Neutral Citation: [2015] IEHC 591

THE HIGH COURT

[2014 No. 5970 P]

BETWEEN

PAUL McCLEARY

PLAINTIFF

AND

PAUL McPHILLIPS

DEFENDANT

THE HIGH COURT

[2014 No. 5264 P]

BETWEEN

PAUL McPHILLIPS

PLAINTIFF

AND

ACC LOAN MANAGEMENT LTD FORMERLY ACC BANK PLC

GRANT THORNTON INTERNATIONAL LTD TRADING AS GRANT THORNTON IRELAND

STEPHEN TENNANT PAUL McCLEARY DECLAN KAVANAGH AND JACK McCANN

DEFENDANTS

Judgment of Mr. Justice Cregan delivered on 31st day of July, 2015.

Introduction

1. In the first set of proceedings (record number 2014/5970 P) the plaintiff, a receiver, seeks an order for possession over certain properties owned by the defendant, and certain permanent injunctions directing the defendant not to interfere with the receiver in the exercise of his functions. In the second set of proceedings (record number 2014/5264 P) the plaintiff, in the second set of proceedings, (being the defendant in the first set of proceedings) is seeking declarations that Stephen Tennant (who was the first appointed receiver) was not validly appointed as receiver, that, if he was validly appointed, he was not validly discharged and also that Mr. Paul McCleary, the second receiver, was not validly appointed.

Background

2. By letter of sanction dated the 20th May, 2004 (and varied on 6th April, 2009 and 19th October, 2009) ACC Bank offered to make available to Mr. McPhillips a loan in the sum of €700,000. This loan facility was drawn down by Mr. McPhillips on 24th June, 2006.

3. By letter of sanction dated 15th March, 2005 (and varied on 6th April, 2009 and 19th October, 2009) ACC Bank made available to Mr. McPhillips a second sum of €255,000. The second loan facility was drawn down by Mr. McPhillips on 25th April, 2005.

4. By a third letter of sanction and agreement dated 13th October, 2006 (and varied on 6th April, 2009 and 19th October, 2009) ACC Bank offered to make available to Mr. McPhillips a loan in the sum of €906,000.

5. By letter of sanction and agreement dated 25th October, 2006 (and varied on 19th June, 2007, 6th April, 2009 and 19th October, 2009) ACC Bank offered to make available to Polygon Developments Ltd ("PDL"), a loan in the sum of €2,895,000.

6. Mr. McPhillips executed a guarantee and indemnity on 6th October, 2009 in favour of the Bank, to guarantee and indemnify the Bank in respect of all liabilities of PDL to the Bank.

7. Mr. McPhillips defaulted in his repayment obligations to the Bank and by letter of demand dated 17th January, 2013 the Bank demanded repayment of the total sum of €1.86 million approximately. In addition PDL defaulted in its repayment obligations to the Bank, and the Bank, by letter of demand dated 17th January, 2013 demanded repayment of the total sum being €1.5 million approximately.

8. On 25th January, 2013 the Bank also sent a letter of demand to Mr. McPhillips, pursuant to his obligations in accordance with the PDL guarantee and indemnity, demanding repayment of the total sum then outstanding on the PDL loan facility being approximately €1.5 million.

9. Mr. McPhillips failed, refused and/or neglected to pay the said sums demanded by the Bank.

10. Arising from the default of Mr. McPhillips in respect of his indebtedness, ACC Bank appointed Stephen Tennant as receiver over the property, pursuant to a deed of appointment dated 4th February, 2013. (I shall refer to Mr. Stephen Tennant hereafter as "Mr. Tennant" or "the first receiver".)

11. On 17th January, 2014 the Bank discharged Mr. Tennant as receiver and appointed Paul McCleary as receiver of the property (I shall refer to Paul McCleary hereinafter as "Mr. McCleary" or "the second receiver" or "the plaintiff receiver").

12. On 25th June, 2014 the plaintiff receiver directed his agents to attend at the relevant property to secure it.

13. The plaintiff receiver's agents were prevented by Mr. McPhillips, and an associate of Mr. McPhillips, from taking possession of the property.

14. As a result, by letters dated 2nd July, 2014 the solicitors for the plaintiff receiver wrote to the defendant (and also to his purported attorney, Mr. Ben Gilroy) seeking the defendant's undertaking by close of business on 4th July, 2014 that he would cease to obstruct the plaintiff receiver in the conduct of his duties as receiver over the property.

15. The plaintiff receiver did not receive any such undertakings.

16. On 9th July, 2014 the plaintiff receiver instituted these proceedings and also sought interlocutory injunctive relief from the High Court.

17. On 15th July, 2014 the plaintiff receiver was granted interlocutory injunctive relief which restrained the defendant, his servants or agents from impeding or obstructing the plaintiff receiver, his servants or agents from gaining access to the property, or, from interfering with the plaintiff receiver taking possession of the property.

18. The plaintiff receiver obtained possession of the property on 16th July, 2014.

19. Subsequently the proceedings were admitted to the Commercial List and directions in respect of pleadings were given.

20. Mr. McPhillips, having defended those proceedings, subsequently issued proceedings in his own name as plaintiff, in which he seeks inter alia orders setting aside the appointment of the plaintiff receiver.

21. By order of the High Court (McGovern J.) dated 20th October, 2014 the High Court directed that the first set of proceedings ("the possession proceedings") and the second set of proceedings ("the appointment proceedings") be linked and listed for hearing together.

22. On 30th July, 2014 ACC Bank obtained summary judgment against Paul McPhillips in the sum of €3.64 million and costs. That order was obtained in proceedings entitled ACC Bank Plc v. Paul McPhillips (Record No. 2014/125S / 2014/33 Comm). In addition, ACC Bank plc, on that application applied for, and obtained, an order amending the title of the proceedings to reflect the plaintiff's new name - "ACC Loan Management Ltd". Mr. McPhillips's application for a stay was refused and the order was perfected on 14th August, 2014. Thus ACC Bank has a valid judgment against Mr. McPhillips in the sum of €3.64 million approximately.

The issues in these cases

23. Mr. McPhillips is a lay litigant and at the opening of the case it was necessary to clearly identify what precisely were the issues in each set of proceedings.

24. By agreement between the parties, the issues which arise in the first set of proceedings are:

1. Was Mr. Stephen Tennant validly appointed as first receiver?

2. Was there a valid deed of discharge in respect of the discharge of Mr. Tennant, the first receiver?

3. Was the second receiver - Mr. McCleary – validly appointed?

4. Did the second receiver's servants or agents who appeared at Mr. McPhillips' premises on 25th June, 2014 (seeking possession of the property) represent themselves as agents of Mr. Stephen Tennant or Mr. McCleary?

5. Does ACC hold a mortgage over Mr. McPhillips property, or did it sell on the debt?

6. Did the mortgage contain an express power to take possession of the property, and/or an express power of sale over the property?

25. In the second set of proceedings, the issues which arise are:

1. Is Mr. McPhillips entitled to damages for trespass to his property? (because the servants or agents of the receiver had no right to be there).

2. Is Mr. McPhillips entitled to a declaration that the servants or agents of the receivers had produced false documents?

3. Is Mr. McPhillips entitled to a declaration that the deed of discharge had not been properly signed and that there was a "cover up"?

4. Is Mr McPhillips entitled to damages because an injunction had been wrongly granted by the High Court at the interlocutory stage?

Chronology of key events

26. I set out below a chronology of some of the key dates in relation to this matter.

4th February 2013 – Stephen Tennant appointed as receiver.

17th January 2014 - Stephen Tennant discharged as receiver.

17th January 2014 – Paul McCleary appointed as second receiver.

4th February 2014 – Meeting between Stephen Tennant and Ben Gilroy.

12th February 2014 – Second meeting between representatives of Grant Thornton and Ben Gilroy.

25th June 2014 – Attempt by receiver through his servants or agents to attend on the property and obtain possession of the property.

2nd July 2014 – Letter from second receiver to defendant threatening injunction proceedings.

9th July 2014 – Second receiver – the plaintiff in the first set of proceedings - issues proceedings and seeks interlocutory injunction.

15th July 2014 – Order for possession and injunction.

30th July 2014 – ACC Bank obtain summary judgment for €3.64 million against Mr. McPhillips.

Evidence of Stephen Tennant

27. Mr. Tennant is a partner in the firm of Grant Thornton. He gave evidence that on 4th February, 2013 he was appointed receiver over a number of properties owned by Mr. McPhillips including the lands and premises comprising a petrol station and adjacent building known as Lisadrumskee, Shercock, Co. Cavan – the property in dispute in these proceedings. The property is owned by Mr. McPhillips. Mr. Tennant prepared a witness statement for the court and he confirmed his witness statement.

28. At appendix 1 to his witness statement, he attached a copy of his deed of appointment as receiver. This document stated:-

"Deed of Appointment of Receiver

In pursuance of the powers contained in the Deeds of Mortgage/Charge listed in the schedule hereto ("the security documents) between (1) Paul McPhillips ("the Chargor") and (2) ACC Bank Plc, we ACC Bank Plc having our registered office in Charlemont Place, Dublin 2 do hereby appoint Stephen Tennant, Grant Thornton, 24/26 City Quay, Dublin 2 ("The receiver") to be receiver of all the assets of the Chargor referred to and comprised in and charged by the Security Documents and the receiver shall have and be entitled to exercise the powers conferred upon him by the security documents and by law."

Dated 4th day of February 2013.

In witness whereof the common seal of ACC Bank was hereunto affixed the day and year above written and the receiver has hereunto set his hand by way of receipt and acknowledgment of his appointment.

Present when the common seal of ACC Bank plc was affixed here,

I, Stephen Tennant hereby acknowledge receipt of this Deed and accept the appointment thereby notified upon and subject to the terms and conditions above referred to and more particularly contained in the security documents.

