

THE HIGH COURT**2011 7025 P****BETWEEN****TOM KAVANAGH AND FERGUS LOWE****PLAINTIFFS****AND****JEREMIAH LYNCH AND****ST. ANGELA'S STUDENT RESIDENCES LIMITED****DEFENDANTS****JUDGMENT of Ms. Justice Laffoy delivered the 31st day of August 2011****1. The parties to the application**

1.1 The first plaintiff (Mr. Kavanagh) brings these proceedings as a receiver appointed by Bank of Scotland Ireland Limited, before it ceased to exist on the 31st December, 2010, pursuant to a cross border merger by absorption. I will refer to Bank of Scotland (Ireland) Limited and its successor, Bank of Scotland plc, as "Bank of Scotland" hereafter. Mr. Kavanagh claims to be receiver over land, including 21 residential units and other buildings at St. Angela's College, Clogherrevagh, Co. Sligo (St. Angela's).

1.2 The second plaintiff (Mr. Lowe) is a party to these proceedings as receiver appointed by Irish Life & Permanent plc, hereinafter referred to as "Permanent". Mr. Lowe claims to be a receiver over 21 residential units at St. Angela's.

1.3 These proceedings are brought against the first defendant (Mr. Lynch) and the second defendant (the Company) on the basis that both defendants are preventing the plaintiffs from obtaining possession and receipt of the rents and profits of the property at St. Angela's over which they claim to be receivers. Each of the mortgages in favour of Bank of Scotland and Permanent on foot of which each of Mr. Kavanagh and Mr. Lowe was appointed receiver was created by Paul Feeney and Timothy Lynch, who were obviously the legal owners of the property mortgaged. It is Mr. Lynch's case that the property mortgaged was vested in Paul Feeney and Timothy Lynch on behalf of a partnership and that he has a 60% interest in the partnership. Mr. Lynch acknowledges that he is a director and shareholder of the Company. The position of Mr. Kavanagh and Mr. Lowe is that Mr. Lynch has a controlling interest in the Company. Mr. Lynch is the owner of three residential units at St. Angela's. However, those three units are not the subject of these proceedings. The position on the ground is that Mr. Lynch has been acting as "caretaker" of the student residences at St. Angela's and he has created the lettings in favour of student occupants and performed certain caretaking functions and he has collected the rent from the occupants. While I am unclear as to the precise status and function of the Company, it is alleged that it has also derived income from the letting of the residential units to students.

1.4. The application addressed in this judgment is an application by the plaintiffs for interlocutory orders:-

- (a) restraining the defendants from remaining on or continuing in occupation of the property described in the schedule to the plenary summons and restraining them from refusing access to the property to the plaintiffs (para. 1 of the notice of motion),
- (b) restraining the defendants from attempting to carry on, manage or otherwise interfere with the exercise by the plaintiffs of their functions as receivers over any portion of the said property (para. 2),
- (c) directing the defendants to deliver up to the plaintiffs forthwith the keys, alarm codes, locks and other security and access devices and equipment in respect of the said property (para. 3),
- (d) granting the plaintiffs possession of the said property (para 4),
- (e) directing the defendants to deliver up all books and records held by them relating to the said property, including copies of all leases and licence agreements, and a schedule of all tenants and licensees, setting out particulars of their occupancy (para. 5), and
- (f) restraining the defendants from preventing, impeding and/or obstructing the plaintiffs from taking possession of, getting in and collecting the property (sic), and collecting the rents and licence fees associated with the said property (para. 6).

The property in issue is described in the Schedule to the plenary summons, which issued on 29th July, 2011, as follows:

"All That and Those part of the lands of St. Angela's College . . . being the property more particularly described in the Conveyance dated the 18 day of November 2005 and made between Marianne O'Connor . . . of the one part and Timothy Lynch and Paul Feeney of the other part and including 21 units over which the first named plaintiff has been appointed receiver and 21 units over which the second named plaintiff has been appointed receiver . . ."

1.5 It is clear from the affidavits filed on behalf of the plaintiffs, and, in particular, the grounding affidavit of Mr. Kavanagh sworn on the 29th July, 2011, that the property at St. Angela's originally the subject of the Bank of Scotland security now comprises four apartment blocks containing 72 residential units, together with common areas and a convenience store, gym, laundry, administration building and waste water treatment plant. Mr. Kavanagh, as receiver, claims to be entitled to possession of 21 identified residential units and also the common areas and ancillary buildings. Mr. Lowe, as receiver, claims to be entitled to possession of another 21 identified residential units.

