



**THE COURT OF APPEAL  
CIVIL**

**Court of Appeal Record No. 2020/104  
High Court Record No. 2014/6750P  
Neutral Citation No. [2021] IECA 248**

**NO REDACTION NEEDED**

**Whelan J.  
Haughton J.  
Murray J.**

**BETWEEN**

**KEN FENNELL (AS RECEIVER OF CERTAIN ASSETS OF HUGH CORRIGAN)**

**PLAINTIFF/RESPONDENT**

**- AND -**

**HUGH CORRIGAN**

**DEFENDANT/APPELLANT**

**JUDGMENT of Mr. Justice Murray delivered on the 5<sup>th</sup> day of October 2021**

## **I FACTS AND ISSUES**

### ***Introduction***

1. By letter dated 11 December 2006, IIB Bank p.l.c (now KBC Bank Ireland p.l.c) ('the Bank') agreed to advance an amount of up to €2,150,000 to the defendant for the purpose of refinancing existing ACC Bank plc facilities. The facility was renewed thereafter by a series of letters, the last of which was dated 15 September 2011. The advances were secured by a mortgage dated 28 May 2007 ('the mortgage') in respect of two properties – a Londis Supermarket and restaurant in Kilmuckridge, Co. Wexford, and a supermarket, takeaway and two apartments in Oulart, Co. Wexford ('the Kilmuckridge Property' and 'the Oulart Property' respectively and 'the properties' collectively). By letter dated 16 May 2014 the Bank demanded repayment of €2,831,345.20, being the full amount of capital and interest then said to be outstanding on the facilities. By deed of appointment dated 21 July 2014 the Bank purported to appoint the plaintiff as receiver pursuant to the powers conferred by the mortgage.
2. In these proceedings (issued on 1 August 2014) the plaintiff sought an order granting him possession of the properties, together with injunctive relief preventing the defendant from obstructing the plaintiff in getting in and collecting the secured assets and damages. A declaration was also sought that a purported lease of the Kilmuckridge property to Melphia Enterprises Ltd. ('Melphia') was invalid as against the plaintiff. The defendant counterclaimed asserting that the plaintiff's appointment as receiver was invalid and claiming damages on this basis and as a result of various events that were alleged to have occurred in the course of the receivership. A number of interlocutory

applications were brought in the action directed to enabling the plaintiff obtain access to the secured lands. In January 2017 the plaintiff obtained possession of the Kilmuckridge property.

3. As of the date of the trial, the evidence was that there was a sum in the region of €2.5M outstanding on this facility. The trial lasted five days, Pilkington J. delivering a detailed reserved judgment ([2020] IEHC 79), ultimately ordering that the plaintiff was validly appointed as receiver and manager over the properties and directing that he was entitled to possession of those properties. She also granted a declaration that the plaintiff was not bound by any purported leases executed by the defendant his servants or agents in respect of the properties. The defendant's counterclaim (which arose from alleged damage and acts of trespass said to have been caused to the properties by the plaintiff or his agents) was dismissed.
4. The defendant represented himself at the hearing in the High Court. The notice of appeal subsequently served by him addressed a wide range of complaints arising from the High Court judgment. These were reduced in his written submissions to three headings of objection – that the appointment of the plaintiff as receiver was invalid, that leases had been granted in respect of some of the properties and that the plaintiff was thus not entitled to possession thereof, and that there had been a lack of fair procedures in the hearing before the High Court.
5. At the hearing of this appeal the appellant was represented by counsel and solicitors who made no submissions under the third of these headings but sought (as it was variously described) to add a new ground of appeal, to adduce new evidence and/or to advance a new argument. Each was said to arise from an Order made by this Court on February 19 2021 in distinct proceedings brought against the defendant by the Bank.

The defendant's advisors also sought to advance a claim based upon the proposition that the security on foot of which the plaintiff was purportedly appointed was a 'Welsh Mortgage' and, accordingly, prohibited by the provisions of the Land and Conveyancing Reform Act 2009.

***The mortgage, the deed of appointment and the defendant's argument***

6. The deed of appointment of the plaintiff as receiver provides, where material, as follows:

*"In pursuance of the powers contained in the Mortgage dated 28th May, 2007 made between HUGH CORRIGAN OF ... (the "Borrower") of the one part and IIB Bank plc who pursuant to Section 33 of the Central Bank Act, 1971, transferred its mortgage loans to KBC BANK IRELAND PLC and has its registered address at ... ("the Bank") of the other part (hereinafter referred to as the "Mortgage"), the security constituted by the Mortgage having become enforceable, we, the Bank, do hereby appoint KEN FENNELL of ... Dublin 4 ("the Receiver") to be **Receiver of and over, all the undertaking, property and assets of the Borrower referred to and charged by the Mortgage** to enter upon and take possession of the same in the manner as specified in the said Mortgage and the Receiver shall be entitled to exercise all of the powers conferred on him by the said Mortgage and by law. It is hereby declared that the Receiver shall be the agent of the Borrower who shall be solely responsible for the Receiver's acts, defaults and remuneration".*

(Emphasis added).

7. As evident from this, the appointment was made '*in pursuance of the powers contained in the Mortgage dated 28<sup>th</sup> May 2007*'. The relevant provision of the mortgage is clause 9.1:

*'At any time after the Chargor so requests all the security hereby constituted becomes enforceable, the Bank may from time to time appoint under seal or under the hand of the duly authorised officer of the Bank any person or persons to be **receiver and manager or receivers and managers** (hereinafter called a "Receiver" which expression shall where the context so admits include the plural and any substituted receiver and manager or receivers and managers) of the Secured Assets or any part or parts thereof and may from time under seal or under the hand of the duly authorised officer of the Bank remove any one or more receiver or receivers so appointed and may so appoint another or others in his/their stead.'*

(Emphasis added).

8. The point urged by the defendant by reference to these provisions starts from the correct premiss that the mortgage enables the appointment of a person to one position and one position only – that of '*receiver and manager*'. Here, it is indisputable that the deed of appointment upon which the plaintiff relies does not record the appointment as that of '*receiver and manager*' instead only identifying the appointee as '*Receiver*'. There is, the defendant says, a legal requirement that the deed of appointment strictly follow the

power conferred by the mortgage deed. Therefore, the defendant contends, given that the mortgage conferred a power to appoint a receiver and manager and only a receiver and manager, a deed of appointment which identified the appointee simply as ‘*Receiver*’ is invalid and ineffective.

9. This argument was rejected by the trial Judge. She found that the mortgage set out the powers of the receiver extensively and that the powers so identified were the powers of a receiver and manager. In her view that was properly reflected in the deed of appointment which referred to the terms of the mortgage and thus cross referenced the powers and duties of the appointee in that instrument (at para. 104). In other words, the plaintiff had been appointed a receiver, the appointment was of a receiver under the mortgage, and the receiver appointed under the mortgage had the powers of a manager. Therefore, he was a receiver and manager. This was the only argument arising from the deed of appointment pursued at the hearing of this appeal – while the notice of appeal refers generically to ‘*many inaccuracies*’ in this deed, no other point was identified such as to affect the validity of the appointment.

## **II THE VALIDITY OF THE PLAINTIFF’S APPOINTMENT AS RECEIVER**

### ***The decision in McCarthy v. Moroney***

10. In contending that Pilkington J. erred in thus concluding, the defendant relies heavily upon the decision of McDonald J. in *McCarthy v. Moroney* [2018] IEHC 379. There, the Court addressed a number of interlocutory applications arising in two sets of proceedings. One of these applications was brought by a receiver purportedly

appointed by Ennis Property Finance DAC over lands owned by the defendants. The appointment had been made on foot of a mortgage agreement entered into between the defendants and Bank of Scotland plc. The plaintiff's application was for an interlocutory order prohibiting the defendants from impeding or preventing him from taking possession of mortgaged properties. Because the application was, in substance, for an interlocutory mandatory order requiring the defendants to vacate the lands and enabling the plaintiff to take possession thereof it was necessary for the plaintiff to establish that he had a '*strong case*' that he was entitled to this relief.

**11.** The mortgage agreement on foot of which the plaintiff had been purportedly appointed was very similar to the form of the mortgage in issue in these proceedings, down to the numbering of the relevant paragraphs. Thus, clause 9.1 of the mortgage deed in question there referred also to the appointment by the Bank of '*person or persons to be receiver and manager or receivers and manager*'. The defendant in that case contended – as the defendant claims here - that it was only a person whose appointment was as receiver *and manager*, who could exercise the powers conferred by the mortgage deed to enter into, take possession of, get in or collect the secured assets. The end point of the argument was that if the deed did not actually recite the appointment as that of '*receiver and manager*', it was ineffective.

**12.** In refusing the application for interlocutory relief, McDonald J. referred to the decision of Gilligan J. in *The Merrow Ltd. v. Bank of Scotland* [2013] IEHC 130 in which the Court stressed the requirement that the appointment of a receiver be in strict compliance with the terms of the relevant deed or debenture. There, Gilligan J. held that the terms of the mortgage in issue meant that a failure to seal the deed of appointment was fatal

to the appointment of a receiver purportedly effected thereby. Applying that principle to the instruments in issue before him, McDonald J. reasoned as follows (at para. 162 of his judgment):

- (i) The relevant provision of the mortgage envisaged that the appointment would be of a receiver and manager or a number of receivers and managers. There was nothing in the text of the provision to suggest that the mortgagee was entitled to decide to appoint a person solely to be a receiver without also appointing that person to be a manager.
- (ii) References to '*Receiver*' in any other provisions of the relevant part of the mortgage must be interpreted as referring to a person appointed a '*receiver manager*' pursuant to that clause.
- (iii) While it was open to the mortgagee to appoint a receiver under the Conveyancing Act 1881, that was not of assistance because (a) the appointor had not invoked the 1881 Act and (b) such a receiver did not enjoy the statutory power to take possession of the property.