Dated

Signed

Witnessed"

29. The schedule to the deed of appointment set out at number 6 a deed of mortgage/charge dated 2nd June, 2006 which is the relevant deed of charge/mortgage over the premises at issue in the proceedings.

30. The deed of appointment is dated 4th February, 2013 at 11.35 in the forenoon. Mr. Tennant gave evidence that he had signed the document, that this was his signature, that he had dated it 4th February, 2013 and also inserted the time at 11.35. He also gave evidence that his signature was witnessed by a Mr Vincent Hand, another employee at Grant Thornton.

31. The original of the deed of appointment of the receiver was produced in court, and confirmed by Mr Tennant. Mr Tennant also confirmed that there was no other deed of appointment relevant to his appointment as receiver over these assets.

32. I had an opportunity to review the original deed of appointment. There is a red seal with the words "ACC Bank Plc" embossed thereon. Below the seal is a signature of Rose Montgomery of ACC Bank, and the words "person authorised to authenticate the seal". To the left of the seal there is a stamp and contained therein are the words: First witness and a signature, "Mary Walsh", (Bank Official), the words "Second witness", the signature "Isabelle Kerr", (Bank Official), both c/o ACC Bank, Charlemont Place, Dublin 2. Mr. Tennant indicated that he could not recall where he was when he signed it but that his custom and practice was to sign such deeds of appointment in ACC's premises.

33. On 5th February, 2013 (i.e. the day after his appointment) Mr Tennant wrote to Mr. McPhillips to advise him that he had been appointed receiver over a significant number of assets of Mr. McPhillips and he enclosed a copy of the deed of appointment for his information.

34. Mr Tennant also gave evidence that on or about 11th April, 2013 (i.e. the following week) Mr. McPhillips attended a meeting with his solicitor and accountant in ACC Bank Plc, attended by Vincent Hand of Grant Thornton and its legal advisors.

35. Thus, it appeared at the start as if Mr. McPhillips was cooperating with the receivers. Indeed Mr. Tennant's evidence was that Mr. McPhillips was cooperative with him, and his agents, at the beginning of the receivership and provided keys and access to most of the properties in or around 26th June, 2013. Mr. Tennant indicated that he had no direct dealings with Mr. McPhillips during his tenure as receiver.

36. However, over the following months, Mr Tennant said it soon became evident that Mr. McPhillips was interfering with the

receivership process and was not cooperating with the receiver or his agents.

The Deed of Discharge dated 17th January, 2014
37. Mr Tennant gave evidence that, as a result of a conflict of interest issue, Grant Thornton in America informed Grant Thornton in Ireland that it was no longer possible for partners of Grant Thornton to act as receivers for, and on behalf of, ACC Bank. Mr Tennant's evidence was that he and other colleagues had to resign and effectively stand down as receivers in about 50 - 100 ACC Bank receiverships at that time. He emphasised that it was his decision to stand down and that it was based on this conflicts issue which arose. He emphasized it was nothing to do with the conduct of his receivership. I accept this evidence.

38. His evidence was that on 17th January, 2014 he was discharged as receiver in this case and that a deed of discharge dated that day was executed for and on his behalf. This deed of discharge provides that:-

> *"The Bank hereby discharges the receiver from his position as receiver of all of the property under the appointment with effect from the date and time of delivery hereof."*

39. The recitals to the deed of discharge refer to the mortgage/charge dated 2nd June, 2006 made between Mr. McPhillips and the Bank. This document was dated 17th January, 2014 at 11.45am. The document is not signed by Stephen Tennant himself. The document is, instead, signed by a Paul Keeley who is stated to sign "on behalf of Stephen Tennant". The document is also witnessed by Aisling McCaffery, who is an employee of Grant Thornton.

40. The original of the deed of discharge was produced in court. This document has a white embossed seal on it, with the words "ACC Bank" embossed on the seal.

41. Mr Tennant confirmed that he was in fact discharged on 17th January, 2014 and that, as and from that date, he was no longer receiver over the said property. Mr. Tennant also gave evidence that the document was signed by Paul Keeley, and Mr. Keeley had authority to sign on his behalf. This letter of authority was produced in court. I accept that Mr Keeley had authority to sign on behalf of Mr. Tennant. He also gave evidence that the document was not pre-dated and it was created on that date. Paul Keeley is a director of Grant Thornton and Aisling McCaffery is an executive with Grant Thornton.

42. Mr. McCleary was appointed second receiver on 17th January, 2014, i.e. the same day as Mr. Tennant was discharged. A copy of his deed of appointment was proved by him in evidence. The original was also handed into court. Mr. McCleary confirmed that this was the original. He confirmed that this deed of appointment was signed by him and dated by him. He confirmed that the details were accurate. He confirmed that he signed it on 17th January, 2014. He confirmed that the witness - Jennifer Creighton - was an employee in Grant Thornton and she was present when he signed the document. I also note that there is a white seal on the document, with the ACC Bank logo impressed upon the seal. (As a white seal, it would not have come out when the document was photocopied. This is important because of what happened on 25th June, 2014).

Events after the deed of discharge and appointment of second receiver on 17th January, 2014
43. What happened after the deed of discharge is a somewhat unfortunate catalogue of errors on behalf of Grant Thornton and the two receivers.

44. On 23rd January, 2014 a meeting was arranged by Grant Thornton with Paul McPhillips at Grant Thornton's office. The meeting was arranged by Mr Tennant's colleague, Jamie Burke, and by his colleague, Ms. Yipp. Mr. Tennant was going to attend – even though he was no longer receiver. In fact however, when Mr. Tennant got to the meeting, Mr. McPhillips did not attend and Mr Ben Gilroy turned up on behalf of Mr. McPhillips, along with another person who was Mr. McPhillips' brother. At this meeting Mr. Gilroy passed Mr. Tennant a power of attorney for Mr. McPhillips. Mr. Tennant's evidence was that the meeting only lasted about 10 minutes, that the receivership was discussed at a very high level but that he did not discuss any element of it - in particular because he wished to check out the authenticity of the power of attorney. Mr Tennant's evidence was that he did not wish to discuss Mr. McPhillip's business affairs with Mr Ben Gilroy if the power of attorney was not correct. That, in my view, was a reasonable reservation on his part. Mr. Tennant also stated in his evidence, that if Mr. McPhillips had attended the meeting, he would of course have informed Mr. McPhillips that he had been discharged as receiver and that Mr. McCleary had now been appointed as receiver. However he did not wish to mention it to Mr. Gilroy at that meeting because he wanted to ensure that the power of attorney was in order. Again, that is, in my view, an understandable approach to take.

45. Mr. Tennant also indicated that the reason he went to that meeting was that although Mr. McCleary had now been appointed as the second receiver, Mr. McCleary had a contractual arrangement with Grant Thornton whereby Grant Thornton sub-contracted out certain services to him. Thus, the same team in Grant Thornton were involved with both receivers. Mr. Tennant's view was that it seemed the right thing to do, to go to the meeting.

46. Mr. Tennant's evidence was that, when Mr. Gilroy walked into the meeting, he, Mr. Tennant, was surprised and taken aback. Mr. Gilroy was known to Mr. Tennant but he had no issue in dealing with Mr. Gilroy. However he had no knowledge of Mr. Gilroy's involvement in the matter. Mr. Tennant's evidence was that he wanted to end the meeting as quickly as possible because he wanted to get legal advice about the power of attorney. I accept Mr Tennant's evidence in this regard. It appears that Mr. McPhillips gave no prior notice to Grant Thornton that he was not going to attend the meeting, or that he was in Australia, or that in fact Mr Ben Gilroy was going to appear in his place.

47. However that meeting - and what happened afterwards - is the source of much of the confusion that subsequently arose. Because Mr. Tennant did not say that he was no longer the receiver, Mr. Gilroy and Mr. McPhillips assumed he still was the receiver. This confusion was regrettable as it led to a further breakdown in communications between the receiver and Mr. McPhillips. On 23rd January, 2014 a letter was sent, purportedly from Mr. Tennant to Mr. McPhillips. This letter purports in form, and in substance, to be a letter from Mr. Tennant. It states that Mr. Tennant was receiver. Indeed it refers to Mr. Tennant's meeting with Mr. Gilroy on 23rd January, 2014. It was a request to Mr. McPhillips to confirm that he had executed the power of attorney in favour of Mr. Gilroy. However, Mr. Tennant accepted that this letter was sent out in error. He was no longer receiver over the said property, having been discharged on 17th January, 2014. The letter was not dictated or written by him, but was written by a member of the Grant Thornton team. Although it purported in substance to be a letter from Mr. Tennant, it was in fact not written by him, or with his knowledge or approval. That is unfortunate. It was an opportunity to inform Mr. McPhillips that Mr. Tennant had been discharged and that a new receiver had been appointed. However this development was not communicated to Mr. McPhillips.

48. The problem was compounded when, on 3rd February, 2014, a second letter was sent again purportedly from Stephen Tennant to Mr. McPhillips. This letter referred to an email received from Mr. McPhillips on 28th January, 2014 noting his confirmation that Ben Gilroy had the appropriate power of attorney. This letter again, in substance and in form, purported to come from Stephen Tennant in

his capacity as receiver over the assets of Paul McPhillips. Again however, Mr. Tennant accepted that this letter had been sent in error and should not have been sent. Firstly, the letter stated that he was receiver when that was no longer case; secondly, the letter purported to be his letter when in fact it was written and sent without his knowledge or approval. He did not write the letter but a member of the Grant Thornton team wrote the letter on his behalf. Mr. Tennant accepted that there were errors in the administration of this receivership.