1.6 The entitlement of Mr. Kavanagh and Mr. Lowe to possession has been vigorously disputed by Mr. Lynch on his own behalf and on behalf of the Company. He has filed two affidavits sworn on the 9th August, 2011 and 23rd August 2011, setting out the basis on which he contends that the reliefs sought by the plaintiffs should not be granted. Before outlining the arguments advanced by Mr. Lynch, I think it is convenient to consider in detail the documentation on foot of which the plaintiffs claim, as receivers, to be entitled to possession and receipt of the rents and income of the property in issue.

2. Security of Bank of Scotland

2.1 By a mortgage dated 18th November, 2005, made between Timothy Lynch and Paul Feeney of the one part and Bank of Scotland of the other part (the 2005 Mortgage), the lands at St. Angela's, which were described by reference to the conveyance dated the 18th November, 2005, referred to in the schedule to the plenary summons, "together with . . . all buildings, erections, fixtures, fittings (including trade fixtures and fittings) and all fixed plant and machinery from time to time therein or thereon" (Clause 4.1.3) were conveyed to the Bank of Scotland as security for all monies, obligations and liabilities therein covenanted to be paid or discharged by the mortgagors.

2.2 The provisions in relation to the appointment of a receiver and his powers are set out in Clause 9 of the 2005 Mortgage. Clause 9.1 provides:-

"At any time after the power of sale has become exercisable whether or not the Bank has entered into or taken possession of the Secured Assets . . . the Bank may from time to time appoint . . . any person or persons to be receiver and manager . . . (hereinafter called "Receiver" . . .) of the Secured Assets . . .

Clause 9.2 provides that the foregoing power of appointment of a receiver "shall be in addition to and not be to the prejudice of all statutory and other powers of the Bank under the Act . . .". The Act is defined as meaning the Conveyancing Act 1881 (the Act of 1881).

2.3 The introductory segment of Clause 9.4, which sets out the powers of a receiver, is in the following terms:-

"A Receiver so appointed, shall have and be entitled to exercise all powers conferred by the Act in the same way as if the Receiver had been duly appointed thereunder and shall furthermore, but without limiting any powers hereinbefore referred to, have power to do the following things either in his own name or in the name of the Mortgagor in addition to, and not in substitution for the powers contained in the Act and in the event of conflict the terms of this Deed shall prevail . . ."

The first power conferred on a receiver so appointed (clause 9.4.1) is to enter into, take immediate possession of, get in and collect the Secured Assets or any part thereof. What is of significance in relation to the provisions of Clause 9, in the context of the argument (based on the decision in *Start Mortgages Ltd. v. Gunn & Ors.* [2011] IEHC 275 considered later) advanced on behalf of the defendants in support of the contention that Mr. Kavanagh has not been validly appointed a receiver, is that it is expressly provided in Clause 9 that neither the power of appointment nor the powers of the receiver on appointment are dependent on the statutory powers created by the Act of 1881.

2.4 As, by virtue of Clause 9.1, the power of the Bank of Scotland to appoint a receiver is exercisable at any time "after the power of sale has become exercisable", it is necessary to consider Clause 8 to determine when the power of sale would have become exercisable. There are two sub-clauses in Clause 8, which seem to me to overlap to some extent. Under the first, Bank of Scotland may forthwith "exercise the statutory power of sale conferred on mortgagees by the Act" at any time "after the occurrence of an Event of a Default". The second provides that "this security shall immediately become enforceable and the power of sale and other powers conferred by the said Sections as varied or extended by this Deed and all other powers conferred upon the Bank by the this Deed shall be immediately exercisable" either -

(a) immediately upon the Bank making demand upon the Mortgagor for payment and discharge of the Secured Obligations or any part thereof (as and when the same shall have become due and payable), or

(b) immediately upon the Secured Obligations becoming otherwise due and payable in accordance with the provisions hereof.

The term "Event of Default" is defined as meaning "the happening of an event under any loan agreement, facility letter or other arrangement with the Bank whereby the Secured Obligations become immediately due and payable".