**13.** Central to this conclusion was the view of McDonald J. that, at least on one construction, the mortgage agreement imposed an affirmative requirement that any deed of appointment refer to the fact that an appointee was not merely to be a receiver, but that it also had to describe him as a receiver and manager. At para. 163 he said '*the only form of appointment contemplated is that of a 'receiver and manager'*', but added



that *‘no final conclusion can be reached in relation to this issue at this interlocutory stage.’*

**14.** It is clear from the judgment of McDonald J. that counsel for the receiver in that case did not make extensive submissions on this issue. One of the points that was made by counsel (see para. 165(b) of the judgment) focussed on the fact that under the relevant deed Mr. McCarthy was appointed *‘....to enter upon, take possession of the property and to exercise all of the powers of a receiver given by the Mortgages by statute or otherwise’*. Thus, it was said, he had been given all of the powers available to a receiver and manager under clause 9.4 of the Deed of Mortgage and Charge. That clause appears similar to clause 9.3 of the mortgage in issue here. McDonald J. rejected this argument on the basis that the plaintiff was not appointed *‘as receiver and manager’* but was *‘simply appointed as receiver’* and that the powers in clause 9 were only granted to *‘a person who is appointed a “receiver and manager”*.

**15.** Two features of the decision in *McCarthy v. Moroney* bear emphasis. First, the issues addressed by McDonald J. arose in the context of an application for mandatory interlocutory relief. The court was not deciding whether the receiver had in fact been validly appointed. It was concerned exclusively with whether the plaintiff had established a strong case that he had been validly appointed. This was stressed by McDonald J. as follows (at para. 163):

*‘Obviously, no final conclusion can be reached in relation to this issue at this interlocutory stage. My task at this point is solely to consider whether Mr.*

*McCarthy has established a strong case that he is entitled to the relief which he seeks in these proceedings.'*

**16.** Second, it is clear that the basis for McDonald J.'s conclusion that the plaintiff in *McCarthy v. Moroney* had failed to make out a strong case as regards the validity of his appointment lay in his view that the mortgage may have imposed a requirement to designate the appointee as receiver and manager in the relevant deed of appointment. In reaching that conclusion, the Judge was heavily influenced by the fact that both clause 9.3 (describing the Receiver as the agent of the mortgagor) and clause 9.4 (identifying the powers of the Receiver) used the term '*a Receiver so appointed*'. That is the context in which McDonald J. (referring back to clause 9.1) made the comment I have quoted earlier (at para. 163) '*the only form of appointment contemplated is that of a "receiver and manager"*'. When the plaintiff in that case had sought to contend that because he was given all the powers in clause 9 of the mortgage there must have been an intention to confer on him all of the powers of a receiver and manager, the court in rejecting this said '*Mr. McCarthy is not appointed as receiver and manager*' (at para. 165(b)).

**17.** The *ratio* of the decision is that the defendant had a sufficiently strong argument that a deed of appointment which did not expressly nominate the plaintiff as receiver and manager was ineffective - having regard to the provisions of the mortgage agreement in issue in that case – to defeat the application for what was, in effect, a mandatory interlocutory injunction. To put it another way, the plaintiff in that action had not negated to the standard required for the grant of such an injunction the contention of the defendant that where a mortgage deed conferring the power to appoint a receiver

and described therein as a receiver and manager, any deed appointing a receiver had also to expressly designate that receiver as a receiver and manager. He had not, as McDonald J. put it ‘*made out a strong and clear case*’ (at para. 166), stating that (based only, of course, upon the arguments advanced to the Court in the course of that interlocutory hearing) the plaintiff would ‘*have an uphill struggle in persuading the court at trial that he has been validly appointed*’ (at para. 167).

***Charleton v. Scriven and McCarthy v. Langan***

**18.** These features of the decision in *McCarthy v. Moroney* were stressed in the judgments of Clarke CJ. (with whom O’Donnell J. and O’Malley J. agreed) in *Charleton and anor. v. Scriven* [2019] IESC 28, and of Allen J. in *McCarthy v. Langan and ors* [2019] IEHC 651. In the first of these cases the Court was addressing an appeal against an interlocutory order of the High Court which had prohibitory aspects (enabling the payment of certain rents to the plaintiff) as well as an essentially mandatory obligation allowing the plaintiff, a receiver appointed on foot of a series of mortgages, to take over properties the subject of those mortgages. The central issue on the appeal was whether there was a strong case that a receiver appointed as such (rather than as receiver and manager) was validly appointed where the mortgage deed contained provisions similar to those considered by McDonald J. in *McCarthy v. Moroney*.

**19.** Referring to that judgment, Clarke CJ. noted that McDonald J. ‘*appeared to have been concerned that this aspect of the matter was not argued as thoroughly as he might have liked*’. He said that it was important to have regard to the fact that the mortgage deeds themselves defined the persons who were to be appointed as ‘receivers and managers’

as the 'receivers'. For this reason, he felt that it was at least arguable that the use of the term 'receiver' in the deeds of appointment - these being documents contemplated by the mortgage deeds themselves - would carry that same definition (at para. 6.7). In other words, Clarke CJ. explained, it was arguable that the appointment of the receivers in the form in which it occurred in this case was, as a matter of construction of the documents concerned, an appointment as both receiver and manager having regard to the way in which the term 'receiver' was defined in the mortgage deed in question.

**20.** Ultimately, the court found that the plaintiffs had established a fair issue to be tried as to whether they were validly appointed in these circumstances (so that those reliefs sought by them which were prohibitory in nature could be granted), but that they had not established a '*strong case*' for the purposes of reliefs that were mandatory. In that regard, the court's view was affected by the complexity of the arguments concerning the validity of the appointment (see para. 6.10).

**21.** In *McCarthy v. Langan and ors*, Allen J. was faced with the same issue, this time at the conclusion of a plenary hearing. Noting that McDonald J. had not finally decided the question as to whether an appointment pursuant to such provisions which did not specifically designated the appointee as a '*receiver and manager*' was for that reason invalid (at para. 57), Allen J. adopted the position that the correct approach to the deeds of appointment is to construe them as a whole, rather than to focus on the use or omission of any particular word or words (at para. 78). This required the court to examine what the deed actually did (at para. 79). Allen J. agreed with McDonald J. insofar as McDonald J. had held that the natural meaning of the clauses in issue in the mortgage was that the appointee must be appointed as receiver and manager and that it

was only someone who was so appointed that would have the powers conferred by the deed.

- 22.** The point, however, at which Allen J. diverged from the view adopted by McDonald J. arose from the latter's view that the language used in the deed of appointment simply purported to appoint the plaintiff only as 'receiver' strictly so called. Allen J. explained his analysis and conclusion on this issue, as follows (at para. 82):

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

- 23.** While the decision in *McCarthy v. Langan* was appealed to this court, the appeal was not pursued and was eventually struck out. The issue was, however, briefly considered in *Kearney v. Bank of Scotland and anor* [2020] IECA 92 (Baker, Whelan and Collins JJ.). There, the Court upheld the dismissal by the High Court of a wide range of grounds

challenging the validity of the appointment by the defendant of a receiver over the plaintiff's assets on foot of a mortgage similar to that in issue in this case. The dismissal was based on the so-called 'rule' in *Henderson v. Henderson* (1843) 3 Hare 100. However, the Court declined to dismiss an argument to the same effect as the 'receiver-manager' argument sought to be advanced here. Whelan J. explained that it could not be said that there was no credible basis for suggesting that the appellant's claim insofar as based upon that argument, was bound to fail. She said (at para. 117):

*'... it is clear that the specific point has never been definitively determined in this jurisdiction.'*

#### ***Definition and construction***

**24.** As I think obvious from the foregoing, the contention thus advanced by the defendant reduces itself in the first instance to an issue of definition, and from there a question of construction. Insofar as the question of definition goes, the terms 'receiver', 'manager' and, for that matter, 'receiver and manager' are familiar and their meaning clear. A *receiver* is a person (whether appointed pursuant to statute or private contract) who receives and collects rent or other income, and is charged with the payment of identified outgoings therefrom, but who does not enjoy powers of managing the charged assets. A *manager* does: he has the power to buy, sell and carry on the trade.

**25.** Classically, in the case of a corporate debenture, the receiver and manager for debenture holders is a person appointed by the debenture holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture

and, as a condition of the loan, to enable him to preserve and realise the assets comprised in the security for the benefit of the debenture holders (per Jenkins LJ. in *B. Johnson and Co. (Builders) Ltd.* [1955] Ch. 634, at p. 661, cited with approval by McLoughlin J. in *Ardmore Studios v. Lynch* [1965] IR 1, at p. 39 in turn approved in *Bula Ltd. v. Crowley (No.3)* [2003] 1 IR 396 at p. 424 to 425). As applied to a loan and mortgage of the kind in issue in this case the meaning is essentially the same: a receiver and manager is, as Jenkins LJ. described it in *B. Johnson and Co. (Builders) Ltd* ‘*a receiver with ancillary powers of management*’.

**26.** The term ‘receiver and manager’ is thus not a term of art, but a description of a receiver in whom certain powers have been invested. It is, indeed, for this reason that Picarda (*The Law Relating to Receivers, Managers and Administrators* 2<sup>nd</sup> Ed. 1990) observes the blurring of terminology between the two terms both in common usage, and in the relevant statute law (see p.2): thus the provisions of s. 28(8) of the Supreme Court of Judicature Act (Ireland) 1877 speak of the appointment of a receiver in a context in which, it is clear, the relevant agent will typically enjoy management powers. Such a person is a ‘*receiver and manager*’ on any ordinary use of language.