49. It appears from the evidence, that other letters may also have been sent out in Stephen Tennant's name and with his electronic signature stating that he was receiver. Mr Tennant accepted that any such letters were also sent in error and should not have been sent. He admitted that any letter sent out with his name on it as receiver after 17th January, 2014 was an error. He understood entirely why Mr. McPhillips might have been misled.

50. However the errors did not end there. A second meeting took place on 12th February, 2014. Mr. Tennant's evidence was that he was not aware that this meeting was going to take place, he did not arrange it and that he did not attend it. However he may have become aware of it after the event. Persons who attended this meeting were Jamie Burke of Grant Thornton and Ben Gilroy on behalf of Mr. McPhillips. It appears that at this meeting, Mr. Gilroy asked to see the deed of appointment appointing Mr. Tennant as receiver. This deed of appointment was shown to Mr. Gilroy. Extraordinarily, no-one in Grant Thornton saw fit to inform Mr. Gilroy that Mr. Tennant had been discharged as receiver one month earlier and that Mr. McCleary had now been appointed as receiver in his place.

51. In addition, one of the problems was that, as Mr. Tennant fairly accepted, the usual practice is that the new receiver would have written to all property owners - such as Mr. McPhillips - to inform them that the previous receiver - in this case, Mr. Tennant - had been discharged and that a new receiver had been appointed. Unfortunately, this was not done in the present case. This left Mr. McPhillips in the unfortunate position that he believed that Mr. Tennant was acting as receiver because no one informed him otherwise and then, when he was subsequently told that Mr. McCleary was acting as receiver, he believed that the actions of Mr. Tennant had been taken without proper legal authority. Mr. McPhillip's suspicions in this regard were entirely understandable given the errors which took place in this receivership. Indeed, Mr. McPhillips said that it was only on 2nd July, 2014 when he received the second receiver's solicitor's letter, that he heard for the first time that Mr. Tennant had been discharged and that Mr. McCleary had been appointed as receiver.

52. The errors continued into June. A letter sent by the second receiver's legal advisors on about 25th June, 2014 stated that they were acting on behalf of Mr. Tennant as receiver. Mr. Tennant stated that this again, was unfortunately another error in the receivership. Mr. Tennant accepted that there was a lot of confusion in relation to this receivership.

53. It was put to Mr. Tennant in cross- examination that Mr. McPhillips had obtained 22 folders of documents from ACC and that Mr Tennant's deed of discharge was not among those papers. Mr. Tennant said he could not account for ACC documents.

54. Mr. Tennant was asked why did he not sign the document on the 17th January, 2014 and he said he may not have been available on that date. It was put to him that he was not aware that he had been discharged as receiver, but he said he was aware of it. I accept his evidence in this regard.

55. A succession of emails between the tenant at the relevant premises and Mr. Tennant and/or a member of his team, was also put to Mr. Tennant, in cross-examination to show that Mr. Tennant was involved in the receivership even after his discharge. Mr. Tennant explained that he was responding to the question from the tenant but that he was no longer acting as receiver at that time. In response to a series of questions, Mr. Tennant confirmed unequivocally that he had been discharged on 17th January, 2014, and that he did not act as receiver after that time.

56. Mr. Tennant fairly accepted that it was disappointing and embarrassing that so many errors had been made.

The evidence of Mr. McCleary

57. Mr. Paul McCleary gave evidence and confirmed his witness statement. Mr. McCleary confirmed that he had acted as receiver since the 17th January, 2014 and he also confirmed that Mr. Stephen Tennant had not acted as receiver since that date.

58. Mr. McCleary also gave evidence that he engaged Grant Thornton as his agents to carry out the administrative management of the receivership under his management and direction. He confirmed that this was a form of subcontracting arrangement, reduced to writing, and signed by both parties. His evidence was that he was the receiver but that Grant Thornton looked after the running of the receivership on his behalf. Mr. McCleary said he gave them instructions and they carried them out.

59. Mr. McCleary's evidence was that he met Jamie Burke at least once a week to review the receiverships. It was put to Mr. McCleary that he was not copied on any of the emails which were circulating about certain matters to do with this receivership but Mr. McCleary was of the view that he was regularly updated, whenever he was in the office, by Mr. Burke. His evidence was that he went into the Grant Thornton offices approximately once a week. He confirmed that the members of the team were James Burke, Aiden Cuddy, Declan Kavanagh and Ms. Yipp. He also confirmed that the solicitors Kane Tuohy had been the first receiver's solicitors, (since the date of Mr. Tennant's appointment) and that they continued to be retained by him when he was appointed as second receiver.

60. Mr. McCleary fairly accepted that he had not written to Mr. McPhillips when he was appointed as a receiver to inform him of his appointment. He accepted that it was a mistake not to have done so and that it should have been done, but it was not.

61. Mr. McCleary also gave evidence that on 23rd June, 2014 the summary proceedings brought by ACC Bank against Mr. McPhillips were adjourned because Mr. McPhillips indicated that he wished to put a proposal to ACC Bank. However, no such proposal was in fact made.

62. Mr. McCleary gave evidence that, after the events of 25th June, 2014 - when his agents under his direction could not obtain possession of the property - he instructed Grant Thornton (through the team leader Jamie Burke) to take all appropriate steps to obtain an injunction and to instruct Kane Tuohy solicitors to institute proceedings.

63. Mr. McCleary also gave evidence that he gave instructions to Kane Tuohy Solicitors to write the letter of 2nd July, 2014 to Mr. McPhillips. It was also confirmed that Mr. Tennant did not give these instructions.

64. On 16th July, 2014 Mr. McCleary gave evidence that he gave instructions to Declan Kavanagh, (an employee of Grant Thornton) to take possession of the property peacefully. His view was that if he did not get the order of the Court, he would not be able to proceed with the receivership.

65. Mr. McCleary accepted in cross- examination that he should have contacted Mr. McPhillips, but that this was overlooked. Mr. McCleary's evidence was clear, that he was the receiver, that Grant Thornton provided services to him as receiver on foot of a subcontract, that he was liaising with James Burke of Grant Thornton who was the team leader, that Mr. McCleary gave instructions to Mr. Burke, and Mr. Burke and other members of the team carried them out. I accept this evidence.

66. It is clear that what has caused confusion in this case is not only that Mr. Tennant had to stand down as receiver - which in itself is an unusual circumstance – not only that Mr Tennant failed to notify Mr. McPhillips of his discharge as receiver, but also that the second receiver who was appointed, not only failed to notify Mr McPhillips of this appointment but also continued to use the services of Grant Thornton (and the same team in Grant Thornton) to assist him in the receivership. Whilst this was understandable, it meant that Mr. McPhillips was completely confused about who the receiver was. Mr. McPhillips at all times believed that the receiver was Mr. Tennant; he was not informed of Mr. Tennant's discharge and he was not informed of Mr. McCleary's appointment. There is no doubt that this caused an enormous amount of confusion in Mr. McPhillips mind, until the matter was clarified on 2nd July, 2014 by letter from Kane Tuohy solicitors.

67. Mr. McCleary also accepted that mistakes were made in the receivership.

68. In cross - examination Mr. McCleary accepted that he had never contacted Mr. McPhillips either by telephone or in writing. He stated that he could not give an explanation for this, except that he had overlooked it. He accepted that he should have contacted Mr. McPhillips in the first instance.

69. It was put to him in cross - examination by Mr. McPhillips that he, Mr. McCleary was simply "a front man" for Mr. Tennant who was the real receiver in this receivership. However, Mr. McCleary adamantly denied that this was the case. I accept his evidence in that regard. His evidence was that Mr. Tennant had no hand, act or part in the receivership since Mr. McCleary took over, and that he was at all times liaising with the Grant Thornton team led by Jamie Burke. Mr. McCleary accepted that he was not copied in various emails from Mr. Tennant but, in his view, that was because he had delegated certain powers to the administrative team in Grant Thornton and that they were dealing with the administrative and managerial issues that arose in the receivership under his direction. His evidence was that he was the one at all times making all the appropriate decisions in the receivership and that the Grant Thornton team carried out his decisions under his directions. He also indicated that he had not been informed about the meetings between the Grant Thornton team and Mr. Gilroy on 4th February and 12th February, 2014, or he could not recall whether he had been told. He accepted that Mr. McPhillips could have been misled as to who was the appropriate receiver.

70. Mr. McCleary also fairly accepted that the error which had led to Mr. McPhillips being confused about who was the receiver was "a bad mistake".

The events of 25th June, 2014

71. The flashpoint in the relationship between the receivers and Mr. McPhillips occurred on 25th June, 2014. On that date, agents of the second receiver appeared at Mr. McPhillips' property (i.e. the petrol station and adjoining premises at Shercock, County Cavan) to take control of the premises. Mr. McPhillips and an associate of his, a Mr. Martin McConnon, were waiting for them and opposed their attempts to take possession of the property.

72. During the course of the trial, I heard a significant amount of evidence from a number of witnesses in respect of this event. The following persons gave evidence in relation to this matter:

1. Declan Kavanagh, a trainee with Grant Thornton
2. Robert O'Donnell, a security guard with Ktech Security engaged by the plaintiff receiver.
3. Aigars Rozalinskis, another security guard with Ktech Security engaged by the plaintiff.
4. Michael Kavanagh, a locksmith with Lock Stock and Barrell engaged by the plaintiff receiver.
5. Garda Jerome Crawford, a Garda who attended at the scene.
6. Mr. McPhillips, the defendant.

It is unnecessary to set out in detail all of the evidence of all of these witnesses. It will suffice to set out the essential elements of what happened.