2.5 As a matter of construction of the provisions of the 2005 Mortgage, in my view, the power of Bank of Scotland to appoint a receiver became exercisable on the happening of any of the events stipulated in Clause 8 on the happening of which the power of sale of Bank of Scotland was exercisable. For the reasons I will elaborate on later when considering the security of Permanent, I consider that the repeal of ss. 15 to 24 of the Act of 1881 by s. 8 of the Land and Conveyancing Law Reform Act 2009 (the Act of 2009) does not have the impact contended for by counsel for the defendants.

2.6 The deed of appointment of Mr. Kavanagh as receiver pursuant to the powers contained in the 2005 Mortgage was dated the 18th October, 2010 and in it Mr. Kavanagh was appointed -

"to be Receiver and Manager of all the assets referred to and comprised in and charged by the said Mortgage to enter upon and take possession of the same in the manner as specified in the said Mortgage and such Receiver and Manager shall have and be entitled to exercise the powers conferred on him by the said Mortgage and by the Law."

2.7 Mr. Kavanagh, in his second affidavit sworn on the 16th August, 2011, has exhibited the following documentation with a view to demonstrating that he was properly appointed receiver of the property which remains the subject of the 2005 Mortgage:

(a) A Bank of Scotland facility letter dated the 28th January, 2009, which was addressed to Timothy Lynch and Paul Feeney, as the borrowers, wherein a loan facility, which was broken down into two loans, was sanctioned. The purpose of the loan was expressed to be to refinance the existing Bank of Scotland loan accounts, which were identified. It was provided that the security for the loan should be:

"An extension of Bank of Scotland (Ireland) Limited's first specific charge over the freehold land and premises of the Borrower consisting of units: AO1 . . . and Mace Convenience Store, Gym, Laundry and administration Building, St. Angela's College . . ."

Twenty four residential units, including unit AO1, are specified in that provision. I surmise that, since the facility letter issued, three units have been released from security on the sale thereof. The point has been made on behalf of the defendants that the description does not cover the waste water treatment plant. I will return to that issue later. The term of one of the loans was expressed to be three months and the term of the other loan was expressed to be twelve months and, in each case, the principal was to be payable by one repayment to be made at the end of the facility term or to be made on such other later date as Bank of Scotland might determine at its sole discretion.

(b) Letters dated the 21st September, 2010 to each of the borrowers, Paul Feeney and Timothy Lynch, wherein Bank of Scotland notified the borrowers that they had breached the loan agreement based on acceptance of the facility letter referred to at (a), in that the loan accounts were substantially in arrears and stated that that constituted an event of default. The borrowers were told that all loans advanced to them were immediately due and payable and a formal demand for immediate repayment of the loans was made. Notice was given that, failing immediate payment, Bank of Scotland reserved the right without further notice to exercise the power to appoint a Receiver on foot of the 2005 Mortgage.

2.8 The evidence afforded by the foregoing documents, in my view, establishes for the purposes of this application that the power to appoint a receiver under the 2005 Mortgage was exercisable on the 18th October, 2010. Further, I am satisfied that the power was properly exercised by the deed dated the 18th October, 2010, and that, on his appointment as receiver, Mr. Kavanagh became entitled to enter into possession of the property which remained subject to the 2005 Mortgage. Indeed, given that neither of the defendants was a borrower under the loan agreement, the evidence of the relationship of the Bank of Scotland with the borrowers is much more extensive than one would have anticipated, presumably, because Mr. Lynch claims that he has an interest, which can only be an equitable interest, in the partnership property.

3. Security of Permanent

3.1 The security relied on by Permanent was created by a mortgage dated the 22nd March, 2007 made between Paul Feeney and Timothy N. Lynch of the one part and Permanent of the other part (the 2007 Mortgage). The 2007 Mortgage is a two page document, which incorporated the clauses set out in the Mortgage Conditions of 2002 of Permanent. In the 2007 Mortgage, 21 specified apartments at St. Angela's were conveyed to Permanent by way of security.

3.2 The rights and remedies of Permanent are set out in Clause 6 of the Mortgage Conditions. Clause 6.4 provides that at any time after the Total Debt has become immediately payable, Permanent may without any previous notice to or concurrence on the part of the Mortgagor, *inter alia*:-

"... appoint at the cost and sole risk of the Mortgagor a person to collect and receive such rents and profits for the use and benefit of [Permanent] at such commission as [Permanent] shall think fit so that the statutory provisions respecting the appointment of receivers over property in mortgage and the powers and duties of such Receivers or otherwise in relation thereto shall apply to this security except so far as the same are hereby varied and subject to the provisions hereinafter contained."