**27.** The decisions in *McCarthy v. Moroney*, *McCarthy v. Langan*, and *Charleton v. Scriven* suggest two different approaches to the question of whether, as a matter of interpretation, the plaintiff in this case was appointed as ‘*Receiver*’ or as ‘*receiver and manager*’. The first involves an examination of the deed of appointment to determine whether, applying the normal rules of construction governing an instrument of this kind, the plaintiff was in fact given the powers of management such as would, in ordinary course, render him a receiver and manager. This, in effect, is the way Allen J. viewed the matter in *McCarthy v. Langan* resulting in his conclusion (at para. 90) that ‘[t]he

*crucial question is not how he is described, but what he was*'. As I explain, this was also the approach tentatively suggested by Clarke CJ. in *Charleton v. Scriven*.

- 28.** The second is directed at the mortgage rather than the deed of appointment, and requires consideration of the issue from a different viewpoint, namely whether the mortgage agreement properly construed imposes a requirement that any appointment designate the appointee not merely as receiver, but as receiver and manager. This was, ultimately, the manner in which the issue was approached by McDonald J. in *McCarthy v. Moroney*. That being so, it is necessary to consider each approach – although bearing in mind that both are directed to the same ultimate objective, that is the ascertainment of the proper construction of the two instruments having regard to the applicable rules of contractual interpretation.

***Relevant principles of construction***

- 29.** It was the position of counsel for the defendant in her submissions to the Court that the test to be applied to the construction of the deed of appointment was that set forth in the decision of the Supreme Court in *Analog Devices BV v. Zurich Insurance Company* [2005] IESC 12, [2005] 1 IR 274. There, the court approved the approach to contractual interpretation adopted by Lord Hofmann in *Investors Compensation Scheme Ltd. v. West Bromwich BS* [1998] 1 WLR 896. The relevant train of authority in this jurisdiction starting with those cases now ends with the decisions of the Supreme Court in *Law Society v. Motor Insurers' Bureau of Ireland* [2017] IESC 31 and *Jackie Greene Construction Ltd. v. Irish Nationwide Building Society* [2019] IESC 2.
- 30.** The proper analysis was described by Clarke CJ. in the latter decision as that of '*text in context*' (at para. 5.2). Recognising that phrases or terminology rarely exist in the



abstract, and thus that the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence, he explained that the court must approach the document being interpreted on the basis that governing legal rights and obligations should be interpreted as they would be understood by a reasonable and informed member of the public who is cognisant of the purpose and intent of, and background to, the document in question.

- 31.** Important to that exercise (but obviously not dispositive of it) is the ‘*commercial and practical context in which the agreement was meant to operate*’, that context being defined by, and determined by reference to, ‘*all available guides to the meaning of the agreement*’ (per O’Donnell J. *Law Society v. MIBI* at paras. 9 and 12). O’Donnell J. identified this context as follows (at para. 12):

*‘In that regard the Court must consider not just the words just, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement.*

- 32.** Of course, these principles have to be applied having regard to the nature of the document in issue. As Clarke J. (as he then was) observed in the course of his dissenting judgment in *Law Society v. MIBI*, there are certain instruments which, by their nature, are intended to be formal in terms, and significant in effect, in respect of which it is reasonable to assume that the authors or parties intended that words would be used with precision. In those situations, information extraneous to the document itself may be of less relevance in construing the instrument for the simple reason that the exercise of

determining the parties' intent must accord significant weight to the assumption that they had chosen their language carefully.

**33.** But even bearing this in mind, when this approach is applied to the construction of the deed of appointment – a document issued by the Bank and accepted by the plaintiff – the starting point must be that language used in that deed was intended by the parties to carry the same meaning as it bears in the mortgage agreement on foot of which the appointment was made. Indeed, it was accepted by counsel for the defendant in the course of her submissions that in construing the deed of appointment, the mortgage agreement formed part of the relevant factual matrix. Presumptively, instruments which are closely connected and are intended to refer to each other deploy words with the same intended meaning. Where, as here, a deed of appointment is expressly stated to be an implementation of powers conferred by a mortgage agreement, it must be assumed that the parties to the deed intended that it would give effect to the underlying mortgage agreement and, that being so, that a word when used in the deed of appointment had the same meaning as in the mortgage.

**34.** Approaching the matter in this way gives effect both to the mandate that the court look to the specific and broader context to the document and to the requirement that the exercise of interpreting it be directed to the logic – commercial and otherwise – of the instrument. Harmonious interpretation of the deed of appointment and of the mortgage – insofar as this is reasonably possible - is thus the inevitable consequence of the application of a commercial and practical construction and this, indeed, is reflected in the approach adopted to the construction of deeds of appointment of receivers in other

jurisdictions (see, for example, *Kendle v. Melsom* [1998] HCA 13, (1998) 193 CLR 46 at para. 12 per Brennan CJ and McHugh J and para. 55 per Hayne J.).

35. It is clear from the deed of appointment in issue here when construed together with the mortgage agreement that by appointing the plaintiff as ‘*Receiver*’ the Bank intended to invest him with the powers enjoyed by a receiver under the debenture. The appointment would have made no sense if it did not have that effect. The deed of appointment purports to be made pursuant to the powers contained in the mortgage of 28 May 2007. It records the appointment of the plaintiff as ‘*Receiver of and over, all the undertaking, property and assets of the Borrower referred to and charged by the Mortgage*’. It provides that ‘*the Receiver shall be entitled to exercise all the powers conferred on him by the said Mortgage and by law.*’ If the receiver was appointed over the ‘*undertaking*’ of the borrower in question and to that end entitled to exercise *all* powers conferred by the mortgage, then he was entitled to exercise powers of management. If he was entitled to exercise powers of management, he was a receiver and manager.

36. Thus, ‘*Receiver*’ is a defined term in the mortgage agreement, clause 1.1 of which provides:

‘*Receiver*’ has the meaning given in clause 9.1.’

37. I have quoted clause 9.1 earlier. It provides that the Bank may appoint a person to be ‘*receiver and manager or receiver and managers (hereinafter called a “Receiver” ...)*’. That definition of ‘*Receiver*’ as meaning a ‘*receiver and manager*’ is then carried throughout clause 9. His or her powers expressly include powers of management (clause 9.3.2). It thus follows, logically, that if the deed of appointment and mortgage are to be read together in the manner I have suggested, the ‘*Receiver*’ referred to in the

deed of appointment is a ‘*Receiver*’ as provided for in the mortgage deed, being in turn a ‘*receiver and manager*’. Moreover, the powers which ‘*the Receiver*’ is expressly stated in the deed of appointment to enjoy, include the powers of management vested in the ‘*Receiver*’ provided for by the mortgage. That conclusion is supported (but not, in my view, determined by) the fact, stressed by the plaintiff in his submissions and by the trial Judge in her judgment, that clause 9.1 of the 2007 mortgage describes the ‘*Receiver*’ with a capital ‘*R*’, and that the operative part of the deed of appointment does likewise (although one part of that instrument – as the defendant has noted – used the lower case). This differentiated this case from the deed in issue in *McCarthy v. Moroney*.

38. All of this reflects the view Clarke J. expressed at paragraph 6.7 of his judgment in *Charleton v. Scriven* when he – albeit tentatively - suggested:

‘... it is arguable that the appointment of the Receivers in the form in which it occurred in this case was, as a matter of construction of the documents concerned, an appointment as both receivers and managers, having regard to the way in which the term ‘receiver’ was defined in the mortgage deeds themselves’.

***The language used in the deed of appointment***

39. The conclusion thus suggested by Clarke CJ. is ultimately derived from the intent of the Bank as ascertained from the deed of appointment and mortgage when construed together in the light of the accepted meaning of the term ‘*receiver and manager*’.

However, the issue cannot simply be resolved by reference to the Bank's intent. It is a reasonable assumption that the Bank will always have intended to appoint a receiver who can act lawfully having regard to the terms of the mortgage. No matter what the Bank intended (a) that intent must be recorded in a manner that will allow any affected party to understand, and the Court to conclude, that a receiver was actually appointed in the manner envisaged by the mortgage and in particular (b) if the mortgage imposes particular formal or procedural requirements that must be observed prior to appointment, these must be complied with.

**40.** This was, essentially, the point made by McDonald J. in *McCarthy v. Moroney*. There, he addressed the issue of the Bank's intent by reference to the decision of Gilligan J. in *The Merrow Ltd.*. As I have noted earlier, in that case the debenture in question required that the appointment of a receiver be effected under seal. That requirement was not complied with in the purported appointment of the second named defendant as receiver over the assets of the applicant. Gilligan J. cited with approval the remarks of Franklyn J. in *Wrights Hardware Pty. Ltd. v. Evans* (1988) 13 ACLR 631 (at p. 633) that '*the manner in which a receiver is to be appointed ... prescribed by the debenture deed ... must be strictly followed*' and, the terms of the debenture not having been complied with in the appointment, granted a declaration that his appointment was void.