73. The main evidence was given by Declan Kavanagh. Declan Kavanagh is a trainee with Grant Thornton. At the time he was working in the Recovery and Reorganisation team of Grant Thornton, and with the team assisting Mr. McCleary in the receivership. His evidence was that on the day before he went up to Cavan, he was instructed by Jamie Burke of Grant Thornton to secure possession of the filling station at Shercock, County Cavan. The purpose of his visit was to allow the tenant to hand over the keys and to vacate the property in an orderly fashion. His evidence was that, on 25th June, 2014 he travelled from Dublin with his colleague Jack McCann (also of Grant Thornton) to Shercock and arrived there at approximately 9.45 am. Mr. McCann and Mr. Kavanagh then met Robert O'Donnell and Mr. Aigairs of Ktech Security and subsequently with Michael Kavanagh and a colleague of his who were locksmiths of Lock, Stock and Barrels. They proceeded to the property at approximately 10.25 a.m.

74. Mr. Kavanagh's evidence was that on their arrival they were met in the forecourt by Mr. McPhillips accompanied by Mr. McConnon. Mr. Kavanagh's evidence was that he identified himself and handed over the deed of appointment of the second receiver Mr. McCleary, to Mr. McPhillips who proceeded to read the document. Mr. McPhillips then started shouting that it was "only a photocopy" and "where was the original". Mr. McPhillips then proceeded to tear up the deed of appointment in front of Mr. Kavanagh. Mr. Kavanagh's evidence was that the two locksmiths, Patrick and Michael, sought to inspect the building but they could not access the rear of the building as Mr. McPhillips' vehicle was in the way.

75. Mr. Kavanagh then stated that Mr. McPhillips' associate, Mr. McConnon, proceeded to shout expletives at the members of their group. He shouted abuse stating that there was "no Irish blood in any of us" and "asking us how we could do this to Irish families, taking their homes". According to Mr. Kavanagh, Mr. McConnon proceeded to insult and shout abuse at each individual on his team, that he was shouting that the deed of appointment was a "false instrument", that he was demanding a court order and asking where was Stephen Tennant. Mr. Kavanagh's evidence was that, as a result of this intimidation, they decided to call the local Gardaí but it took some time before the Gardaí arrived. Whilst they were waiting for the Gardaí to arrive, a number of threats were made to Mr. Kavanagh and Mr. O'Donnell by Mr. McConnon, who stated to Mr. O'Donnell that he had the registration number of his van and that he

knew where he lived; Mr. Kavanagh was told that he had "a lovely car and that it would look well blown up and burnt" outside his house.

76. Mr. McConnon was also recording the vehicles and the faces of the receiver's agents on his mobile phone. Mr. Kavanagh was, quite understandably, very concerned. It goes without saying that these threats which were made by Mr. McConnon were clearly unacceptable. They should not have been made. They were clearly intimidatory and intended to be intimidatory. It is clear from the evidence, that Mr. McPhillips himself did not personally make any of these threats. Indeed, at the end of the trial, he expressly disassociated himself from Mr. McConnon. However, to some extent, he has to be held accountable for the actions and threats made by his associate. He knew Mr. McConnon and he invited him to be present. He knew, or ought to have known, that Mr. McConnon might act in this manner. The entire behaviour of Mr. McConnon was clearly designed to threaten and intimidate the agents of the receiver. Each of the witnesses who gave evidence on behalf of the plaintiff receiver corroborated Mr. Kavanagh's evidence about the nature of the threats and intimidating remarks that were made. I accept their evidence. I have no doubt that these remarks were made. Indeed, Mr. McPhillips did not seek to argue that they were not, but rather to submit that he himself had never made such threats.

77. The Gardaí arrived but, having heard both sides, the Gardaí were of the view that this was a civil matter and that because there was no address on the deed of appointment and no court order, he could not let Mr. Kavanagh and his colleagues complete the lock changes. The Gardaí then left the property and at approximately 2pm Mr. Kavanagh and his colleagues left the property.

78. The other issue of significance which arose during the evidence about this incident was that Mr. Kavanagh said that when he got out of his vehicle, he introduced himself and his colleagues to Mr. McPhillips, that he told them that they were agents of the second receiver, Mr. McCleary, and that he showed Mr. McPhillips the deed of appointment. Mr. Kavanagh's evidence was that the deed of appointment which he showed to Mr. McPhillips was the deed of appointment of Mr. McCleary. Mr. McPhillips however, contended at all times, that the deed of appointment which he was shown was that of Stephen Tennant. There was a sharp difference of evidence between the various witnesses on this point. However, it transpired that Mr. McPhillips and/or his associate had taken some video footage of the event on their mobile phones. They produced a video still/ photograph from this video footage on the mobile phone. This photograph showed a deed of appointment with a black seal on it. As I indicated earlier in my judgment, I have seen the originals of the deeds of appointment of Mr. Tennant and Mr. McCleary. They differed in one respect. The deed of appointment of Mr. Tennant had a red seal on the document; the deed of appointment of Mr. McCleary had a white seal on the document. The originals of the deeds were clearly not produced at the petrol station in Shercock. Instead photocopies of the relevant deeds of appointment were produced. However on a photocopy of the deed of appointment it is highly likely that the red seal would show up as a black seal on the photocopy of the document. By contrast, it is highly unlikely that the white seal on the deed of appointment of Mr. McCleary would show up in a photocopy. It appears from the photograph that a black copy of the seal is visible. On this basis I would conclude, on the balance of probabilities, that the deed of appointment which Mr. Kavanagh showed to Mr. McPhillips on the 25th of June, 2014 was that of Mr. Tennant and not that of Mr. McCleary.

79. However, in addition to that photograph, I also considered the evidence of Mr. Kavanagh and Mr. McPhillips. Mr. Kavanagh's evidence was that he was reasonably sure that the deed of appointment which he had given to Mr. McPhillips was that of Mr. McCleary not that of Mr. Tennant. However, in my view, Mr. Kavanagh was a tentative witness. He is still a trainee in Grant Thornton and I have no doubt that the incident at the petrol station was, for him, a frightening and intimidating experience. In addition, I have the evidence of Mr. McPhillips who was quite clear that the deed which he was shown was the deed of appointment of Stephen Tennant. Mr. McPhillips also made the reasonable point that if the deed of appointment had been that of Mr. McCleary, he would have asked who Mr. McCleary was, as he had never heard of him up to this point. Mr. McPhillips accepted that he did tear up the deed of appointment on the day and accepts that he should not have done that. However, despite this behaviour, I am of the view that Mr. McPhillips' evidence was credible on this point. Thus, on the balance of probabilities, and having heard the evidence of the two main protagonists on this issue, I would prefer the evidence of Mr. McPhillips. I would therefore hold that the deed of appointment which was shown by Mr. Kavanagh to Mr. McPhillips on 25th June, 2014 was in fact the deed of appointment of Mr. Tennant. Having said that, nothing much turns on this. It is simply another error by the receiver in his dealings with Mr. McPhillips.

80. It was clear from Mr. Kavanagh's evidence that none of the individuals or agents of the receiver ever gained access to the defendant's property. It is of course true that they were on the forecourt to the petrol station but, in my view, on the facts of this case that could not be regarded as a trespass. It was a forecourt over which members of the public passed and repassed to obtain petrol.

81. Clearly, after the incident on 25th June, 2014, Mr. McCleary as he stated in his direct evidence, gave instructions to Jamie Burke and the Grant Thornton team to instruct Kane Tuohy solicitors to issue proceedings to gain possession of the property.

Evidence of Mr. McPhillips

82. Mr. McPhillips also gave evidence. He confirmed the details of certain affidavits he had sworn in these proceedings and elaborated on them. He confirmed he gave Ben Gilroy power of attorney to act on his behalf. He said that Ben Gilroy had pointed out to him that documents appointing the receivers were invalid for a number of reasons. He also gave detailed evidence about the incident on 25th June, 2014 at his premises in Shercock, Co. Cavan.

83. In cross- examination Mr. McPhillips also referred to the fact that the Bank had not correctly executed the deed of appointment of the receiver in accordance with the deed of mortgage/ charge.

84. In cross- examination, Mr. McPhillips indicated that he had a number of reasons as to why the deeds appointing the receivers were invalid. The first was that Mr. Tennant had been appointed receiver over all of the assets but Mr. McCleary had only been appointed over some of the assets; The second was that the company seal had not been correctly put on the deeds and his third objection was that the documents were executed under seal when they should not have been executed under seal.

85. It was put to Mr. McPhillips in cross - examination that he had appointed a number of different people to act either as his solicitor, or as his attorney, pursuant to a power of attorney. This may well be so but in my view, it is not relevant to the central issues which I have to decide in this case, which are whether the deeds of appointment and the deed of discharge were valid. It was put to Mr. McPhillips that his allegation that he was confused as to who was the receiver rang hollow, in circumstances where he had appointed numerous persons to act as his attorney or as his solicitor. However, in my view, that is not really the issue. It is for the receiver to prove that he is validly appointed when there is a challenge to his appointment. They cannot prove the validity of their appointment by pointing out how they themselves might have been confused as to which agents of the mortgagor they were dealing with.