Clause 7 of the Mortgage Conditions set out the circumstances in which the "Total Debt" would become immediately payable to Permanent, the first circumstance being if the Mortgagor should default in the making of two monthly repayments or for two months in payment of any other monies payable under the 2007 Mortgage.

3.3 The letter of loan approval issued by Permanent to Paul Feeney and Timothy Lynch on the 13th March, 2007, and two letters dated the 28th April, 2010, one to Paul Feeney and the other to Timothy Lynch, in which Permanent demanded payment of the total balance due to it as of the 28th April, 2010 and intimated that it intended on the expiration of ten days to appoint a receiver to receive the rents from the secured property, have been exhibited by Mr. Lowe in his affidavit sworn on the 16th August, 2011.

3.4 The deed of appointment of Mr. Lowe as receiver was dated the 13th May, 2010. In the operative part, Permanent, in exercise of the statutory powers and the powers in the 2007 Mortgage, appointed Mr. Lowe to be receiver of the income, rents and profits of the secured property. The deed provided that Mr. Lowe would "have the powers, rights and obligations and functions set out in the Conveyancing Act 1881".

3.5 On the basis of the provisions of the 2007 Mortgage and the Mortgage Conditions to which I have referred and the contents and provisions of the documents exhibited by Mr. Lowe, I am satisfied that on the 13th May, 2010 the power of Permanent to appoint a receiver was exercisable and, further, that it was properly exercised by the deed of appointment of that date. By the combined operation of the 2007 Mortgage and the Mortgage Conditions, certain rights, remedies and powers were given to Permanent, in some instances by reference to the Act of 1881. At the time the 2007 Mortgage and those rights, remedies and powers were created, the Act of 1881 was in force. In properly construing the extent of the mortgagee's rights, remedies and powers, one must read into the 2007 Mortgage and the Mortgage Conditions, where appropriate, the relevant provisions of the Act of 1881 where they have been incorporated therein, subject to any variations which are expressly provided for. The fact that since the commencement of the Act of 2009, on the 1st December, 2009, ss. 15 to 24 of the Act of 1881 have been repealed cannot vary the proper construction of the 2007 Mortgage or impact on the contractual relationship of the mortgagors and Permanent, as mortgagee, thereby created. The rights, remedies and powers conferred on Permanent *ab initio* in the 2007 Mortgage still apply.

3.6 Accordingly, in my view, the considerations which arose in *Start Mortgages Limited v. Gunn and Others* [2011] I.E.H.C. 275 in consequence of the repeal of s. 62(7) of the Registration of Title Act 1964 (the Act of 1964) by s. 8 of the Act of 2009 do not arise in relation to the power of Permanent to appoint Mr. Lowe as receiver or the nature of the powers conferred on Mr. Lowe as such receiver, insofar as they are conferred by reference to the provisions of the Act of 1881.

4. Further objections to the standing of Mr. Kavanagh to seek relief

4.1 Mr. Lynch contends that senior management figures in Bank of Scotland were complicit in the unlawful distribution of the loan funds contrary to the loan purpose clause in the facility letter, which ultimately resulted in substantial losses to the partnership, in which he claims of have a 60% interest, and the St. Angela's Students Residences development. Therefore, he contends, Mr Kavanagh's appointment is invalid as it is an attempt by Bank of Scotland to profit from its own breach of contract. In his final affidavit he has exhibited a draft plenary summons which names Paul Feeney, Mr. Lynch and the Company as plaintiffs and Bank of Scotland as defendant which, in the general endorsement of claim, seeks various reliefs including a declaration that Bank of Scotland is not entitled to rely on the provisions of the 2005 Mortgage for the purpose of appointing a receiver at St. Angela's and that the appointment of Mr. Kavanagh is null and void and/or invalid. Paul Feeney, who was one of the borrowers, is not before this Court in these proceedings or on this application. The challenge to the validity of the 2005 Mortgage and the appointment of Mr. Kavanagh as