**41.** McDonald J. said the following of *The Merrow Ltd.* (at para. 167):

*'In The Merrow, an argument might equally have been made that the intention of the bank in that case was, notwithstanding the failure to seal the Deed of Appointment, to appoint a receiver with all the powers given to such a receiver under the terms of the relevant deed. Although the bank in that case failed to*

*seal the deed of appointment there, it seems fairly clear that the bank nonetheless intended to appoint a receiver. Nonetheless, the failure to seal the Deed of Appointment was considered by the court to be a failure to comply with the strict terms of the debenture in that case. The fact that the bank in that case had intended to appoint a receiver with all necessary powers was not ultimately relevant. What the court took into account was whether the bank had acted in accordance with the terms of the debenture which it had itself drafted. While the facts of that case are obviously different to the present case, it seems to me that the same principle applies. In that case, the bank had failed to seal the Deed of Appointment. Here, Mr. Moroney submits that Ennis Property failed to comply with the express terms of Clause 9.1. On the face of it, what Mr. Moroney has said seems to be correct.'*

**42.** This conclusion – effectively that to resolve the matter solely on the basis of what the Bank intended to do would render the language used in the relevant instruments irrelevant - might also be referred to the comments of Clarke J. in *Law Society v. Motor Insurers Bureau of Ireland* which I noted earlier. As he said there, in the case of certain formal documents the parties must be assumed to use language carefully and, in those cases, the terms in which they have expressed themselves may outweigh the implication that might otherwise follow the context.

**43.** Nonetheless and however the argument is expressed, I do not agree that, properly construed, the mortgage required the description in the deed of appointment of the receiver as '*receiver and manager*' so that a failure to so designate the appointee invalidated the appointment. What clause 9.1 says is that the Bank could '*appoint ... any person ... to be receiver and manager.*' This could have been done by a deed

which described the appointee in precisely those terms and, undoubtedly, it would have been prudent to so identify him. But given that a receiver and manager is a receiver who has powers of management, and given that the term '*receiver and manager*' is not one of art, an appointment of a person *qua* receiver by an instrument which properly construed has the effect of conferring upon him or her powers of management, achieves the same end. The consequence is the appointment is of a receiver and manager. Clause 9.1 describes what is being appointed (a receiver and manager) but does not prescribe the language that must be used to achieve that objective.

**44.** That conclusion is not, in my view, displaced by the use of the phrase '*a Receiver so appointed*' in clause 9.3. This refers to the person appointed pursuant to clause 9.1, and clause 9.1 is concerned with a person who has been appointed '*to be receiver and manager*'. Given that – for the reasons I have explained – a person who is appointed to exercise the powers of a receiver under the mortgage is, having regard to the nature of those powers, properly described as a *receiver and manager*, the phrase '*a Receiver so appointed*' does no more than confirm the specific powers that will be vested in such a person. It does not either in terms or by any evident implication impose a formal requirement as to the contents of the instrument of appointment.

**45.** In this regard, there is in my view a clear distinction between this case and *The Merrow*. There, the debenture described the power to appoint a receiver by reference to – and only to – an appointment under seal. In fact, the instrument expressly excluded the power otherwise arising under s. 24(1) of the Conveyancing Act 1881 to effect an appointment by writing '*under hand*'. The appointment in question was not made under seal, but by hand. The conclusion that the appointment was accordingly invalid as not having been effected in the manner described in the mortgage document followed. The

same can be said of the other decisions referred to by Gilligan J. in the course of his judgment which presented defects in appointment of a similar kind – an appointment made before the entitlement to do so had arisen (*R Jaffe Ltd. (In Liquidation) v. Jaffe (No.2)* [1932] NZLR 195) or a suggested failure to comply with the requirement that the appointment be ‘by writing’ (*Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd.* [1961] Ch. 375 and, more recently on this same issue *McCleary v. McPhillips & ors.* [2015] IEHC 591).

- 46.** However, while all of these cases may afford authority for the proposition that a requirement expressed in the mortgage and conditioning the appointment of a receiver must be strictly complied with, they were concerned with the point when, or the manner in which, the deed was executed. They were not concerned with the terms in which the appointment was expressed. To succeed in this case, the defendant must go considerably further than those decisions. He must establish that even though objectively construed according to the standard principles of contractual interpretation the deed of appointment operated to appoint the plaintiff as receiver and manager - because the effect of the language used in the deed was to vest him with the powers of a manager - the failure to use the precise language ‘*receiver and manager*’ vitiated the appointment. He must establish that this was the case even though the mortgage prescribed no particular form of appointment and no particular form of language. *The Merrow Ltd.* is not authority any such proposition. It shows, as McDonald J. suggested, that even where the appointor may intend to effect an appointment that intent may be defeated by a failure to comply with the formal requirements of the mortgage. It does not decide that the failure to express that intent in a particular way has the same effect.



47. Nor do the other authorities relied upon by the defendant. In *Harold Meggitt Ltd. v. Discount & Finance Ltd.* (1938) 56 WN (NSW) 23, the defendant was entitled under a deed of debenture to appoint a receiver and manager in the event of a default under the relevant security. The defendant appointed a receiver but not a receiver and manager. Owen J. of the New South Wales Supreme Court decided that the appointment was invalid. There, however, the argument advanced by the defendant that the deed of appointment conferred on the appointee not merely the powers of a receiver but also those of a manager failed because under the applicable law the leave of the ‘*Moratorium Court*’ was required to appoint a manager. That leave not having been obtained, it was held, the defendant could not assert that there had been an appointment as envisaged and authorised by the debenture. A critical procedural step required before such an appointment could occur was not taken. Therefore, the essential conclusion I have reached as governing these proceedings – that properly construed the deed of appointment operated to vest the powers of receiver and manager in the plaintiff irrespective of whether he was described as ‘*manager*’ – did not arise in that case. Appointment as manager required a distinct application to court which was never made.
48. *Harold Meggitt Ltd. v. Discount & Finance Ltd* was cited in *Wrights Hardware Pty. Ltd. v. Evans* as authority for the proposition that the power to appoint a receiver and the power to appoint a receiver and manager were fundamentally different. There, a debenture holder purported to appoint receivers ‘*jointly and severally to be receivers and managers*’ of the plaintiff company. The debenture gave only a power to appoint receivers who could act jointly. In granting an interlocutory injunction to restrain the defendants from acting or purporting to act as receivers, Franklyn J. concluded that as a matter of construction of the debenture, it authorised the appointment of joint receivers or receivers and managers but did not authorise the appointments of joint and

several receivers and managers. Putting to one side the consideration (explained by me in the course of my judgment in *Sheedy v. Jackson* [2020] IECA 167 at para. 41) that the specific conclusion in *Wrights Hardware* that the debenture in issue did not confer a power to appoint joint and several receivers appeared to have been overtaken by other legal developments in that jurisdiction,<sup>1</sup> the case as it was viewed by the judge was clear and straightforward. The debenture holder was held to have had unequivocally appointed a class of receivers that was not authorised by the debenture – receivers whose authority was several as well as joint. This cannot be said of this case. Here the issue does not arise because of the use of language in the deed of appointment that was not permitted by the mortgage. Instead, the question is whether the language that was used in the deed of appointment has the same meaning as the same language when used in the mortgage.

49. In the course of her submissions counsel for the defendant contended that the application of the *contra preferentum* rule required either the conclusion that the mortgage deed mandated express reference to an appointment as receiver and manager, or that the deed of appointment failed to appoint the plaintiff as receiver and manager. I cannot accept this contention. The *contra preferentum* principle operates where, and only where, a provision is capable of more than one meaning. However this principle does not mean that the court looks for ambiguities, inadvertencies or doubtful alternative meanings (per Gannon J. in *Re Arbitration between Gaelcrann and Payne*

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<sup>1</sup> In point of fact, the judgment of Hayne J. in the High Court of Australia in *Kendle v. Melsom* would suggest that the appropriate course of action where the appointment of receivers wrongly (having regard to the terms of the charge) described their authority as joint *and several* would have been to simply sever the offending clause. He said ‘*I do not accept that if faced with the choice of appointing only jointly or not at all, the Bank would have chosen to refrain from making any appointment*’ (at para. 55). This not only shows the importance of interpreting the appointment in the light of the charge, but would suggest a further basis on which *Wrights Hardware* (the decision in which was not reached following a full hearing) was not correctly decided under Australian law.

[1985] ILRM 109, 113). The maxim should not be used to create an ambiguity which it is then employed to resolve (per Kearns J. in *Emo Oil Ltd. v. Sun Alliance and London Insurance plc* [2009] IESC 2 at p. 5). In order to decide that there is such ambiguity, the document must first be interpreted by reference to the established methods of construction. It is only if after that exercise is undertaken there are two or more meanings that the instrument can be said to be ambiguous, and only then, that the issue of *contra preferentum* arises. This is why it has been said that it is not possible to find an agreement ambiguous in the abstract (per MacMenamin J. in *O'Reilly v. Irish Life Assurance plc* [2005] IEHC 449 at para. 87). The correct position was, in my view, expressed by Auld LJ in *McGeown v. Direct Travel Insurance* [2004] 1 All ER (Comm.) 609 (at p. 615):

*'A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own. And it should not, in any event, on such a finding, move straight to the contra preferentum rule without first looking at the context and, where appropriate, permissible aids to identifying the purpose of the commercial document of which the words form part. Too early recourse to the contra preferentum rule runs the danger of "creating" an ambiguity where there is none.'*

**50.** Thus understood, there is, in my view, no ambiguity in either instrument in issue here because, when the mortgage and deed of appointment are construed by reference to each other, their meaning is clear. The deed of appointment operated to appoint a receiver who had powers of management and therefore to appoint a receiver and manager. The mortgage deed allowed only the appointment of a receiver and manager,

not a receiver who lacked powers of management. There is nothing in the mortgage to support the proposition that the failure to use the word ‘manager’ in the appointment meant that an appointee did not have powers of management or otherwise meant that there had not been an appointment of a ‘*receiver and manager*’ as required by clause 9.1 of the mortgage. When the court undertakes the exercise of construction following a full plenary hearing (rather than in the course of an interlocutory application) and with the benefit of complete argument there is, in my view, no other plausible construction of either document. To that extent I am in complete agreement with the conclusion reached by Allen J. in *McCarthy v. Langan and ors.*

***The statutory receiver and delegation***

51. The plaintiff advances two alternative arguments which, by reason of this conclusion, can be dealt with more briefly. If, he says, his appointment is invalid having regard to the mortgage deed, it should nonetheless be upheld as a valid appointment of a statutory receiver pursuant to the provisions of the Conveyancing Act 1881 to 1911. In that regard he notes that the statutory power of appointment is expressly referred to and preserved by clause 9.2 of the mortgage. This provides:

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

*the appointment of a Receiver thereover or over any other of the Secured Assets'.*

**52.** Once the secured liabilities have become due, he argues, all that is required for the appointment of a statutory receiver is that the appointment be effected in writing, that requirement having been met in this case. In the course of his submissions counsel for the plaintiff contended that if the Court was to conclude that the deed of appointment was not effective to appoint a receiver under the mortgage, then the Court had to construe the deed and given that the only other power was to appoint under the 1881 Act, this must have been what it was. He noted that there was no requirement in the 1881 Act that the appointor under that Act be identified as such.