Evidence of Mr. Gilroy

86. Mr. Gilroy gave evidence for Mr. McPhillips. His evidence was that Mr. McPhillips appointed him to act as his attorney under a valid power of attorney. He stated that Mr. McPhillips asked him to conduct his affairs, on his behalf, in relation to the appointment of a receiver, namely, Stephen Tennant of Grant Thornton. In an affidavit of Mr. Gilroy sworn on the 7th November, 2014 (which was regarded as evidence of Mr. Gilroy in this case) he stated at para. 10 of this affidavit:

> *"I say that I made several trips to the offices of Kane Tuohy to inspect Deeds of Mortgage, paid €300 for the privilege, eventually when I had inspected all documents I came to the conclusion that Mr. Tennant's appointment was erroneous and void. On 24th June 2014 I wrote to Mr. Tennant pointing out that his deed was invalid and that I believed he had intended to place some security personnel in some of Mr. McPhillips properties".*

87. On 24th June, 2014 Mr. Gilroy acting pursuant to his power of attorney for Paul McPhillips wrote to Stephen Tennant and in his letter he stated as follows:

> *"For the avoidance of doubt your appointment is invalid as are your Deeds of Appointment and you are well aware that that is the position."*

88. This letter was replied to by letter dated 25th June, 2014 from Kane Tuohy to Ben Gilroy. In the second paragraph of its letter Kane Tuohy stated as follows:

> *"Having regard to the second paragraph of your letter, the allegation that the Bank's appointment of our client as receiver over specific assets of the borrower is invalid is entirely spurious and devoid of merit. Not only is there no evidence of such an assertion, the borrower has not sought to advance such an allegation in proceedings brought against him (by the appointing Bank) or by him (against the appointing Bank)."*

89. The letter also in its concluding paragraph states as follows:

> *"In summary, the receiver shall proceed as he sees fit in accordance with his contractual and statutory powers pursuant to the mortgage entered into between the borrower and the Bank."*

90. Mr. Gilroy in his direct evidence (Day 7 Page 62) also gave evidence as follows:

> *"I mean there was no – there was no sort of – there seemed to be to me to be no sort of rush on this because normally what I would do is when I go and check a Deed of Appointment I then get a copy of it which I know then to be a true copy.*
>
> *Question: Yes*
>
> *Answer: My next thing then that I would obviously do is I would check it against the mortgages within the Bank.*
>
> *Question: Mm*
>
> *Answer: To make sure that the appointment was done in accordance with the charge document*
>
> *Question: Mmm*
>
> *Answer: I have made several trips to Kane Tuohy because the first thing I was asked for was €300 to produce the documents and then, I can't remember, like I couldn't swear how many mortgages were shown to me on the first occasion. Question: Yeah*
>
> *Answer: But I remember there was a number of trips because there was difficulty finding the mortgages.*
>
> *Question: Yeah Ok*
>
> *Answer: So I think it took a couple of months before all mortgages came to be there*
>
> *Question: Yeah Ok Ok*
>
> *Answer: And then when I checked them I believe that the Deed of Appointment was not done in compliance with the Deed of Charge.*
>
> *Question: Ok so just to confirm that you sent an email of that letter on the 24th of June to Mr. Tennant pointing that out.*
>
> *Answer: Yeah the only reason I sent it by email so quickly was you had gone on and you said that someone had informed you*
>
> *Question: That's right*
>
> *Answer: That security might be coming down to change locks*
>
> *Question: Yeah and obviously at this stage when we knew there was a suppression of a document, a very important document in relation to some property you know I have to raise that issue very quickly". (Emphasis added).*

91. The alleged suppression of a document which Mr. Gilroy is referring to is that at a meeting between Mr. Gilroy and some persons in the offices of Grant Thornton on or about 12th February, 2014 Mr. Gilroy had asked for a copy of the relevant deed of appointment. He was given a copy of the deed of appointment of Mr. Tennant. He specifically asked were there any other deeds and/or was this the correct deed and he was informed that there were no other deeds and this was the correct deed. In fact, this was another error by Grant Thornton because clearly there were at least two other deeds (i.e. the deed of discharge of Mr. Tennant on 17th January, 2014 and the deed of appointment of Mr. McCleary as the second receiver also on 17th January, 2014). However, I do not accept the characterisation by Mr. Gilroy that this document was "suppressed". Rather it seems to me that it was simply a mistake on the part of Grant Thornton not to provide Mr. Gilroy with all of the relevant deeds when he requested them.

92. However what is important about this evidence is that it establishes that Mr. McPhillips' case - both in the correspondence, in his own evidence in cross - examination and also in Mr. Gilroys evidence – is that the issue of whether the deed of appointment was in conformity with the deed of mortgage/ charge was an issue which was clearly raised throughout the evidence.

93. It is also clear on his evidence, that Mr. Gilroy attended the offices of Kane Tuohy on several occasions and the purpose of these visits was, as he stated, to compare the deed of appointment against the mortgages. Thus, it was clear at all times, that one of the central issues in these proceedings was the validity of the appointment of the receivers having regard to the deed of mortgage.

Evidence of ACC Bank Witnesses

94. Before I set out a summary of the evidence of the ACC Bank witnesses, it is noteworthy to set out how they came to give their evidence. During Mr. McPhillips' closing submissions he submitted to the Court that the deeds of appointment of the receivers and the deed of discharge of Mr. Tennant had not been properly executed by ACC Bank. Mr. Dunleavy S.C. for the receiver indicated that he was somewhat taken by surprise by this submission. I enquired whether he wished to call additional evidence to deal with these points. After taking instructions he indicated that he would like to call additional evidence from Bank witnesses to deal with this issue. As Mr. McPhillips was a lay litigant, and as I had afforded him every opportunity to present his case fairly and properly, I was of the view that it was equally important in the interests of justice to ensure that the receiver, Mr. McCleary, had an equal opportunity to present his case in full. I therefore adjourned the hearing for a number of weeks to permit Mr. McCleary to furnish new evidence from the Bank witnesses.

95. I would note in passing however, that from the very start of the trial the issue of whether Mr. Tennant and Mr. McCleary were validly appointed as receivers were the issues in the case. It is difficult to see therefore on what basis Mr. McCleary was taken by surprise by Mr. McPhillips' submissions. Indeed, not only was it identified by Mr. McPhillips as an issue in the case at the very start of the case, but in addition, evidence was given by him, and other witnesses on his behalf, about why and on what basis they were seeking to challenge the appointment of the receivers.

96. Thus, in giving his evidence (on day 6 page 104 of the transcript), under cross-examination, Mr. McPhillips stated "I think he [Mr. Gilroy] was saying that the Bank or the receiver had the option to execute these documents under hand or seal but they chose to do it by seal and he reckons that is wrong. So I don't know. He'll probably explain that better." He was then asked:

> *"Do I understand then the third point is simply your objection is that the documents were executed under seal at all?*
>
> *Answer: That what?*
>
> *Question: That they ought to have been executed under hand that they were executed in seal.*
>
> *Answer: That is the point I am making. But yes that's the point I am making. Yes."*
>
> *Subsequently on page 105 at line 10 Mr. McPhillips also stated:*
>
> *Question: "There is the fact that there don't appear to be two signatures on the seal and then there is the fact that the documents are sealed at all.*
>
> *Question: Is there anything else? That is the question by Mr. Dunleavy:*
>
> *Answer "No it wasn't – well – I can confirm they were sealed.*

97. Likewise on day 6 / page 107 Mr. McPhillips was asked:

> *"Question: So your third objection is that the documents were executed under seal at all?*
>
> *Answer: Yes.*
>
> *Question: All right are there any other objections?*
>
> *Answer: No no, I don't think so.*
>
> *Question: Okay.*
>
> *Mr. Justice Cregan: So the third objection is that the documents were executed under seal and they shouldn't have been executed under seal.*
>
> *Mr. Dunleavy: They shouldn't have been executed under seal.*
>
> *Mr. Justice Cregan: Yes*

98. Moreover, Mr. Ben Gilroy gave evidence on behalf of Mr. McPhillips. On day 7 page 63, Mr. Gilroy stated as follows:

> *Answer – And then, when I checked them, I believe that the Deed of Appointment was not done in compliance with the Deed of Charge.*

99. Therefore, the issue of whether the receivers were appointed in compliance with the deed of mortgage was always an element of the challenge to the validity of the appointment of the receivers by Mr. McPhillips. Clear evidence was given on this point and it was then emphasised by Mr. McPhillips in his closing submissions. Mr. Dunleavy S.C., perhaps understandably, had focused more on the signatures of the receivers to the deeds of appointment, to ensure that the receivers had complied with all of the formalities, rather than whether the Bank had done so. However, the challenge was to the deeds of appointment in their entirety and also whether the deeds had been done in conformity with the deed of mortgage/charge.

100. In any event, when the trial resumed, counsel for the receiver indicated that three witnesses would be called to give evidence – Ms. Tara Glynn, Ms. Rosa Montgomery and Ms. Loretta McCauley.

Evidence of Ms. Tara Glynn

101. Ms. Glynn is the head of the legal department with ACC Bank (now ACC Loan Management) and also the Company Secretary since 2003. Her evidence was that ACC authorised certain nominated persons to witness the affixing of the seal of ACC on documents. In early 2010 Ms. Glynn updated the list of persons who, it was proposed, should be authorised to witness ACC's sealing of documents and she prepared a memorandum for consideration by the board of ACC. This internal memorandum dated 17th February, 2010 was proved in evidence by Ms. Glynn. Ms. Glynn's evidence was that the Board of Directors of ACC Bank Plc. approved the sealing authority set out in this memorandum at its meeting on the 4th March, 2010.

102. In the Internal Memorandum to the Board of Directors of ACC Bank from Ms. Glynn dated 17th February, 2010 the subject is stated to be "Sealing authority for specific categories of documents".