receiver has been the subject of correspondence between Michael F. Butler & Co., the solicitors on record for the defendants in these proceedings, who, in the correspondence, name Paul Feeney as their client, on the one hand, and A & L Goodbody, who have been instructed by Bank of Scotland, on the other hand, which has been ongoing for approximately five months. On behalf of Bank of Scotland, A & L Goodbody have stated that it is satisfied as to the validity of the 2005 Mortgage and the appointment of Mr. Kavanagh. Paul Feeney and Timothy Lynch were the legal owners of the secured property when the 2005 Mortgage was created. *Prima facie*, the 2005 Mortgage is a valid mortgage and, for the reasons outlined at 2 above, *prima facie*, the power to appoint a receiver was exercisable when Mr. Kavanagh was appointed and he was validly appointed. Save to comment that it is difficult to see how Mr. Lynch has standing to challenge the validity of the 2005 Mortgage, that is as far as this Court needs to go on this application.

4.2 In his first affidavit, Mr. Lynch has raised the question as to how Mr. Kavanagh "plans to address the fact that the water and waste water treatment plant unit is also the property of the defendants" and he makes the point that the development as a whole cannot operate without a functioning waste water treatment plant and water treatment plant. In his subsequent affidavit sworn on the 16th August, 2011, Mr. Kavanagh exhibited a survey dated the 15th August, 2011, carried out by ORS Consulting Engineers, to show that the waste water treatment plant is located on the property secured by the 2005 Mortgage. However, as a result of the exhibiting by Mr. Kavanagh of the facility letter dated the 28th January, 2009 in that affidavit, it was submitted that, as there was no mention of the waste water treatment plant in the description of the security in that document, which I have quoted at para. 2.7(a) above, Bank of Scotland does not have security over the waste water treatment plant. It most definitely is not the function of the Court on this interlocutory application to express a view on the title to the secured property. However, in order to address that argument, some observations are necessary. As I have stated, the property secured by the 2005 Mortgage is described therein by reference to the conveyance of the same date, the conveyance of 18th November, 2005. In fact, a copy of that conveyance is exhibited in Mr. Kavanagh's first affidavit. The Court is under a considerable handicap in that the map annexed to the copy of the conveyance of the 18th November, 2005, and the maps referred to in the copy of the survey of ORS, Consulting Engineers, before the Court are not coloured in conformity with the original maps. However, even on a superficial examination of the exhibited maps, it would appear that the statement by ORS that "the waste water treatment plant and associated elements are located inside the landholding", which I understand to mean the holding conveyed by the conveyance of the 18th November, 2005, is correct. That conclusion is based on the fact that when Paul Feeney and Timothy Lynch acquired the land by the conveyance of the 18th November, 2005, it was unregistered freehold land and what they mortgaged to the Bank of Scotland was unregistered freehold land. I make that observation because of the reference in the letter of the 15th August, 2011 from ORS to the boundaries of the landholding "as registered with the Property Registration Authority", the relevance of which I do not understand.

4.3 Accordingly, *prima facie*, on the basis of the totality of the evidence, the property currently secured by the Bank of Scotland security is all of the property the subject of the conveyance of the 18th November, 2005, except –

(a) the 30 residential units, which, apparently, have been sold to third parties, including the three sold to Mr. Lynch, which have been released from Bank of Scotland security, and

(b) the 21 residential units which are now the subject of the Permanent security, which have also been released from the Bank of Scotland security.

The fact that the waste water treatment plant is not explicitly itemised in the description of the secured property in the facility letter, in my view, is immaterial, because the security was expressed to be an extension of the first specific charge over the freehold land and premises, which was created by the 2005 Mortgage. While some units and buildings which did not exist in 2005 are itemised, on the proper construction of the facility letter, the security was intended to extend to all of the property the subject of the 2005 Mortgage, which by January 2009 had not been released from the security. I assume that the waste water treatment plant had not been released by Bank of Scotland from its security.

4.4 Although the various documents which reflect the scheme of disposal of the units at St. Angela's (for example, the agreement in relation to the common areas with the management company, the leases of units to owners etc.) are not before the Court, of course, Mr. Lynch is correct in his averment in his second affidavit that the common areas are subject to the rights of the unit owners created in the scheme of disposal. This is a matter of which Mr. Kavanagh will have to take cognisance when he gets possession of the common areas.