**53.** A similar argument was rejected by McDonald J. in *McCarthy v. Moroney*. He reasoned that the appointor had not sought to invoke or rely upon the 1881 Act. The plaintiff disputes the necessity for such invocation, noting that the 1881 Act does not require that reference be made to it within the instrument by which the appointment is sought to be effected and emphasising that the mortgage specifically recorded that the contractual power of appointment was in addition to the statutory power.

**54.** In my view, this argument is misconceived. Whatever else one can say about the manner of appointment of a receiver under the 1881 Act, a party contending that they are entitled to rely on the statutory power provided for under that legislation must establish that they have in fact invoked that power. Usually this will be established by reference to the document by which the appointment was made. While the plaintiff is correct in observing that the legislation does not prescribe any particular form for such appointment, if the writing by which it is purportedly effected does not evidence such

an appointment then it falls to the appointor to establish its invocation in some other way.

55. Here, the alleged appointment does not merely not refer to the 1881 Act, but it is in terms inconsistent with any intention to invoke it. It is – expressly – effected ‘*in pursuance of the powers contained in the Mortgage dated 28 May 2007 ...*’. While the Mortgage was ‘*in addition*’ to the statutory power to appoint, the power to appoint under the 1881 Act derives from s. 19(1)(iii) of that Act: s. 19(1) states that ‘*[a] mortgagee, where the mortgage is made by deed, shall, **by virtue of this Act**, have the following powers ..*’. The power does not derive from the mortgage, which merely acknowledges its continued operation. It follows that – absent exceptional circumstances where there is evidence of an intention to effect an appointment on one of two alternative bases - the recording of an appointment as having been made in pursuance of a power conferred by the mortgage pursuant to the 1881 Act does not establish that it was made where there is another alternative basis in the mortgage for such an appointment. It may well have been open to the plaintiff to identify some basis in the admissible factual matrix from which it could be concluded that the Bank intended, in the event that its appointment under the mortgage failed, to effect an alternative appointment under the 1881 Act or otherwise actually invoked that provision. No such basis having been identified, this argument must fail. That being so it is not necessary to address the separate issue raised by the plaintiff as to whether McDonald J. was correct in concluding that a receiver appointed under the 1881 Act does not enjoy a power to take possession of the property. Having regard to the fact that those comments were made in the course of a judgment on an interlocutory application, the issue should be viewed as being an open one.

56. The second point is not dissimilar and falls to be disposed of on the same basis. It arises from clause 13 of the mortgage, which provides as follows:

*‘The Bank and any Receiver may delegate by power of attorney or in any other manner to any person or persons all or any of the powers, authorities and discretions which are exercisable by them under this Mortgage. Any such delegation may be made upon such terms (including power to sub-delegate) and subject to such regulations as the Bank or such Receiver may think fit. Neither the Bank nor any Receiver will be liable or responsible to the Chsrgor for any loss or damage arising from any act, default, omission or misconduct on the part of any delegate or sub-delegate.’*

57. Pointing to this provision, the plaintiff says that one of the powers exercisable by the Bank under the mortgage is the power to take possession of the secured assets. The deed of appointment expressly empowers the plaintiff to enter upon and take possession of all the undertaking, property and assets of the borrower. Therefore, it is argued, even if the deed of appointment were not effective for the purposes of appointing the plaintiff as receiver and manager under clause 9 of the mortgage, it ought to be regarded as a valid delegation by the bank to him pursuant to clause 13 of the bank’s power to enter into and take possession of the secured assets. However, as with the power of appointment of a statutory receiver, if the plaintiff wishes to contend that the bank has exercised this power, it must adduce some basis on which the Court could conclude that it actually invoked it. This it has not done. The deed of appointment shows that the Bank invoked clause 9 of the mortgage, and no more.

### **III THE LEASES**

***The purported tenancies***

**58.** In the course of the trial the defendant relied upon a number of tenancy agreements which, he claimed, operated to preclude the plaintiff from assuming possession of the properties. The plaintiff's response was that clause 7.19 of the mortgage agreement rendered these agreements ineffective as against the Bank and the plaintiff. That provision stated that the defendant should not:

*'without first obtaining the written consent of the Bank give or agree to give any licence or tenancy affecting any part of the Secured Assets nor exercise the powers of leasing or agreeing to lease or of accepting or agreeing to accept surrenders conferred upon a mortgagor by statute or otherwise or enter into or permit any parting with possession or sharing agreement whatsoever in respect of the Secured Assets'.*

**59.** The provision operates in a context in which the 1881 Act provided (s. 18(1)) that a mortgagor of land while in possession shall, as against every incumbrancer, have by virtue of the Act power to make from time to time any lease of the mortgaged land. At the same time it conferred this power (s. 18 (13)) only if and so far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed or otherwise in writing, and should have effect subject to the terms of the mortgage deed or of any such writing.



- 60.** I have noted earlier that the premises at Oulart comprised a ground floor retail outlet, an adjacent takeaway and two first floor apartments. The mortgage agreement in respect *inter alia* of that property was entered into in May 2007. In February 2008, the defendant purported to lease the supermarket at this location to Mr. Laurence Corrigan. The rent was €100,000 and the term four years and nine months.
- 61.** The evidence of Mr. Shane O'Connor, an employee of the Bank, was that the Bank was aware of the fact of this lease over the Oulart premises, but had never consented to it. However, on its face this lease would have expired on 19 November 2012. The defendant identified no basis for concluding otherwise. In the course of her submissions to this Court, counsel for the defendant suggested that the tenant had acquired statutory rights in respect of the premises, but it was never identified how or when this occurred. That lease, accordingly, does not assist the defendant.
- 62.** A second lease was executed on 19 December 2012. This was for a term of ten years. The rent had reduced to €62,400 it being reduced further by a deed of variation of 1 November 2013 to €615 per week (that is an annual rent just short of €30,000). At the same time a lease was purportedly entered into on December 2 2013 in respect of the takeaway at the Oulart property, which had a rental of €125 per week and a term of ten years. In each case the tenant was Laurence Corrigan, the defendant's brother.
- 63.** In relation to these new leases, the evidence from Mr. O'Connor was also clear. The Bank was not aware of the latter two leases, it had made contact with the defendant in September 2013 and did not re-establish contact with him until December of that year. The same evidence was given by Mr. O'Connor in respect of certain residential leases for part of the Oulart property purportedly entered into in July and August 2017.

- 64.** On 3 May 2018 Costello J. ordered that Laurence Corrigan might pay a certain amount per week in respect of rent for the supermarket and takeaway premises, but specifically directed that these payments would not result in any landlord and tenant or proprietary interest being granted in that property.
- 65.** The Kilmuckridge property comprised a convenience store, in part two storey and in part single storey, with a restaurant, kitchen office and stores on the first floor. In late 2013 the Bank conducted an independent business review of the defendant. On 24 October 2013 the defendant, as landlord, purported to lease the Kilmuckridge property to a company, Melphia Enterprises Ltd. (as tenant) in respect of the Kilmuckridge Property. The lease was as noted by the trial Judge a most unusual one, as it provided for a rent of €45,000 per annum for a term of ten years from the date of the lease, and with provision for five yearly rent reviews. Generally, a landlord will seek to agree a term of years which will preclude the creation of statutory rights of renewal for the tenant and therefore of less than five years in duration.
- 66.** The evidence before the Court was that the Bank believed that the premises in Kilmuckridge was being operated as a supermarket by the defendant personally, and that the Bank did not and would not have agreed to a tenancy agreement of the kind allegedly executed with Melphia Enterprises Ltd. Mr. Shane O'Connor testified that the first the Bank became aware of the lease with Melphia was after December 2013 when it was raised by the receiver. No oral evidence was adduced to contradict this.
- 67.** The trial Judge held that as a matter of law mere notification or a suggestion that leases may have been alluded to in conversation or indeed documentation despatched to the mortgagor is not sufficient to fix a mortgagee with a tenancy where there is a provision

such as clause 7.19 in the mortgage agreement. She said that she accepted the evidence of Mr. O'Connor that had the bank been notified of the leases in respect of the supermarkets at Kilmuckridge and Oulart it would not have consented to the terms of ten years in respect of commercial properties. She also concluded on the basis of the evidence she had heard that no prior written consent was sought of the bank to the leases, and that none was given. Thus, she found, in the absence of prior written consent the leases did not bind either the mortgagee or the plaintiff.