103. The document then states:-

> *"In order to reflect current staffing arrangements in the Bank it is proposed that:*
>
> *1. The seal may be now affixed to the documents listed below in the presence of any one of the persons listed below;*
>
> *2. The seal of the Bank may be affixed to any document which is required to be sealed by the Bank in the ordinary course of business and in presence of the Chief Executive or Secretary;*
>
> *3. Any document that is required to be signed under hand on behalf of the Bank in the ordinary course of business may be signed on behalf of the Bank by the Chief Executive or the Secretary." (Emphasis added).*

104. The document then sets out a suggested sealing authority for specific categories of documents and it states:

> *"The seal of the Bank may be fixed to the following documents:*
>
> *34) Deeds of appointment of receiver.*
>
> *In the present of any one of the following:*
>
> *(a) The Chief Executive*
>
> *(b) The Secretary*
>
> *(c) Loretta McAuley*
>
> *(d) Kathryn Malone*
>
> *(e) Claire Lowe*
>
> *(f) Rosa Montgomery*

The memorandum then states:

> *General Sealing and Signing Authority*
>
> *The seal of the Bank may be affixed to any document which is required to be sealed by the Bank in the ordinary course of business in the presence of the Chief Executive or the Secretary.*
>
> *Any document which is required to be signed under hand on behalf of the Bank in the ordinary course of business may be signed on behalf of the Bank by the Chief Executive or the Secretary, or the Law Agent". (Emphasis added).*

It is noteworthy that the internal memorandum prepared for the Board of Directors by Ms. Glynn as Company Secretary, specifically distinguishes between

> (a.) documents under seal and
>
> (b.) documents which are required to be signed under hand on behalf of the Bank

105. It is also noteworthy that it sets out different persons who should have the Bank's authority to witness the affixing of the company's seal, (of whom there are six) and persons who should have the Bank's authority to sign documents under hand, (of whom there are only three).

106. Thus, in respect of documents which are required to be executed under seal, it sets out that the seal of the Bank may be affixed to particular types of documents and also provides that the seal may be affixed in the presence of any one of six persons.

107. However, in relation to any document which is required to be signed under hand, on behalf of the Bank, in the ordinary course of business, these documents may only be signed on behalf of the Bank by the Chief Executive, or the Secretary, or the Law Agent. It is only these three persons who have the authority on behalf of the Bank to sign documents under hand, on behalf of the Bank.

It is also of note that this is precisely what was approved by the Board at its Board meeting on 4th March, 2010. Thus, the board minute provides that the seal of the Bank may be affixed to particular types of documents in the presence of any one of the six persons listed therein.

108. Ms. Glynn also proved the minutes of this board meeting. Under "Any other Business" the minute of the board meeting stated as follows:-

> *"The Board approved the sealing authorities as set out in the memo prepared by the company secretary in her memo dated 17th February, 2010".*

109. Appended to the minutes is a document entitled "Extract from the minutes of the meeting of the Board of Directors of ACC Bank

Plc. held on the 4th March, 2010 in ACC Bank, Charlemont Place, Dublin 2 at 10.30am."

110. Under the heading: "Any other Business" it is stated:

> *"The Board approved the sealing authorities as set out in the memo prepared by the company secretary in her memo dated 17th February, 2010."*
>
> *Sealing Authority for Specific Category of Documents*
>
> *The seal of the Bank may be affixed to the following documents:*
>
> *(34) Deeds of Appointment of receivers.*
>
> *In the presence of any one of the following:*
>
> *(a) The Chief Executive*
>
> *(b) The Secretary*
>
> *(c) Loretta McAuley*
>
> *(d) Kathryn Malone*
>
> *(e) Claire Lowe*
>
> *(f) Rosa Montgomery*

111. However the document also goes on to say as follows:

> *General Sealing and Signing Authority*
>
> *The seal of the Bank may be fixed to any document which is required to be sealed by the Bank in the ordinary course of business in the presence of the chief executive or the secretary.*
>
> *Any document which is required to be signed underhand on behalf of the Bank in the ordinary course of business may be signed on behalf of the Bank by the Chief Executive or the Secretary or the Law Agent."*

Therefore, in this case, the only persons who have the company's authority and the board's authority to sign on behalf of the Bank for documents which are required to be signed under hand are:

> a.) the Chief Executive
>
> b.) the Secretary or
>
> c.) the Law Agent

112. Ms. Glynn, in her witness statement and in her evidence, stated that she had reviewed the deed of appointment of Stephen Tennant dated 4th February, 2013, the deed of discharge of Stephen Tennant dated 17th January, 2014 and the deed of appointment of Paul McCleary dated 17th January, 2014 and that she recognised the signatures of the witnesses as Loretta McCawley and Rosa Montgomery. Loretta McCawley and Rosa Montgomery are not the Chief Executive, or the Secretary, or the Law Agent of the Bank. She also stated that the deeds of appointment and deed of discharge were prepared and executed to give effect to the intention of ACC to appoint Stephen Tennant as receiver, then to discharge Stephen Tennant and to appoint Paul McCleary as receiver of those assets in his place.

113. Ms. Glynn also gave evidence that ACC did not adopt the Table A Memorandum and Articles of Association as set out in the Companies Act 1963 (as amended). Ms. Glynn's evidence was that the Table A Articles of Association of the Companies Act were dis-applied by ACC and that it adopted its own Memorandum and Articles of Association.

114. The Companies Act 1963 Schedule 1, Table A, Article 115 sets out a precedent Memorandum and Articles of Association and also deals with the issue of a company seal.

115. However, the corresponding Articles of Association of ACC (at paragraph 18) provide that:

Signature of Sealed Instruments

> *"Every instrument to which the seal shall be affixed shall be signed by two directors or by a Director and the Secretary or by any person appointed by the Directors for the purpose … save that as regards any certificates for shares or debentures or other securities of the company, the directors may by resolution determine that any such signatures shall be dispensed with, printed thereon or affixed thereto by some method or system of mechanical signature".*

116. Ms. Glynn also gave evidence that the 2002 Memorandum and Articles of Association were applicable at the time that the three deeds were entered into. It is clear that the two deeds of appointment of receivers in this case, and the deed of discharge, had the ACC seal affixed to them and that the seal was witnessed by a person appointed by the directors for the purpose. I am satisfied therefore that the company seal was affixed in accordance with the Articles of Association of the Bank and that the persons who witnessed the affixing of the seal were persons who were authorised to do so by the board of directors.

117. That however, is not the issue which arises in this case. The issue which arises is whether the deeds of appointment were done in accordance with the precise terms of the deed of mortgage/charge, i.e. whether they were done under hand in writing by the Bank.

118. Ms. Glynn, when asked had she seen the deed of mortgage/ charge at issue in this case, indicated that she had not. A copy of

the deed of mortgage/charge was given to her. She confirmed that she had not before then, reviewed the deed of mortgage. She accepted that paragraph 10(a) (1) of the deed of mortgage provides that the Bank may appoint a receiver "by writing under its hand". She accepted that this deed of mortgage/charge did not make any reference to the use of a seal.

119. In response to a question put by the Court the following exchange took place:

"At day 10, page 62, line 10 (of the transcript), Mr. Justice Cregan:

> *"In other words it appears that there is a distinction between documents under seal and documents under hand, and if it's documents under seal then the seal can be applied in the presence of any one of six people. But if it's documents under hand they may be signed by the Bank, by the chief executive or the secretary or the law agent. There is no list of other people there?*
>
> *Answer: No if it was under hand it would have to be one of the three".*

120. Subsequently in a question from Mr. Dunleavy S.C. Ms. Glynn stated that if a document was required to be under seal, it should be under seal. If it was signed under hand and it should have been under seal she would not have regarded that as appropriate. But she stated:

> *"I would regard the opposite as all encompassing if it were under seal and it said it was underhand, I would regard that as having been appropriate."*

121. Ms. Glynn also gave evidence that her understanding was that all receivers appointed by ACC were always appointed under seal.

Evidence of Rose Montgomery
122. Ms. Montgomery is a legal administrator in the legal department of Rabo Bank plc which provides a shared service to ACC Loan Management Ltd. formerly (ACC Bank plc). Ms. Montgomery was one of the persons named in the internal memorandum as having the authority to witness the impressing of the seal of ACC to various deeds and documents. Ms. Montgomery confirmed that it was her signature on the deed of appointment dated 4th February, 2013 appointing Stephen Tenant as receiver.

Evidence of Loretta McAuley
123. Ms. McAuley is employed as a secretary in the Legal Department of ACC Loan Management Ltd. (formerly ACC Bank plc). She was one of the persons named in the internal memorandum approved by the Board of Directors who was authorised to witness the impressing of the seal of ACC to various deeds and documents.

124. Ms. McAuley confirmed that it was her signature on the deed of appointment of Paul McCleary as receiver dated 17th January, 2014 and that it was also her signature on the deed of discharge of Stephen Tennant dated 17th January, 2014.

THE LEGAL ISSUES

Introduction
125. The central issue in this case is, and always has been, whether the receiver was validly appointed under the deed of mortgage/charge. That central issue has been made more complicated in this case because the first receiver, Mr. Tennant, was discharged and a second receiver, Mr. McCleary, was appointed on 17th January, 2014.

Therefore the central issues in these proceedings are:

1. The validity of the deed of appointment of Mr. Tennant as first receiver

2. The validity of the deed of discharge of Mr. Stephen Tennant as receiver on 17th January, 2014

3. The validity of the appointment of Mr. McCleary as receiver on 17th January, 2014.

126. Moreover, the central issue in the challenge to the validity of the appointment of the receiver is whether the receiver was appointed in accordance with the deed of mortgage/charge entered into between ACC Bank and the borrower Mr. McPhillips.

127. The relevant clause of the deed of mortgage/charge dealing with the appointment of receiver is clause 10 which provides as follows:

> *"10. The Bank at any time or times after the execution of these presents may without any further consent from or notice to the Borrower or any other person or persons*
>
> *a. (1) By writing under its hand appoint such person as it thinks fit to be the receiver of the income of the mortgaged premises or any part thereof or of the rent and profits of the mortgaged premises or any part thereof similarly to remove any such receiver and to appoint another in his place and to require any such receiver to insure the mortgaged premises or any part thereof in such manner as the Bank shall from time to time direct. The receiver so appointed shall be deemed to be the agent of the borrower and may carry on the business of the borrower in or on the mortgaged premises and manage the same and pay and receive debts due to or from the borrower in respect thereof.*

(Emphasis added).

