yearly or weekly tenancies at the best rents that may be reasonably obtainable and to accept from time to time the surrender of the leases or tenancies of the Property or any part thereof for the purposes of selling or re-letting the same, without being responsible for loss.

…

6.4 At any time after the Total Debt has become immediately payable Permanent TSB may without any previous notice to or concurrence on the part of the Mortgagor:

…

(b) whether Permanent TSB shall or shall not have entered into possession or receipt of such rents and profits appoint at the cost and sole risk of the Mortgagor a person to collect and receive such rents and profits for the use and benefit of Permanent TSB at such commission as Permanent TSB shall think fit so that the statutory provisions respecting the appointment of receivers over property in mortgage and the power and duties of such Receivers or otherwise in relation thereto shall apply to this security expect so far as the same are hereby varied subject to the provisions hereinafter contained;"

31. In the deed of appointment, the defendant was empowered to enter upon and take possession of the relevant assets in the manner specified in the security documents together with the powers conferred by the security documents and by law. In terms of the two properties at issue in these proceedings, the security documents are the mortgage and charge dated 1st June, 2009, which incorporate the clauses set out in the Mortgage Conditions 2002. Having examined all of the above provisions, the Court is satisfied that the manner of possession vested in the defendant relates to 1) the income of the mortgaged property (s. 19(1)(iii) of the 1881 Act), 2) the rents and profits for the use and benefit of the mortgagee (Clause 6.4(b) of the 2002 Conditions), and 3) possession of any tenancy or otherwise recovered by the bringing and taking of actions or proceedings for said possession in the name of the mortgagor (Clause 6.2(c) of the 2002 Conditions). While the latter of these is not a specific type of possession outlined in the provisions, Clause 6.2(c) would be rendered a nullity if a receiver were empowered to take steps to recover possession but not empowered to then actually take up the possession he had recovered and carry out the other duties bestowed upon him.

32. It is important to note at this juncture that there are two distinguishing elements between this case and the case in *Kavanagh*: 1) the deed of appointment used to appoint the defendant is much broader than the one in *Kavanagh*, where the receiver was only appointed to be "receiver of the income, rents and profits of the secured property", and 2) the relevant receiver in *Kavanagh* was seeking an order of possession from the Court, as opposed to this defendant, who has sought to enforce his alleged right to possession without recourse to the courts. In this sense, the *Kavanagh* decision is not on all fours with the facts of this case. However, its logical reasoning is still relevant to this case, as evidenced by the third form of possession outlined above. The plaintiff is correct in submitting that receivers' powers are interpreted strictly. However, as stated in *Kavanagh*, that rigour is not so severe as to render the terms of the appointment entirely self-defeating. In assessing the plaintiff's arguments under the heading of receivers' powers, the Court will determine whether there is a fair question to be tried that the defendant has acted outside the powers conferred on him in the deed of appointment and, by extension, the security documentation.

33. The disputed actions taken by the defendant include possession and preparation of the property for sale. While brief submissions were made regarding an implied delegation of the power of sale, no actions were taken on foot of that supposed delegation. It is clear from the evidence that the defendant intends to prepare the property for sale and then make way for Havbell to enter into possession and actually execute that sale. The defendant has not expressed any intent to complete a sale and I would have extreme doubts as to his power to do so in any event. Therefore, a supposed power of sale vested in the defendant is not a live issue in this case and the Court will not consider it further.

34. As a matter of logic, a receiver must be able to take possession of the property before he can prepare it for sale. Therefore, the issue of preparation for sale only arises if the Court were to conclude that no fair question arose regarding the defendant's power to take possession. With regard to an implied power to take possession, a common theme exists between all the authorities relied on by the defendant: the receiver sought an order for possession from the Court. In those cases, a court reviewed the application and concluded that a receiver of a property's income, rents and profits had, by implication, the power to seek and secure an order for possession of the property. Laffoy J.'s decision in *Kavanagh* puts this proposition beyond doubt. However, I am of the view that there is a fair question to be tried, not in the soundness of Laffoy J.'s decision, but rather in its extent. The defendant submits that, under the *Kavanagh* decision, a receiver of income, rents and profits has an implied power to simply seize possession from a protesting mortgagor without any recourse to the courts whatsoever. While it is possible that *Kavanagh* supports this approach, I am not satisfied that such a proposition can be stated with certainty. I am of the view that the vesting of such a power in a receiver has the potential to raise public policy concerns of such significance that it requires a full determination by a court. Therefore, the first two types of possession identified by the Court as having been vested in the defendant under the deed of appointment are insufficient to

obviate any fair question that arises from these facts. The third type of possession is insufficient for identical reasons: it clearly envisages possession recovered through the bringing and taking of actions and proceedings. No such action or proceeding has been brought or taken by the defendant. I am therefore of the view that a fair question to be tried exists on this point also.