***The authorities***

**68.** In the course of her judgment in *Fennell and ors v. N17 Electronics Ltd. (In Liquidation)*, [2012] IEHC 228, [2012] 4 IR 634, Dunne J. conducted a review of the authorities addressing the limits of the power of a mortgagor to grant tenancies of land the subject of a mortgage. She deduced the following principles from the cases (see para. 30 of her judgment):

- (i) a mortgagor and mortgagee can expressly agree to exclude the power conferred by s. 18 of the 1881 Act.
- (ii) If the power is excluded, it may be done in a way that permits the mortgagor to grant a lease subject to the prior consent of the mortgagee.
- (iii) If such prior written consent is not obtained by the mortgagor and the mortgagor proceeds to enter into a lease with a tenant, the lease will be binding on the mortgagor as lessor, but as against the mortgagee, the lease will not be binding.

- (iv) In certain circumstances, the lease may be binding on the mortgagee such as where, for example, the mortgagee serves a notice on the tenant to pay the rent to him.
- (v) The mere fact that the mortgagee is aware of the existence of a tenancy and that a tenant is paying rent to the mortgagor which is being used to pay the obligations of the mortgagor to the mortgagee, is not, of itself, sufficient to create a relationship between the mortgagor's tenant and the mortgagee.

**69.** Applying the foregoing to clause 7.19 of the mortgage in issue here, the provision requires the consent in writing of the Bank before a mortgagor can enter into a lease, or other agreement of the kind referred to in the provision, and it is clear that no such written consent was obtained in respect of any of the leases. On its face, while some or all those leases may be valid as between the parties to them, unless the defendant can bring the facts within point (iv) and having regard to point (v) above, this means that the leases are null and void as between mortgagor and mortgagee consequent upon the breach of the negative pledge clause (see also *ICC Bank plc v. Verling* [1995] 1 ILRM 123).

**70.** In that regard the facts of *Fennell and ors v. N17 Electronics Ltd. (In Liquidation)* are instructive. There, the owner of four properties had mortgaged them to ACC Bank plc. The mortgages required the consent of the mortgagee prior to the creation of any leases of the properties and the owner, notwithstanding that covenant, proceeded to enter into a business lease agreement with the respondent in respect of them. The applicants (the bank and a receiver appointed by it) sought declaratory orders that the lease agreement was unenforceable against the bank. One of the issues arose from the contention of the

respondent that the bank was aware of the occupation of the units, that the rent payable by the respondent was used by the owner to make repayments due by him to the bank on foot of the various charges and that the bank was anxious that a formal leasing arrangement with the respondent be entered into. Having thus taken the benefit of the arrangements, it was said, the bank could not deny them.

**71.** In the view of Dunne J. the fact that the bank did not consent to the leasing agreements and never conveyed to the owner that it accepted their validity when combined with the fact that the nature of those arrangements was such that it would never have agreed to them, was inconsistent with the asserted validity of the lease agreements. That conclusion was based upon, and followed from the decision in *In Re O'Rourke's Estate* (1889) 23 LR Ir. 497, in which Munroe J. explained the distinction between conduct of a mortgagee falling short of express consent in writing, and actions which would preclude the mortgagee from relying upon a negative covenant of this kind by reference to whether a new tenancy had arisen between the mortgagee and the tenant. This would arise, he said, where the mortgagee entered into receipt of the rents and continued to take them from the tenants, or where the mortgagee served notice on the tenant requiring him to pay his rents direct to the mortgagee (at p. 500). No authority was opened to this Court suggesting that in this – or any other – regard Dunne J. was incorrect in the conclusions she reached in *Fennell and ors v. N17 Electronics Ltd. (In Liquidation)*. The decision appears to me to correctly state the law.

**72.** The same point was made by Peart J. in *Murphy v. Hooton* [2014] IEHC 266, where he said of a provision such as clause 7.19 (at para. 22):

*‘Where it is sought to imply by its conduct that the lender has acquiesced or given up its entitlement to the protection of such a clause, the facts must be clear*

*so that an intention to do so is clearly made out, in circumstances where the need for a prior written consent is so clearly spelled out.'*

***Application to the facts***

**73.** The foregoing considerations of fact and law lead me to the following conclusions.

First, no basis has been suggested on which this Court can review the findings of the trial Judge (a) that the Bank did not consent to any of the leases, (b) that its consent was never sought to those leases and (c) that had that consent been sought it would not have been forthcoming. Those findings were based on the evidence of Mr. O'Connor, and that evidence was not contradicted by any oral testimony from the defendant.

**74.** Second, it cannot be said on the facts here that the circumstance which the authorities most readily identify as precluding reliance by a mortgagee on a negative pledge clause of the kind in issue— acceptance from the tenant of rent – has occurred. Indeed, the defendant made a point in the High Court of stressing the reluctance of the plaintiff to accept any rent from those purportedly occupying the properties. The arrangement put in place in respect of the Oulart property by the Order of Costello J. of 3 May 2018 was expressly directed on a without prejudice basis. Similarly, and insofar as the defendant referred to the fact that by order dated 15 June 2016 Lucillia Gardiner on her own behalf and on behalf of Melphia Enterprises Ltd undertook to pay the sum of €1000 per week to the bank account of the plaintiff, the Court Order provided that these monies were:

*'to be paid pending the handover of the premises and that payment shall not entitle Lucillia Gardiner, Melphia Enterprises Limited or any other party, to*

*any interest of any kind in the property whether under statute or any instrument at law or in equity.'*

**75.** Third, while it was accepted by the plaintiff that the Bank was aware of the first Oulart lease, this expired in November 2012. In the course of her oral argument in this Court counsel for the defendant sought to suggest that that tenant had acquired rights to a renewal under the Landlord and Tenant legislation. As I have noted, this was not elaborated upon but in any event the failure of the defendant to adduce any evidence regarding the leases meant that the Court could not conclude that the first Oulart lease – which had a term of four years and nine months – was renewed or that the tenant otherwise acquired any statutory rights.

**76.** Fourth, the defendant sought to place some reliance on an indicative term sheet furnished to him on a date prior to 6 May 2009, which recorded that repayments of the facilities referred to there:

*'... will be sourced from the EBITDA of the Kilmuckridge Store, rental income from the Oulart Store and Oulart properties and proceeds from the Site with any shortfall being met from the personal resources of the Borrower'*

**77.** However, this was a non-contractual, non-binding document. It described itself as an indicative term sheet which did not constitute an offer from the Bank and which was subject to the formal credit approval of the Bank, its standard terms and conditions and satisfaction of the Bank with all aspects of the transaction. The contract comprised the facility letter, and the facility letter made no reference to any lease agreements. More fundamentally it did not and could not amount to a consent of any kind in respect of leasing arrangements which post-dated the document itself.

#### **IV THE CONDUCT OF THE TRIAL**

##### ***Fairness of the trial***

**78.** In the course of his written submissions, the defendant raised three aspects of the trial which, he said, deprived him of fair procedures. These were the fact that counsel for the plaintiff was permitted to open an extract from a textbook on insolvency law which was not provided to the defendant in advance, the claim that he was not allowed sufficient time to make his closing submission and the complaint that he was not permitted to cross examine the plaintiff on an aspect of the written legal submissions delivered on his behalf. As I have noted, these issues were not pursued by his counsel in the course of her oral submissions. They are clearly groundless. It was a matter for the Judge in her discretion to determine whether (as frequently occurs) counsel should be permitted to refer to legal authorities that are not referenced in submissions or books of authorities delivered in advance of the trial, just as it is a matter for her to determine the length of time the parties will be allowed for the making of submissions or any limitations on cross examination (which was quite properly curtailed on issues of law). No basis has been disclosed on which this Court should or could interfere with her decisions in this regard.

**79.** The defendant included in his notice of appeal a complaint that the trial process over the 5 days ‘*was not a good example of fair procedure as regards the treatment of a litigant in person following an examination of the DAR transcript*’. Apart from the two specific complaints regarding the parties’ closing arguments, the only complaint specified regarding the conduct of the trial related to the issue of cross-examination of



the plaintiff on his written submissions. I have been unable to discern any basis in the transcript of the hearing on which the trial Judge could be criticised for her conduct of the trial and, as I have said, apart from those I have addressed no other basis was identified. A general complaint was made in the notice of appeal that the Judge disregarded the submissions of the defendant, applied the submissions of the plaintiff verbatim, and failed to take cognisance of errors in the mortgage deed as recorded in this submissions. This contention was not elaborated upon at any stage and appears to me to be without any foundation.

#### **V THE NEW ARGUMENTS**

*The application to amend the grounds of appeal/to advance new arguments/to amend the notice of appeal.*

**80.** As I have earlier noted, the defendant sought at the hearing of this appeal to advance a new point and, as I have also noted, this was variously described as justifying the admission of new evidence, the advancement of new arguments and/or the amendment of the notice of appeal.

**81.** The point arose from events in this court on February 19 2021. On that date an appeal in the case of *KBC Bank Ireland plc v. Hugh Corrigan and Anita Corrigan*, High Court Record No. 2016/1246S, Court of Appeal No. 2018/243 ('the debt proceedings') came before Costello J. Those proceedings were instituted in July 2016, and in July 2019 judgment was entered against the defendants in default of appearance. An application

was made to the High Court to set aside that judgment, which was refused by Baker J., her Order being thereupon appealed. It appears (although the Court has received no evidence on this issue) that the debt the subject of those proceedings is the debt which gave rise to the appointment of the plaintiff. The only fresh evidence sought to be relied upon was the Order made by Costello J. on that date.