5. Further objections to the standing of Mr. Lowe to seek relief

5.1 It is clear from the affidavit evidence before the Court that there was an arrangement between Mr. Lowe and Mr. Lynch in relation to the collection of the rents payable by the occupiers of the 21 residential units, which are the subject of the Permanent security, during the past year. Under the arrangement, Permanent received €30,450 out of the rents payable in respect of the 21 units for the academic year 2010/2011, including the summer of 2011 and more was promised in an exchange of emails in January 2011. The stream of emails ended with Mr. Lowe's response to Mr. Lynch's explanation of the situation ending with an "OK" from Mr. Lowe, presumably indicating an acceptance of the position as outlined by Mr. Lynch. Mr. Lynch took exception to a suggestion in Mr. Lowe's affidavit that he had "sought to unilaterally vary" the payment dates by email dated the 19th January, 2011, on the ground that Mr. Lowe ignored the "OK" remark. Whatever the "rights and wrongs" of contentions by Mr. Lowe and Mr. Lynch in relation to the academic year 2010/2011, the position is that, as he has averred in his affidavit, Mr. Lowe, as he is entitled to do, has decided that it is not in Permanent's interest to continue to allow Mr. Lynch to have a role in relation to the collection of income from Permanent's secured property.

5.2 A more fundamental objection to Mr. Lowe being granted the relief sought is the contention that Mr. Lowe has been appointed "to be receiver of the income, rents and profits of the property" and that the deed of appointment "does not make any reference to being appointed in respect of possession of the property". It may be that the initial intention was that Mr. Lowe would only collect the rent and income out of the property and that he would not go into possession. In fact, following his appointment, the solicitors acting for Permanent at the time sent a copy of the deed of appointment to Mr. Lynch and in the covering letter referred to Mr. Lowe as a "rent receiver". *Prima facie*, neither Mr. Lynch nor the Company has any entitlement to possession of the 21 units the subject of the Permanent security, and it is not open to either to contend that a receiver validly appointed by Permanent, which has a first legal mortgage over the 21 units, cannot be authorised by it to go into possession with a view to creating lettings which will produce income, rents and profits which can be used by Permanent to reduce the debt secured by the 2007 Mortgage. However, apart from that, Clause 6.2(c) of the Mortgage Conditions incorporated in the 2007 Mortgage provides as follows:-

"Any receiver shall have power in the name of the Mortgagor to give notice to quit and bring and take actions or proceedings for ejectment or recovery or possession of any tenancy or otherwise and to re-let or let the Property or any part thereof from time to time to such person or persons as he shall think fit for any term of years or on yearly or weekly tenancies at the best rents that may be reasonably obtainable and to accept from time to time the surrender of leases or

tenancies of the Property or any part thereof for the purposes of selling or re-letting the same, without being responsible for loss."

That provision reflects what is necessary to make the appointment of Mr. Lowe as "receiver of the income, rents and profits" of the 21 residential units at St. Angela's a reality and, in my view, notwithstanding that it is not spelt out in the deed of appointment, it is implicit that he has those powers. Without being entitled to take possession of the 21 residential units in the name of the mortgagors, he effectively would not be able to do his job.

6. Fixtures, fittings, furniture and equipment

6.1 In their response dated the 16th March, 2011, on behalf of Mr. Lynch and the Company, to a letter of the 25th February, 2011 from Matheson Ormsby Prentice, on behalf of Mr. Kavanagh, intimating that Mr. Kavanagh intended to take possession of the property the subject of the Bank of Scotland security, it is contended on behalf of the defendants that –

(a) the entire of the contents of the 21 residential units (including all fitted furniture and white goods) were and remain the property of the Company,

(b) the entire contents of the laundry fit out equipment, gymnasium recreational room, external furniture, ICT infrastructure and the office and shop fit out remain the property of the Company, and

(c) the Company was and is the legal owner of the existing treatment plant and all equipment therein and thereon.