35. In summary, the Court concludes that fair questions to be tried have been established with regard to the validity of the appointment of the defendant and the precise powers vested in him by the deed of appointment.

36. Turning to the adequacy of damages, a fact-based approach, as outlined by Keane J. in *Szabo (supra),* is of assistance. In assessing the status of the properties the subject matter of these proceedings, the Court notes that this issue has not been addressed on affidavit or in any of the exhibits. In fact, the only document to refer to the status of the properties is the Outline Legal Submissions of the Defendant, which states at para 1.1 that "[t]he subject properties are residential investment properties: 10 Temple Street is currently occupied by tenants and 34 Temple Street has been vacant since 15th March 2017." This submission went unchallenged in the first-named plaintiff's supplemental affidavit on 19th July, 2017, which was sworn approximately one month after submissions were filed and one day before the matter came on for hearing.

37. While no specific averment definitively states that these properties are residential investments, their status under that heading is the entire basis on which the defendant progressed his case with regard to the adequacy of damages. The plaintiffs have not sought to challenge that basis, nor did they attempt to characterise the properties as something other than commercial investments, e.g. properties used for personal consumption. In light of the implicit agreement between the parties that these are residential investment properties, I am satisfied to that effect. In closing submissions, the plaintiffs submitted that these properties were intended to be put to some use related to the plaintiffs' children. That submission is also not on affidavit and does not augment the properties' status as residential investments. Therefore, there is a valid argument to be made that damages would be an adequate remedy for the plaintiff, as their losses are easily calculable and no doubt has been cast over the defendant's ability to pay those damages, should they arise. However, the Court cannot ignore that real property rights are at stake in this case. The parties are disputing, not over a piece of personalty that can be easily replicated, but over a unique piece of land. There are, of course, numerous decisions of the courts wherein damages were held to be an adequate remedy, notwithstanding that property rights in land were at stake. However, in implementing a facts-based approach and assessing the evidence, the Court is extremely concerned about the plaintiff's property rights in land being undermined in circumstances where serious questions subsist over the receiver's appointment and powers. On that basis, the Court is satisfied that damages are not an adequate remedy.

38. The final limb in the test for interlocutory relief is the balance of convenience. The defendant submits that the balance weighs against the granting of the relief because the status quo (i.e. the receivership's orderly administration) should be maintained. The Court cannot agree with that submission for the very simple reason that this receivership has, thus far, been anything but orderly. On the contrary, quite a large degree of uncertainty and confusion exists in the case put forward by the defendant.

39. While the plaintiffs have made the usual undertaking as to damages, they have failed to substantiate that undertaking by explaining to the Court how exactly they would be able to pay any damages that may arise at the conclusion of these proceedings. While an unsubstantiated undertaking would normally militate against the grant of interlocutory relief, it would also seem to be quite unjust to decline highly warranted relief on the basis of a lack of resources.

40. In assessing the balance of convenience, the Court must return to what is essentially the fundamental principle in assessing the balance of convenience: where does the least risk of injustice lie? In addressing this question, the Court cannot ignore the disorder plaguing the defendant's house. Various averments contained in the affidavits are inaccurate. The defendant has made submissions under both s. 158 of the 2014 Act and the power of attorney, but failed to actually produce the evidence necessary to substantiate them. He has also sought to rely on a power of possession, not explicitly contained in any document (be it a court order, security documentation or otherwise) but implied into those explicit powers that he does have, and then sought to exercise that implied power without any recourse to the courts. In particular, the Court is struck by how easily these issues could have been resolved. Had the defendant been more precise and accurate in the manner in which his case was presented to the Court, had the necessary evidence been exhibited, had Havbell explicitly delegated its powers of possession and/or sale, then the defendant's case would be clear-cut and nigh-on unimpeachable. However, none of those things happened. Indeed, this whole process would probably have benefited from Havbell pausing, reflecting and ensuring that everything was correct and in order before commencing the receivership process. One is left with the impression that there was a rush to commence and/or conclude the process, which ultimately will have the effect of delaying same even further.

41. In the presence of such uncertainty and confusion, I am satisfied that the balance of convenience rests with the plaintiffs. Therefore, the proper approach is similar to that set out by Murphy J. in *English v. Promontoria (Aran) Ltd. No. 1* (2016) IEHC 662: the continued administration of the receivership should be stayed until such time as the defendant puts his house in order and can clearly establish 1) Mr. Smith's entitlement to appoint the defendant, and 2) the defendant's entitlement to take possession of the property.

42. For the reasons outlined above, I propose to grant the injunctive relief sought.