128. Paragraph 11 of the deed of charge/mortgage provides as follows:

> *"The Bank may at any time after entering into possession of the mortgaged premises or any part thereof or receipt of the rents and profits of any part thereof or appointing a receiver of the mortgaged premises or over the rents and profits or any part thereof relinquish such possession or remove such receiver on giving notice to the borrower." (Emphasis added).*

129. It is clear therefore from para. 10 that the exact terms of the deed of charge/mortgage entered into between the borrower and the Bank provide that the Bank may appoint such person as it thinks fit to be the receiver by writing under its hand. The deed of mortgage/charge does not provide that the appointment of the receiver by the Bank should be under seal. It could have done so but

it does not in fact do so.

Review of case law on Bank's obligation to appoint receivers in accordance with Debentures
130. In the *Merrow Ltd v. Bank of Scotland Plc & Anor* [2013] IEHC 130 Gilligan J. considered the legal principles in relation to a Bank's obligation to appoint receivers in accordance with debentures and engaged in an extensive review of the authorities in the common law world. In that case, the company had loan facilities with Bank of Scotland and the balance due on the loans amounted to a sum of approximately €4 million. The Bank had a charge over the premises of the company and the Bank appointed a receiver on 10th October, 2012. The company challenged the receiver's appointment as being invalid. At para. 28 and following of his judgment Gilligan J. stated as follows:

> *"28. Bank's obligation to appoint in accordance with Debentures.*
>
> *The Bank purported to appoint the Receiver without reference to the court and pursuant to its contractual rights under the 1981 and 2008 Debentures and it is clear that the Receiver's authority is derived from those contracts. In R Jaffe Ltd. (in liquidation) v. Jaffe (No.2) (1932) NZLR 195 Smith J. considered the law in this area and held:*
>
> *"The receiver and manager here to be appointed is to be appointed without the aid of the Court. He is to be appointed according to the terms of the contract between the parties. In my opinion, the position is governed by the terms of the contract. Palmer, in his Company Precedents, speaking of a receiver appointed without the aid of the Court, says: "The receiver derives his appointment and authority from the parties themselves in pursuance of the powers of the contract. This is the point to be attended to."*
>
> *In Kerr & Hunter on Receivers and Administrators it is also said with reference to a receiver appointed out of court by the debenture-holders of a company that "the position and powers of such receivers are derived from and depend upon the contract between the parties expressed in the authorising instrument".*
>
> *29. Since a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument. This principle has been recognised by the leading commentators in this area and accepted and applied by the courts throughout the common law world.*
>
> *30. Courtney, in The Law of Private Companies (3rd Ed.) has observed that:*
>
> *"[t]he validity of the appointment of a receiver is dependent upon compliance with the terms contained in the debenture and the capacity of the company and authority of its officers to create the debenture ab initio."*
>
> *31. Lynch-Fannon Corporate Insolvency and Rescue (2nd ed.) has noted that "[t]he penalty for non-compliance with the formalities for the appointment of the receiver is that such appointment is void". She has also observed that non-compliance with formalities of appointment amounts to an abuse of process.*
>
> *32. In The Law of Company Insolvency (2008), Forde has commented that "[t]here is no prescribed form for appointing an out-of-court receiver. Formalities set out in the security instrument must be scrupulously followed; if they are deviated from to any appreciable extent the appointment will be a nullity and the so-called receiver will be a trespasser on the company's property".*
>
> *33. In The Law of Administrators and Receivers of Companies (2007), Lightman & Moss have noted that "[a] receiver must be appointed in accordance with the terms of the debenture." Finally, in The Law Relating to Receivers, Managers and Administrators (4th Ed.) Picarda has observed that:-*
>
> *"There is no set statutory form for the appointment of a receiver and manager out of court. On the other hand any formalities laid down by the relevant debentures or trust deed must be followed. If the debenture requires the appointment to be made in writing or under hand an oral appointment is not sufficient. Again, if the appointment is required to be by deed that formality must be observed".*
>
> *44. Penalty for non-compliance with Debenture.*
>
> *It is clear from the foregoing that a receiver who is not appointed in accordance with the terms of the debenture is not validly appointed. In addition, an invalidly appointed receiver may be a trespasser on Company property.*
>
> *45. Rationale for strict compliance with Debenture*
>
> *The applicant submits that there are good reasons why the Bank ought to be held to the terms of the Debenture. While basic fairness implies that the Bank should be obliged to comply with the terms it chose to impose upon itself, several policy considerations were also identified by Smith J. in R Jaffe Ltd. (in liquidation) v. Joffe (No.2):*
>
> *"The importance of the strict observance of these requirements is shown, I think, by other considerations. A receiver is not an officer of the Court, but, if he is duly appointed, his title is superior to that of a person interfering with the assets under his control, and the Court will then grant an injunction…. If a receiver were unable to prove his title according to the terms of his contract, then I doubt whether he would be entitled to an injunction. Furthermore, while the company is a going concern, a receiver, if the conditions of the debenture so provide, may be the agent of the company, and the company will then be responsible for his contracts. This is particularly important if the debenture-holder has power to appoint not merely a receiver, but a receiver and manager. Under such circumstances the company must be entitled to insist I think, upon the fulfilment of the terms of appointment as a condition of its liability".*

Summary of principles from above case law
131. It appears therefore, that the following is a summary of the applicable principles in relation to this matter:

> 1. The receiver's authority to act is derived from the contracts, or mortgages, or deeds of charge, entered into between the Bank and the borrower.

2. The receiver is to be appointed according to the terms of the contract between the parties.

3. Because a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument.

4. The consequence of non- compliance with the formalities for the appointment of a receiver, in accordance with the terms of the instrument, is that the appointment is void.

5. If the instrument provides that the appointment is required to be by deed, or under seal, that formality must be observed.

6. If the instrument requires that the appointment is to be made in writing under hand, that formality must also be observed.

7. An invalidly appointed receiver may be a trespasser on company property.

8. Considerations of basic fairness and contractual interpretation mean that the Bank should be obliged to comply with the terms it chooses to impose in the instrument involved.

"By writing under its hand"

132. It is clear therefore, that where the appointment of a receiver is challenged, the receiver and/or the Bank must establish that the receiver has been appointed in exact compliance with the terms of the mortgage or charge. In this case, it must establish that the receiver has been appointed by the Bank in writing under its hand.

133. This phrase - "by writing under its hand" - has, in my view, three constituent elements. These are (i) that the appointment of the receiver is "by writing"; (ii) that it is "under its hand" and (iii) the use of the pronoun "its" means that it must be the signature of a person duly authorised by the Bank to sign such documents, under hand, on behalf of the Bank.

134. It is also clear from the authorities that "under hand" or "under the hand of" or "under its hand" means "with the signature of". See *Trustee Solutions v Dubery* [2006] EWHC 1426 (ch); *Watersons Trustees v St. Giles Boys Club* 1943 SC 369; *Electronic Rentals v Anderson* [1971] 124 CLR 27.

135. In this case, the document appointing the receiver is in writing. It is stated to be a "deed of appointment of a receiver". It has the seal of the company affixed to it, and the seal is witnessed by a person authorised by the Board of Directors to witness it. It is, therefore a document under seal.

136. I am satisfied that all of the requisite formalities in the Bank's articles of association have been complied with, and therefore if the deed of mortgage had specified that the appointment of the receiver should be by deed under seal, then those formalities would have been fulfilled in this case.

The authority of the Board for documents in "writing under its hand" in this case

137. However, even if the appointment of the receiver was done under seal, the next question which arises is whether, on the facts of this case, this constitutes the appointment of a receiver "by writing under its hand".

138. Counsel for the receiver submits that the appointment of the receiver under seal also constitutes the appointment of a receiver "by writing under its hand". In his submission, "the greater includes the lesser" and because the receiver was appointed by way of deed under seal, it must mean that this also constitutes "by writing under its hand".

139. However I do not agree with this submission. On the facts of this case, it is clear that the Bank has given different signing authorities to different people in respect of different categories of documents.

140. Thus the Bank has authorised 6 different people to witness the affixing of the seal of the company to certain deeds. However the Bank has only authorised three specific people to put its signature to documents which are required to be in writing under its hand. These are the Chief Executive Officer, the Secretary and the Law Agent.

141. On the facts of the present case, the deeds of appointment were not signed by one of these three duly authorised people.

142. Therefore the documents appointing the receiver, although "in writing", were not "under its hand" i.e. were not signed by a person duly authorised to sign such documents.

143. In these circumstances, it must follow that the deeds appointing the receivers were not "by writing under its hand" as required by the deed of mortgage/ charge.

It must therefore follow that the two deeds of appointment were invalid. (Given that the deed of appointment of Mr. Tennant was invalid, it arguably follows that his deed of discharge was not necessary).

144. It must also be remembered that what is being considered in this case is (a) the Bank's own deed of mortgage/ charge (b) the Bank's own deed of appointment of receiver and (c) the Bank's own delegated authority to persons who can witness seals, or sign documents in writing under its hand.

145. It is the Bank's own deed of mortgage which requires that the appointment of a receiver shall be "by writing under its hand". The rules of law require that this mode of appointment be strictly followed. The Bank however, did not follow its own contractual stipulations. It agreed with the borrower that if it was going to appoint a receiver, it would do so "by writing under its hand" The Bank's evidence, from its own witnesses, are that the only persons duly authorised to sign such documents appointing receivers are the Chief Executive, the Secretary and the Law Agent.

146. Despite this, the Bank chose to appoint the receiver under seal and to have as a signatory witnessing the seal, a person who was authorised to witness a seal but who was not authorised to sign a document in writing under hand on behalf of the Bank.

