THE HIGH COURT

COMMERCIAL

Record No. 2016/10270P

VITGESON LTD.

WILLIAM FARRELLY

PLAINTIFFS

AND

TOM O'BRIEN

PROMONTORIA [ARROW] LTD.

DEFENDANTS

JUDGMENT DELIVERED BY MR. JUSTICE HAUGHTON ON THURSDAY, 9TH NOVEMBER, 2017 DAY 7

MR. JUSTICE HAUGHTON: In this case, the Plaintiffs challenge the purported transfer of Allied Irish Bank's loan facilities and security from NALM to the Second Defendant, Promontoria (Arrow) and also the validity of the purported appointment by Promontoria of Mr. O'Brien as a rent receiver and in relation to his activities in relation to the secured properties.

Promontoria, on its part, in its Amended Defence and Counterclaim, asserts that it has acquired the loan facilities and security in respect of which the Plaintiffs are in default. It asserts that demands were made and that it was contractually entitled to appoint Mr. O'Brien as receiver. Promontoria seek judgment on foot of the facilities and other ancillary reliefs.

Three issues loom largest. Firstly at the outset, the Plaintiffs put the Defendants on proof of many matters and particularly the transfer of the loan facilities to Promontoria. A real issue was raised as to whether and to what extent heavily redacted or copy documents of title in respect of the facilities and attendant security could be relied upon, both on the grounds of admissibility and the absence of proof as to content.

Secondly, a legal issue of construction arises as to the whether the mortgage deeds relied upon by Promontoria contain a contractual power to appoint a rent receiver as opposed to a statutory power.

Thirdly, a second related issue arises if the Court finds that there was not a contractual power to appoint, that is to say whether the statutory power to appoint a receiver under The Conveyancing Act 1881 (As Amended) and particularly under Section 19 (1)(iii) can be relied upon by Promontoria to appoint a receiver before the registration of the charges in Promontoria's name is completed and at a time when registration was pending.

Over six days of hearing, many other issues, both factual and legal, were raised, or were raised in the Plaintiff's Pleadings, but fell away or were disposed of based on admissions made by the Plaintiffs' witnesses, Mr. Farrelly and his partner and fellow Director in Vitgeson Limited, Ms. Kathleen Mangan. It is convenient to address some of these first.

Firstly, that the facilities were entered into by the Plaintiffs with Allied Irish Banks was not disputed. Lists of these that are not disputed are set out in Schedules 4, 8 and 9 of the Statement of Claim. In the evidence and witness statements of Ms. Lisa Burns of Capita Asset Services Ireland Limited, a company providing loan administration and asset management services to Promontoria, there is set out the accounts now representing the borrowings under these facilities that are relevant to these proceedings. For the purposes of these proceedings, two of the loan accounts listed by Ms. Burns in respect of which no demands for payment had been made fall to be disregarded. These are account numbers 55001303 and 55001981.

Secondly, that the Plaintiffs borrowed and drew down monies on foot of these loan facilities is not disputed.

Thirdly, that on foot of these facilities, the Plaintiffs granted security over various lands and properties is accepted. Admitted security arises under mortgages listed in Schedules 5 and 7 of the Statement of Claim, mortgages created either by Vitgeson or Mr. William Farrelly with AIB between 1994 and 2010.

Fourthly, it is not contested that Allied Irish Banks' interest in these facilities and mortgages transferred from it to NAMA. Both Mr. Farrelly and Ms. Mangan accepted that under cross examination.

Fifthly, on 17th February 2015, Vitgeson entered into five more deeds of mortgage with NALM. The execution of these by Vitgeson was not disputed. However, this occurred at the request of NALM followed by a proposal or "letter of comfort", as the Plaintiffs described it, from NALM in a letter of 4th July 2014. This was sent at a time when the Plaintiffs were cooperating with NALM in the management of the property and investment portfolio which bore the NAMA debtor ID code 0910 and this ID was NAMA's designation of the connection. It covered both Plaintiffs and all their AIB or NAMA borrowings and all of the security. This was accepted by Mr. Farrelly and Ms. Mangan in evidence.