In his first affidavit, Mr. Lynch averred that the defendants paid for and were the owners of all of the items referred to as (a), (b) and (c) above, that those items were not the property of either Paul Feeney or Timothy Lynch or the partnership, but were paid for by the Company. It was contended that the property in those items did not pass to Mr. Kavanagh as receiver. The response of Mr. Kavanagh in his second affidavit to that claim was that he had not yet determined its validity and that the issue would be dealt with in the normal course as part of the receivership. In that affidavit, Mr. Kavanagh undertook that none of the contents would be disposed of pending determination of the validity of the claim and these proceedings and, in the interim, to the extent that any such assets are used, they will only be used in regard to the rental of units. However, he made the point that some of the items in respect of which the defendants claimed ownership must have become fixtures, so that they became the property of the mortgagors and are now subject to the Bank of Scotland security. He also rejected a suggestion of Mr. Lynch that the removal of certain items, beds, bedside lamps and such like, would result in the development not being able to operate, the implication being that, if the items were removed, they could be replaced by Mr. Kavanagh, which was the position taken by his counsel on his behalf at the hearing of the application.

6.2 There can be no doubt that certain items in the 42 residential units and in the other parts of St. Angela's which are the subject of the Bank of Scotland security are not captured by the 2005 Mortgage, in that they could not be classified as fixtures or fittings, for example, the beds and the bedside lamps. If these items belong to the defendants, then the defendants are entitled to remove them from the secured property. Otherwise, Mr. Kavanagh may resort to the power conferred on him by Clause 13.3 of the 2005 Mortgage to deal with furniture and chattels as agent of the borrowers/mortgagors. However, Mr. Kavanagh's contention that some of the other items must have become fixtures is probably correct and, if they are, they are captured by the 2005 Mortgage and the 2007 Mortgage. Obviously, the issue as to whether particular items to which the defendants claim ownership are fixtures or not, cannot be determined on this interlocutory application. The practical solution would appear to me to be that any item in respect of which the defendants claim ownership which cannot be removed from the properties secured by the 2005 Mortgage and the 2007 Mortgage without damaging the fabric of the relevant buildings should be left there, so that the ownership of the items can be determined at the trial of the action, insofar as it cannot be resolved by agreement.

7. Principles of law applicable and their application

7.1 In relation to the principles of law relevant to the determination of this application, counsel for the plaintiffs referred the Court to two recent Irish authorities on the first test to be applied.

7.2 The first was the decision of the High Court (Keane J., as he then was) in *Keating & Co. Ltd. v. Jervis Shopping Centre Ltd.* [1997] 1 I.R. 512. In that case, the owners of a licensed premises in Dublin city centre sought an interlocutory injunction restraining the defendants, who were the developers of an adjoining shopping centre site in the course of construction, from trespassing on the plaintiffs' property by the operation of a tower crane on the development site to the extent that the jib of the crane moved into the airspace above the licensed premises. Having pointed out that, as the Court was dealing with an application for an interlocutory injunction, it could not express any concluded view on the respective contentions of the parties in relation to matters of fact or law, Keane J. stated:

"It is clear that a landowner, whose title is not in issue, is *prima facie* entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only. However, that principle is subject to the following qualification explained by Balcombe L.J. in the English Court of Appeal in *Patel v. W. H. Smith (Eziot) Ltd.* [1987] 1 WLR 853 at p. 859: –

'However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application of the principles set out in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396 in relation to the grant or refusal of an interlocutory injunction.'"

7.3 The other was a decision of the High Court (Lynch J.) in *ICC Bank Plc. v. Verling* [1995] 1 ILRM 123. In that case, the plaintiff, who had a mortgage over premises used as an off-licence, sought mandatory and prohibitory interlocutory injunctions requiring the third named defendant to whom a lease had been granted by the mortgagor, in circumstances where it was contended that he was not entitled to grant the lease and that it was void, and the second named defendant, who was the nominee of the third named defendant for the holding of the Intoxicating Liquor Licence, to vacate the premises. The injunctions were granted. The passage from the judgment of Lynch J. on which counsel for the plaintiffs relied is at p. 130 and states:

"There is no doubt but that the plaintiffs have made out an arguable case to support their claim for interlocutory relief. Where, however, the interlocutory relief sought takes the form of a mandatory injunction and where, as in this case, a mandatory injunction will effectively conclude the matter as against the second and third defendants and thus alter rather than maintain the status quo so far as they are concerned, I think that in the exercise of my discretion to grant or refuse interlocutory relief, I should look for something more from the plaintiffs than a mere arguable case. When I do so, and without in any way purporting to decide the issues in any final manner, I find that the plaintiffs have made out a strong *prima facie* case."