**82.** That Order was on consent. The Order recites as follows:

*‘... the Court being informed by Counsel for the Plaintiff that there is consent to the reliefs sought in the motion on the basis that the relief sought in paragraph 3 of the draft amended Notice of Appeal be amended to read ‘An Order substituting the reliefs sought in No. 2 above for the relief of Strike out of the Proceedings no. 2016/1246S as against the First Named defendant only’.*

**83.** The application to amend the notice of appeal in those debt proceedings (the consent of the Bank to which is recorded here) sought to include a new relief as follows:

*‘A Declaration that remitting proceedings bearing record no. 2016/1246S to the High Court is contrary to public policy, offends the rule in Henderson v. Henderson and is further offensive to the applications of the Supreme Court in Minister for Agriculture, Food and Forestry v. Alte Leipziger (2000) IESC 13 whereby evidence available to the Respondent was not before the High Court.’*

**84.** The argument advanced by counsel for the defendant was to the effect that the judgment debt was as a result of this order ‘gone’, the proceedings brought by the Bank seeking judgment having been struck out in their entirety. It was also suggested that the effect of the agreement of the Bank (which it should be observed had at the time of the

application to Costello J. sold the debt) to the amendment of the notice of appeal was to preclude it from relitigating the debt against the defendant. The argument was outlined by the defendant in an affidavit sworn by him shortly before the hearing of this appeal in which he recorded his view that there was, as a result of the Order of Costello J. ‘*no equity in these proceedings*’ and that the Bank (which appointed the plaintiff as receiver) ‘*has failed to establish in Court that any debt is owed to it by the Appellant*’.

**85.** Given that this issue arose from events occurring after the hearing in the High Court, I am of the view that the Court should address the argument advanced by the defendant, and this is all the more so in circumstances where it requires reference only to the Court Order of February 2021, rather than to evidence properly so called.

**86.** However, in my view, the contention is based upon a number of misconceptions. To begin with, I cannot see anything in the Order of Costello J. that directly or indirectly provides or acknowledges that the debt the subject of the proceedings could not be the subject of subsequent suit or, more importantly, enforcement. The effect was merely to allow the appeal, to enable the amendment of the grounds of appeal and not to remit the proceedings to the High Court. While the defendant was permitted – on consent – to include in his notice of appeal in the debt proceedings the declaration I have quoted above, the Court was neither asked to nor did it make any such declaration. In fact, it is not clear to me why – given that the appeal was being allowed – the defendant was persisting in seeking to amend his notice of appeal at all. If he was doing so in the belief that the inclusion within the notice of appeal of the new relief combined with the fact that the appeal was allowed meant that the Court was in some sense accepting, or the Bank was deemed to be acknowledging the validity of the declaration inserted into the notice of appeal, that simply did not follow.

**87.** But aside from this, and more fundamentally, underlying the submission is a more basic error. Even if one assumes that the Bank could no longer pursue summary proceedings to recover the debt in question, this does not extinguish the debt itself and it certainly does not mean that the receiver is disabled from realising the secured assets and applying the proceeds toward the liabilities in question. Indeed, if the argument were well placed it would mean (as counsel for the plaintiff pointed out in the course of his submissions) that the failure of a creditor to institute proceedings for the recovery of a debt within the statutory limitation period would deprive the receiver of any power to act. That is a most surprising proposition: it is common for a mortgagee to simply enforce its security without bringing proceedings to recover the underlying debt and, if authority were required to show that this is entirely permissible absent the extinguishment of the debt, it is afforded by the decision of the Supreme Court in *Bula Ltd. v. Crowley (No. 3)* and *Fennell v. Slevin* [2020] IEHC 677. Whatever the effect of the Order of Costello J. upon which the defendant relied, it did not extinguish the liability of the defendant to repay the monies which (it was never denied) had been advanced by the bank and which (it was never denied) had not been repaid in full. Once that was the case, the Order had no impact of any kind on the receivership nor on the plaintiff's entitlement to act as receiver.

### ***Welsh Mortgage***

**88.** The argument in this regard arises from the fact that in correspondence sent to the defendant on May 5 2021, the plaintiff's solicitors addressed the defendant as the 'Chargor'. Noting that in the deed of appointment the plaintiff was described as agent of the 'Borrower', the defendant says that the term 'Chargor' is used only in a 'Welsh

*mortgage*’, that the Bank breached the terms of a ‘*Welsh mortgage*’ when it began collecting principal sums from the defendant’s account in 2008. He also says that the effect of the Land and Conveyancing Law Reform Act 2009 is that Welsh mortgages are void and that the Bank issued a new contract offer in 2010 and charged principal thereon after the commencement of the 2009 Act.

**89.** None of this was argued before the High Court and, indeed, even now I am uncertain as to the exact basis for the claim that the mortgage was a ‘*Welsh*’ mortgage. This, to be clear, is an ancient form of mortgage under which the lender is entitled to take rents and profits from the land instead of interest on the loan sometimes as a means of paying back capital as well as interest, the characteristic being that the mortgagee is entitled to go into occupation of the secured property. Mortgages with these features may not be created after the coming into effect of the Land and Conveyancing Law Reform Act 2009 (s.89(7) and (8)) it being believed that they were inconsistent with the contemporary understanding of a mortgage as providing only security.

**90.** The defendant sought to maintain an entitlement to make this case for the first time on appeal by reference to the decision of the Supreme Court in *Allied Irish Banks v. Ennis* [2019] IESC 12. There, the Supreme Court allowed the defendant/appellant to summary proceedings to advance a contention that had not been raised before the High Court when it considered an application for (and granted) judgment to the plaintiff directing the defendant to deliver up possession of certain lands. The new case he sought to make included claims to the effect that he had a defence to the claim based on provisions of the Consumer Credit Act 1995 because (essentially) the bank ought to have delivered a copy of the credit agreement on foot of which it sued after that agreement took effect and that the defendant had a ‘cooling off’ period during which

he could withdraw from it. The Court of Appeal had refused the defendant permission to make that point, a conclusion reached in part on the erroneous assumption that the defendant had not been given liberty to adduce certain new evidence comprising documentation which he had obtained subsequent to the High Court ruling.

**91.** In deciding that the new argument the defendant sought to advance did disclose an arguable defence, that he should be permitted to make it and accordingly that the appeal against the judgment obtained against the defendant should be allowed, MacMenamin J. (with whose judgment O'Donnell, Dunne, Charleton and O'Malley JJ agreed) made five points of relevance here. First, the issue with which the Court was concerned (and indeed the sole issue in the Determination of the Court granting leave to appeal) concerned the approach to be adopted on applications to make a new case in appeals for judgment in summary proceedings (at para. 2). Second, MacMenamin J. was of the view that where the Court was concerned with appeals from summary judgment (as compared to an appeal against the decision in a full plenary trial) '*different weighting considerations apply*' (at para. 14). Third, this was viewed as appropriate having regard to the similarity between at least some summary applications and interlocutory applications (in respect of which a more flexible approach to the admission of new evidence has always been adopted), to the high threshold an applicant for summary judgment must meet in order to obtain it, and to the nature of the rights and interests at stake. Fourth, from this it followed that when presented with an application to receive a new argument or new evidence in a summary proceeding a court (at para. 32):

*'may first look to the criteria as in plenary proceedings; but they will do so having regard to the fact that the 'default position' in respect of any proceedings is that they should go to trial and that depriving a party of a full trial will be a*

*departure from the norm which should only be adopted where there is no risk of injustice .... The courts will then consider whether, applying this consideration but with less rigour, the application should be entertained.'*

**92.** All of this is to be done in the light of the fact that the over-riding consideration is the interests of justice resulting in greater flexibility in proceedings of this kind (at para. 39) - at least where the proceedings in question could be said to be analogous to an interlocutory application.

**93.** I labour all of this this having regard to the frequency with which *Allied Irish Banks v. Ennis* was invoked by counsel throughout her submissions because, as I think is clear from the foregoing, it does not determine and no aspect of the reasoning in the decision affects, the proper approach to the admission of new evidence in appeals against final judgment entered after a plenary hearing. If anything, the decision confirms that the criteria to be applied to an application to admit either new evidence or to advance a new argument in the appeal of a final judgment following a plenary hearing remain those set out in the judgment of O'Donnell J. (with whom Hardiman and Clarke JJ. agreed) in *Lough Swilly Shellfish Growers Co-op Society Ltd. v. Bradley* [2013] IESC 16, [2013] 1 IR 227 (see para. 10 of the judgment of MacMenamin J. in *Allied Irish Banks v. Ennis*). There the Court identified (at para. 28) a '*spectrum*'. That spectrum runs at one end from cases in which a new argument would involve new evidence with a consequent effect on the evidence already given or where the new argument would be diametrically opposed to the argument actually advanced at the trial (these being cases where the Court would incline against granting leave), to cases at the other extreme in which the new argument was closely related to arguments that were advanced and

which were not dependant on new evidence (in which case leave might be more readily granted). In cases at the first end of the spectrum, considerations of finality, the obligation of a party to bring forward its case in full at trial, fairness to the other parties to the action, and the possible need for a remittal in order to deal with the point all lean heavily against the admission of new arguments of this kind. This was both made clear by O'Donnell J. in *Lough Swilly Shellfish Growers Co-op Society Ltd. v. Bradley* (at para. 28) and indeed by MacMenamin J. in *Allied Irish Banks v. Ennis* itself (see para. 14).

**94.** In this case, I am emphatically of the view that the application that this Court declare the Loan Terms and Conditions dated 11 December 2006 and the security of the 28 May 2007 to be a '*Welsh mortgage*' and the allied contentions that '*the Chargor*' was the only person who had the capacity to permit the appointment of the receiver should be refused having regard to these principles. Specifically:

- (i) The Court could not entertain this argument without affording the Bank and/or present owner of the loan and security the opportunity to participate in the hearing. It is not appropriate that such an issue requiring the involvement of additional parties be determined for the first time on appeal.
- (ii) There is absolutely nothing in the evidence that was adduced before the High Court to support the proposition that there was any '*Welsh mortgage*' entered into either at all or, more particularly, *after* the coming into effect of the Land and Conveyancing Law Reform Act 2009. The argument, were it to be permitted, could only be agitated on the receipt of such evidence and that in itself would require remittal of the proceedings.