The letter of 4th July 2014 has some parts that should be referred to. It notes on page 2 that Allied Irish Banks, which was acting as an effective manager or agent with NAMA in the supervision of this connection was not satisfied with a business plan that had been submitted by the Plaintiffs and in response to that plan, indicated that:

> *"The following sets out the principal required conditions and commercial terms underpinning continued support by NAMA of the connection. It does not constitute a legally binding commitment nor does it create any legal obligations on or for NAMA or the connection."*

It then goes on to state the terms and conditions. Number 1 reads:

> *"NAMA is prepared to continue to support the connection to the period ending 31st December 2014 subject to regular review or as may be required by NAMA at its discretion from time to time when the performance of the connection will*

be assessed on the following basis to include, but not limited to:

> *1. The connection complies to the satisfaction of NAMA with the provisions of this letter. NAMA reserves its right to amend these conditions."*

And so forth.

> *"2. The connection fully implements the current property strategy and in particular puts plans in place to meet all property disposal targets and complies both with the requirements for enhanced security and disclosure as well as the other connection specific commercial conditions as set out below and in the appendices to this letter."*

And No. 3 was that the connection fully co operates with NAMA. It is not necessary to read through the rest of the conditions save to note that in the appendices, there is reference to security disclosure and connection specific requirements, and on the third page of that, Appendix 2, it is stated:

> *"NAMA, at its sole discretion, will consider funding the following expenditure up to a maximum of the following. €125,000 per annum, €250,000 in total, as remuneration for the Directors of Vitgeson Limited for each of the two years 2014 to 2015 inclusive.*
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> *Secondly, a maximum of €250,000 for the Directors of Vitgeson after the sale of the last asset of the connection per the approved asset strategy, the amounts to be reduced in the event that salary payments continue to be made post 2015."*

Those payments were strictly conditional upon full adherence to certain other terms and conditions and in addition to that NAMA approved, the following budgets for 2014 and it then set out an operating budget of €160,000 for property management expenses, €30,000 for office administration and small sums of money in respect of capital expenditure.

So the Plaintiff challenges the validity of the 2015 mortgages on the ground that there was no consideration for provision of the additional security that was put in place in those mortgages. Those mortgages, however, were entered into following on that "letter of comfort" or proposal.

The Plaintiffs' argument on this is unstateable because the deeds executed in 2015 were under seal and in any event, as I have just outlined, there was consideration moving from NAMA to the Plaintiffs in relation to continued support of the connection and their remuneration and in relation to budgets or the continued operation of the properties.

Sixthly, it is not disputed that the 2015 mortgages contained contractual powers for the mortgagee to appoint a receiver in case of default, and I emphasise that that is in relation to the 2015 mortgages, in addition to any statutory right arising under the Land and Conveyancing Law Reform Act 2009, and it is not disputed that the receiver so appointed would have a power of sale. The relevant provision, and I quote from one of the mortgages that is under discussion, is at Clause 18 headed "Receiver" which states at 18(1)(a):

> *"The lender may appoint any one or more persons to be receiver of all or any part of the security assets if the security has become enforceable or the charger so requests the lender in writing at any time."*

Over the page, at Clause 19, the powers of the receiver are set out and it is stated at 19.1(a):

> *"Any receiver appointed hereunder shall have all the rights, powers and discretions set out in this deed in addition to those conferred on him by any law including, without limitation, the Act."*

Under 19.2(b) the receiver is endowed with the power "*to sell, realise or otherwise dispose of the security assets."*

These 2015 mortgages cover inter alia the lands and folios at 34231F and 49301F and 24906F and 22770F of the Register of Freeholders, County of Meath. Of these folios, folios 49301F and 34231F relate to lands at Whitehall Co. Meath. An application to register Promontoria as the owner of these charges was lodged with the Property Registration Authority on

2nd February 2016 and remains pending.

In relation to the other two folios, 24906 and 22770, the subject of the 2015 mortgages, Promontoria applied to be registered as owner of these charges also on the 2nd February 2016 and it was registered as owner on 4th January 2017.