7.4 On this application, the defendants have raised issues about the title of the plaintiffs as receivers and their powers, which I have addressed earlier, by reference to the provisions of the 2005 Mortgage and the 2007 Mortgage, and they have done so in reliance on the fact that the provisions of the Act of 1881, by reference to which powers were conferred on the mortgagees and receivers appointed by them, have been repealed. On this point, it seems to me that there is a clear distinction between the impact of the repeal of s. 62(7) of the Act of 1964, which provided a statutory remedy to the owner of registered land to apply to court in a summary matter for possession of the land when repayment of the money secured by the charge had become due, as found by Dunne J. in *Start Mortgages Limited & Ors v. Gunn & Ors*, and the impact, if any, of the repeal of the Act of 1881 on the drafting device universally availed of by draftsmen of security documents of conferring powers on mortgagees by incorporating statutory provisions in force at the time of creation of the security, with or without variation. As I have found, in the latter situation, the ascertainment of the rights and liabilities of the parties to the security document is a matter of construction of the document and the repeal of the statutory provisions does not have the impact advocated by counsel for the defendants. Nonetheless, the issue may be the subject of further debate at the trial of the action. However, at this juncture, on the basis that all of the immovable property the subject of this application was mortgaged by the 2005 Mortgage or the 2007 Mortgage and that both Mr. Kavanagh and Mr. Lowe have been validly appointed as receivers with power to take possession of the respective parts of that property over which each has been appointed a receiver, I am satisfied that the title of each of the plaintiffs to possession cannot be in issue.

7.5 That leads to the question whether the defendants have adduced any evidence from which one could conclude that there is a fair issue to be tried that, by refusing access to the plaintiffs over the property of which they are receivers, the actions of the defendants do not amount to a trespass. While Mr. Lynch claims a beneficial interest in the St. Angela's, there can be no doubt that both Bank of Scotland and Permanent under their respective legal mortgages have priority over any beneficial interest to which Mr. Lynch is entitled. Moreover, I cannot see how any of the proceedings which are pending in this Court in which the defendants are involved, of which the Court was apprised, in any way affect the status of Bank of Scotland Ireland and Permanent as mortgagees. Therefore, I have come to the conclusion that the defendants have not demonstrated that there is a fair issue to be tried that, by preventing the receivers taking possession of the property which is the subject of the securities, their actions would not amount to a trespass.

7.6 Although some of the reliefs sought on the notice of motion have been formulated in mandatory terms, I consider that the orders sought by the plaintiffs directing the defendants to deliver up keys, alarm codes and such like and the documentation evidencing the rights of third parties to portions of the properties the subject of the securities, such as copies of leases and licence agreements, are, in reality, ancillary to a primary reliefs sought by the plaintiffs which, in substance, are prohibitory, in that they are seeking to restrain the defendants' trespass. Therefore, I am of the view that the plaintiffs do not have to show that they have "a strong case" that they are likely to succeed at the hearing of the action, in line with the decision of the Supreme Court in *Maha Lingham v. Health Service Executive* [2006] 17 ELR 137. Having said that, I am of the view that they have demonstrated that they have a strong case.

7.7 Insofar as is necessary to consider the other *American Cyanamid* criteria, namely, the adequacy of damages and where the balance of convenience lies, my conclusions are as follows:-

(a) If the plaintiffs, not having been granted the interlocutory relief sought, were to succeed at the trial in establishing their right to permanent injunctions, neither would be adequately compensated by an award of damages.

(b) If the defendants were to be successful at the trial, I have no doubt that they would be adequately compensated on foot of the plaintiffs' undertakings as to damages for any loss which would accrue from the grant of interlocutory relief.

(c) In any event, the balance of convenience lies in favour of granting the injunctive relief sought to the plaintiffs, so that they can perform their functions as receivers and take charge of the rental of the residential units for the academic year 2011/2012, the commencement of which is imminent, and use the income to discharge the borrowers' debts. While no doubt Mr. Lynch has gained experience in managing the letting of the residential units at St. Angela's in the past, it is entirely a matter for the receivers whether they wish to avail of that experience.

8. Order

8.1 On the basis of the undertaking as to damages given by both plaintiffs, there will be orders in the terms of paras. (1), (2), (3), (5) and (6) of the notice of motion pending the trial of the action. I consider that an order in the terms of paragraph (4) is not necessary to maintain the *status quo*.