- (iii) The proposition that the fact that solicitors for the plaintiff used the term ‘*chargor*’ in correspondence means that there was a ‘*Welsh mortgage*’ is untenable.
- (iv) The explanation given by the defendant for the failure to raise this issue at the trial (that the use by the plaintiff’s solicitors of the term ‘*chargor*’ in correspondence in May 2021 first alerted him to the point) is, having regard to the countervailing interests of finality and the over-riding obligation on a party to bring their entire case forward at once, not a reasonable excuse for the failure to raise this issue before now. If the defendant wished to raise a point of this nature and significance it was incumbent upon him to do so at the trial. He had every opportunity to do so. The case was five years in gestation, was the subject of an extraordinary number of court applications (the trial Judge refers to 34 court orders and over 60 applications to court in this and other proceedings arising out of the background facts and circumstances). The defendant was in a position to identify a wide array of legal points and arguments throughout.

## **VI THE NOTICE OF APPEAL AND ORDERS**

### ***The notice of appeal***

**95.** The amended notice of appeal delivered by the defendant on 23 February 2021 presented twenty six grounds of appeal. I have addressed above those grounds that were specifically agitated in the course of the written and oral submissions. Noting that no grounds of appeal were abandoned by the defendant, and to be clear, the grounds

covered by the principal parts of this judgment are (in Part II) grounds 4, 5, 8, 11, 12 and 15, (in Part III) grounds 9 and 10, and (in Part IV) (grounds 7, 19, 24 and 26).

**96.** The remaining grounds were, correctly, not pursued in written or oral submissions. For the avoidance of any doubt my reasons for the conclusion that they did not present stateable grounds of appeal are, briefly, as follows.

**97.** First, the defendant has not explained how any alleged failure of the plaintiff to show or confirm properties of the defendant on the deed of appointment or High Court Order of 22 August 2014 affects (having regard to the provisions of the mortgage) either the validity of his appointment, his entitlement to possession of those properties having regard to the provisions of the mortgage or to any other relief claimed in these proceedings (ground 1).

**98.** Second, it is not evident to me on what basis issues around the attempts made by the plaintiff to enforce an interlocutory Order made by McDermott J. on 22 August 2014 (which Order was the subject of a separate, and unsuccessful, appeal to this Court) are relevant to the judgment of Pilkington J. under appeal here (grounds 2 and 3). For the same reason ground 14 (which also makes reference to the identification of properties in the deed of appointment and to the Order of 22 August 2014) fails to advance any aspect of this appeal. The appellant's criticism (in the same ground) of the trial Judge for her description of the background to the matter is misconceived. She was fully entitled to detail the context to the proceedings in her judgment. In a related vein, the alleged error in the trial Judge's description of the disposal of the appeal against this Order by this Court (ground 20) appears neither to be an error, nor to be relevant to any

issue in the case, nor is the asserted conflict of evidence surrounding the service of that Order (ground 21).

99. Ground 6, thirdly, complains that the trial Judge failed to take cognisance of certain alleged conduct of the plaintiff as receiver including his allowing the property to run into a state of dereliction, accepting rent in respect of the Kilmuckridge property for a period of three months pursuant to an Order of Gilligan J. and then resisting the continuation of that arrangement. The defendant has proffered no response to the reply of the plaintiff that the Order of Gilligan J. referred to (dated 15 November 2016) did not require the plaintiff to accept rent but placed a stay on an application for attachment and committal made against associates of the defendant on the basis that they would vacate the property and pay a sum expressly characterised by the Court as not comprising rent. That is a correct account of the Order made by Gilligan J. on that date (which said that the payment referred to there should not entitle any party ‘*to any interest of any kind in the Property whether under statute, under any other instrument ...*’). Moreover, the plaintiff was not required to accept rent from a person by whose alleged lease he was not bound. The trial Judge found on the facts as determined by her that there was no basis for the claim that the plaintiff or any person under his control committed any of the acts of damage alleged, and that no evidence of any kind was before the Court of any damages under any of the headings claimed in the proceedings (at para. 140 of the judgment). Given that the only witness called by defendant was a valuer and assessor who had not been present at the time of any of the events the subject of the proceedings, this was not a surprising conclusion. No basis has been disclosed on which this Court could interfere with it.

**100.** For the same reasons, the application made by the defendant shortly before the hearing of this appeal that the court should issue a declaration that the plaintiff acted in breach of the Deed of Charge by unlawfully removing chattels, keeping the proceeds of sale for himself, committing malicious criminal damage to the chattels or property and in not keeping the chattels and property in good insurable condition should be refused. These were matters to be dealt with at the trial and, insofar as the defendant chose to raise them, were addressed in the findings of the High Court Judge.

**101.** Fourth, complaint was made (ground 13) that because the plaintiff had carried out an internal banking review of the defendant's business before the receivership commenced, he had obtained confidential information relating to the defendant thereby placing him in a position of conflict of interest. I do not see any basis on which the conduct of such a review by a person subsequently appointed as a receiver (which is not unusual) causes any conflict of interest and it has not been explained how, in particular, the information allegedly furnished to the plaintiff was such as to preclude him from discharging the function of receiver. No such basis was identified or explained in either submissions to this Court or in evidence before the trial Judge.

**102.** Fifth, the defendant complains of the manner in which the deed of appointment was executed (grounds 16 and 17). The defendant does not specify the conclusion he says should follow from these complaints. One complaint was that the deed of appointment was signed and sealed at the same time by the bank officials in question and by the plaintiff although they were in different locations. The defendant has proffered no response to the plaintiff's assertion that in fact that the evidence of one of the officials was that he could not recall the time of the day when the deed was signed. The defendant has failed to identify any specific error in the decision of the trial Judge having regard to

that evidence, or to any particular consequence which it is alleged should follow. The same applies to his complaint that there was '*interference*' with the sealed deed by the plaintiff.

**103.**Sixth, I can see no basis on which any aspect of the High Court decision is vitiated by the alleged failure of the trial Judge to take cognisance of the actions of K-Tech Security Ltd. and its employees who (the defendant says) admitted that they did not hold a static licence which prohibited entry by force into the private property of the appellant (ground 25). There was no issue in the action as pleaded relating to the licences held or not held by any agent employed by the plaintiff.

**104.**Finally, the amended notice of appeal seeks a reference to the Court of Justice of the European Union. The question to be so referred does not appear to have been identified, and the application was not elaborated upon in written or oral submissions. Reference is made to the decision of the European Court of Human Rights of 25 October 2003 in *Rousk v. Sweden* (Application no. 27183/04) in support of the proposition that the Court is asked to apply principles of fair balance and proportionality. It is said that the actions of the plaintiff were disproportionate in circumstances where twenty two jobs were lost as was any chance of debt reduction and where rent was being collected on the property in Oulart.

**105.**There is no issue of European law in play in this case, and the defendant has failed to identify any basis on which the decision of the European Court of Human Rights in *Rousk v. Sweden*, (Unreported, (Application No. 27183/04), has any relevance to this appeal. The plaintiff was appointed on foot of a lawful instrument to recover monies which were advanced to the defendant and never repaid, and the steps taken by him to effect such recovery were fully authorised by that instrument. In *Rousk* in contrast, the Court found

actions of the Swedish tax authorities to be a disproportionate interference with the property rights of the applicant under Article 1 of the First Protocol to the European Convention on Human Rights in circumstances where those authorities caused the applicant's property to be sold at public auction and him to be evicted from it. All of this occurred on foot of a very small tax liability when the applicant was not formally served with the relevant writ of execution, where the writ had not obtained legal force at the time of the sale, where the Court found that the applicant had been effectively deprived of the opportunity to exhaust all rights of appeal against the execution, where the tax authority had granted a respite either shortly before or shortly after the time at which the execution authority proceeded with the sale but before his eviction, where the ground on which that respite was sought included the medical condition of the applicant and where there were other assets of the applicant that could have been seized and sold to meet the small debt without the necessity for an eviction.

**106.** Given the absence of any proper argument in this case as to the application of this decision to steps taken by a private party to recover a debt on foot of instruments of the kind in issue in these proceedings, it would not be appropriate in this case to express any view as to whether (and if so how) this decision could possibly constrain parties in the enforcement of their private law contractual rights. Suffice to say that there are fundamental differences in principle between the obligations of a public body seeking to recover a tax liability, and those of a private party seeking to recover a debt owed to it. One is governed by public law and the other by private contract. More fundamentally there is simply no comparison of any kind between the facts and issues presented by *Rousk* and those in issue here having regard to the size of the outstanding debts, the opportunities afforded to the defendant to repay them, the conduct of the defendant and

his associates as outlined in the judgment of the trial Judge, and the evidence tendered on behalf of the plaintiff as to the difficulties he encountered in discharging his functions *vis a vis* the properties (which, to repeat, was never the subject of any contradictory testimony). *Rousk* was a wholly exceptional and extreme case which has no application to the facts here. On the basis of the argument advanced on the issue in this case (which was little more than assertion in the notice of appeal) no foundation whatsoever has been disclosed for any ground of appeal arising from it.

### ***Costs***

**107.**It follows that this appeal should be dismissed. While two of the defendant's grounds of appeal (grounds 22 and 23) are directed to the Order for costs made by the trial Judge, it is my preliminary view that it follows from this judgment (with which Whelan and Haughton JJ. agree) that the defendant has been entirely unsuccessful in these proceedings and must, therefore, bear the costs of the plaintiff in both the High Court and in this Court. If the defendant disagrees with this, he should advise the Court office within fourteen days of the date of this judgement whereupon a hearing will be convened to address the issue of costs.