147. In these circumstances, and based on these facts, I must conclude that the appointments of the receivers were not properly "by writing under its hand" because the persons who signed the deeds (witnessing the seal) did not have the proper authority of the Bank to sign, on behalf of the Bank, documents which were required to be "in writing under its hand".

148. The facts in this case also show how different companies might well have in place different levels of authorisation for documents which are to be executed under seal and documents to be executed by writing under its hand. On this ground alone, it would, in my view, be unwise to conclude, as a general principle, that "the greater includes the lesser" i.e. that a deed executed under seal must, as a matter of logic and/or as a matter of law be regarded as incorporating the requirement of "by writing under its hand".

149. As the facts in this case demonstrate, a company might well have different procedures – and importantly different persons authorised – to execute (i) documents under seal and (ii) documents by writing under its hand.

150. Because this possibility can arise, I am of the view therefore that documents which are to be executed under seal, and documents which are to be executed "by writing under its hand" are, in fact and in law, separate and distinct modes of execution. If that is so, then it must follow, given the oft- repeated principles set out in the case- law above, that the mode of appointment of a receiver must follow the exact terms of the debenture or deed of mortgage/ charge. Thus, if the mortgage/ charge provides that a receiver is to be appointed "by writing under its hand" it is not correct to appoint a receiver by deed or document under seal.

151. Mr. Dunleavy S.C. also relied on the case of *Trustee Solutions Ltd & Ors v. Dubery* [2006] EWHC 1426 a decision of the UK High Court (Lewison J).

152. However, the issue in that case was quite different to the issue which I have to decide. The issue in that case was whether the rules of a pension scheme were validly amended. In order for the rules of the pension scheme to be amended, the rules of the scheme dealing with amendments had to be followed. Rule 38 which contained the power of amendment provided that:

> *"The trustees may from time to time and at any time with the consent of the principal company by way of formal variation of these rules adopted by any deed or deeds executed by the trustees and the principal company or by any writing effected under hand by the trustees and the principal company alter or modify all or any of the provisions of the scheme….."*

153. At para. 16 of his decision, Lewison J. under the heading "Approach to construction" stated as follows:

> *"16. The principal question of construction turns on the requirement that the document amending the rules must be either a deed (which is not suggested in this case) or "writing effected under hand".*
>
> *17. The rules of a pension scheme must be interpreted in a practical and purposive way. The fiscal background is also of importance. The ultimate question is what the words of the Scheme would mean to a reasonable reader with the background knowledge of the parties."*

154. I pause here to note that whilst Lewison J. held that the rules of a pension scheme must be interpreted in a practical and purposive way, the law on the interpretation of the appointment of receivers in a mortgage/charge or debenture is different. That rule of interpretation is much stricter.

155. Lewison J. also referred to a decision of the High Court of Australia – *Electronic Rentals Pty Ltd v. Anderson* [1971] 124 CLR 27 where Windeyer J., with whom the other judges agreed, said:

"To be under his hand means I take it, that it must bear his signature".

Lewison J. at para. 29 of his decision also stated:

> *"To these references I would add only the entry in the Shorter Oxford English Dictionary (3rd ed) 1956, current at the date when the rules were adopted. The definition of "under the hand of" is "with the signature of".*

At para. 35 Lewison J. stated:

> *"Nor do I consider that the supposed contrast between deeds on the one hand and instruments under hand on the other is helpful. At the date when the rules were adopted, a deed had to be signed, sealed and delivered. What is the contrast intended? Is it to dispense with only with sealing and delivery? Or is it to dispense with signing as well? If the latter, why refer to deeds at all? The most obvious contrast between a deed on the one hand and an instrument under hand on the other is to dispense with sealing and delivery, not signing."*

156. The key issue in Trustee Solutions on which the receiver relies, is the statement by Lewison J at para. 35 of his judgment where he compares deeds and instruments under hand. He notes that instruments under hand have to be signed, and deeds have to be signed, sealed and delivered. Therefore he notes that all deeds are also "signed" and therefore all deeds are also instruments under hand. At first glance, the logic of this seems correct. However, when fully considered, in the context of the facts of a particular case, - particularly on the facts of this case – it is clear that it rests upon an assumption that the signing authority of the person who signed both is the same. What is clear in this case – as it could be in many other cases – is that this assumption cannot be made. Each case turns on its own facts and in this case, the Bank had different authorisations for different persons to witness the affixing of a seal or to sign documents under hand.

157. Counsel for the receiver also sought to rely on *Windsor Refrigerator Co. Ltd. & Anor. v Branch Nominees Ltd & Ors.* [1961] Ch 375. However this case needs to be considered in its context. It was a trial of a preliminary issue in which many of the facts were not agreed, and required to be proved at a full trial, and the judgment refers to "how unsuitable this type of procedure is for the determination of a question of this sort".

158. In that case the Bank appointed receivers pursuant to a debenture. This debenture provided that the Bank could appoint receivers "by writing". The document appointing the receivers was intended to be a deed. The seal of the company was affixed to it, it was stamped as a deed and it was referred to as a deed of appointment. The plaintiff challenged the deed and the court held that, on various grounds, it was ineffective as a deed. The Bank then argued that even though the instrument might not be "a deed", it was still an instrument "in writing" and since the debenture required an appointment "by writing", it would suffice to appoint the receivers. The Court held that the document, though it failed to operate as a deed, could nevertheless be an instrument in writing.

159. However, the facts of that case are far removed from the facts of this case. Firstly, there is no reference there to "writing under its hand"; Secondly, there does not appear to be any evidence as to who might, or might not have been, authorised to sign on behalf of the Bank; Thirdly, as Lord Evershed remarks:

> *"So to decide is not, of course, to decide – far from it – that Greenwood's appointment was valid.*
>
> *There remain matters of fact plainly in issue, and all that we can say, as it seems to me, is that assuming those facts are found eventually in a sense which could be favourable to the defendants' case, then this document could operate as an instrument in writing within the contemplation of condition 12 of the debenture so that it could be said by the defendants that Branch Nominees Ltd. had by writing appointed Greenwood."*

Invalid appointments

160. In this case the deed of appointment of Stephen Tennant signed on 4th February, 2013 was signed by Rosa Montgomery. She is not the Chief Executive or Secretary or Law Agent of the Bank. Ms. Montgomery had authority to witness the affixing of the seal but did not have authority to sign on behalf of the Bank for documents which are required to be in writing under the Bank's hand. In those circumstances, I must conclude that this deed of appointment of Mr. Tennant as receiver was invalid.

161. The deed of discharge of Mr. Tennant dated 17th January, 2014 was signed by Loretta McAuley. Ms. McAuley is also not the Chief Executive or Secretary or the Law Agent of the Bank. Therefore this deed of discharge is invalid.

162. Likewise the deed of appointment of Mr. McCleary as receiver dated 17th January, 2014 was signed by Loretta McAuley. Again Ms. McAuley is not the Chief Executive or Secretary or the Law Agent of the Bank. Therefore, this deed of appointment of Mr. McCleary was not signed under hand on behalf of the Bank by any person duly authorised to do so. In those circumstances I must conclude that this deed of appointment is also invalid.

Other issues

Did ACC hold the debt at the time when it appointed the receiver?

163. Although Mr. McPhillips raised this as an issue in the case, he conceded during his cross- examination of Mr. McCleary that he had no evidence that ACC sold on any of his mortgages. There is therefore no evidence before the court to suggest that ACC has sold on any of the debts of Mr. McPhillips. Moreover, it is also clear that on 30th July, 2014 ACC Bank obtained summary judgment against Mr. McPhillips in the sum of €3.64 million. That application, in the normal way, was grounded upon an affidavit on behalf of ACC Bank. There is nothing in that affidavit which would suggest that ACC Bank had sold on any of the defendant's debts. In those circumstances, I am satisfied that ACC Bank was owed substantial monies by Mr. McPhillips as at February, 2013 which was the date upon which they appointed Mr. Tennant as receiver and indeed on 17th January, 2014 which was the date upon which they appointed Mr. McCleary as receiver. I would therefore dismiss that issue as an issue in the case.

Did the mortgage contain an express power to take possession of the property and/or an express power of sale over the properties?

164. Mr. McPhillips raised an issue that the mortgage did not contain an express power to take possession of the property, or an express power of sale over the property. This suggestion appears to have emerged from a memo which Mr. McPhillips obtained from ACC Bank, when he obtained 22 folders of his documents from ACC Bank. There is a document among those papers which would seem to suggest that the mortgage did not have such powers.

165. However, Mr. Dunleavy S.C. for ACC Bank has opened the relevant sections of the mortgage to me. In the circumstances, I am satisfied that the mortgage did indeed contain an express power to take possession of the property and/or an express power of sale over the property. No evidence to the contrary was put forward.

Conclusions

166. In the circumstances I would make the following conclusions:

1. Mr. Stephen Tennant was not validly appointed as first receiver.

2. There was no valid deed of discharge in respect of Mr. Tennant.

3. Mr. McCleary was not validly appointed as receiver.

4. Mr. McCleary's servants, or agents, represented themselves as agents of Mr. Tennant, not Mr. McCleary on 25th June, 2014.

5. ACC did not sell on the debt which Mr. McPhillips owed to it.

6. The mortgage did contain an express power to take possession of the property and/or express power of sale over the property.

167. In relation to the second set of proceedings:

1. Mr. McPhillips is entitled to damages for trespass to his property because the receivers were not validly appointed.

2. It is not necessary to give a declaration that the servants or agents of the receivers produced false documents.

3. Mr. McPhillips is entitled to a declaration that the receivers were not validly appointed.

4. I will hold over any issue of whether Mr. McPhillips is entitled to damages because an injunction had been wrongly granted.