[Seventhly,] the undisputed evidence was that two of the secured properties were unregistered land. These are Number 9 Grosvenor Road, Rathgar, Dublin 6, the subject of a mortgage to AIB Bank on the 13th January 1994, and secondly, Apartment 31, The Willow, Rockfield, Dundrum, Dublin, the subject of mortgage to AIB on the 2nd July 2010.

The evidence of Mr. Paul Halley, Solicitor, satisfies me that he and the firm that he works for,

Mason Hayes & Curran, Solicitors, acting on behalf of Promontoria, did on the 2nd February 2016 apply to the Property Registration Authority to register in the Registry of Deeds a Deed of Conveyance and Assignment dated 11th December 2015 in respect of the transfer of the mortgages relating to these two unregistered property by NALM to Promontoria and that those applications were completed on 3rd May 2016. Accordingly, if the Court is satisfied that these mortgages were assigned to Promontoria, it follows that if there was default on the loans, the appointment of Mr. O'Brien as receiver on the 21st October 2016 in respect of the apartment in Dundrum and on the

24th October 2016 in respect of the Grosvenor Road property are valid.

[Eighthly,] the Plaintiffs did not really dispute that NAMA had disposed of their loans and security. Rather, they disputed that they were acquired by Promontoria.

[Ninethly,] it was also not disputed that the Plaintiffs were in default under the facilities at all material times.

[Tenthly,] it was also not seriously disputed that letters of demand were sent on behalf of Promontoria. Mr. Burke, a Director of

Promontoria, gave evidence that the letters of demand dated 23rd September 2016 were sent by certified post on the 26th September 2016 and copies were annexed to his witness statement. His oral evidence and the evidence of Ms. Burns confirmed this and were not disputed.

[Eleventhly,] the quantum of the counterclaim was not disputed. Nor was the calculation of interest. It was clear that no surcharge interest was claimed. Ms. Mangan, who took responsibility for financial administration for both Plaintiffs, did not dispute the figures. I am satisfied that they are as stated by Ms. Burns in her evidence. Counsel for Promontoria stated that there was no claim for interest post 25th July 2017. The amounts for which judgment is sought by Promontoria are therefore as follows:

As against Mr. Farrelly, €15,335,201.88.

As against Vitgeson, €11,434,198.52. These sums are crystallized as of 25th July 2017.

[Issue 1 Transfer of Loan Facilites]
Turning then to the first contentious issue, this is the transfer of facilities. The Defendants were not prepared to put to the Plaintiffs' witnesses or adduce in evidence the original document, a Deed of Transfer or Global Assignment Deed dated 11th December 2015 made between *NALM and Promontoria (Arrow) Limited*, by which they asserted Promontoria acquired the loans and security, because of commercial sensitivity, confidentiality and lack of relevance. This related in part to the fact that extensive schedules to the Transfer Deed listed the loans and security of other connections. They therefore sought to rely on a heavily redacted copy of the Transfer Deed, limited to relevant parts of the schedules. Further substantial redaction of the body of the deed was pursued initially again on the basis of commercial sensitivity and secrecy. The Plaintiff, through Counsel, opposed the use of this as secondary evidence, although Counsel did accept that part of the schedules relating to third parties, nonparties, attracted banker or client confidentiality and possible protection under the Data Protection Acts and, therefore, that this could be redacted.

The Court was sympathetic to the argument that the third party information in the schedule should be redacted from the document. As to admissibility of a copy as secondary evidence, I was referred to an ex tempore decision of Murphy J. In *English v Promontoria (Aran) Limited No. 2*, a decision that she gave on 17th May 2017, where she allowed the Defendant to rely on heavily redacted copies of relevant sale documents to prove an assignment by Ulster Bank Promontoria of certain loans and security. The background to that decision was rather different to the present. Firstly, it was a motion brought by Promontoria heard on affidavit to vacate a stay obtained by the Plaintiff on the appointment of a receiver. Secondly, the transfer of the mortgage from Promontoria was only registered in The Registry of Deeds. Thirdly, the motion was brought because the Plaintiff had not taken any real steps to advance his plenary action, causing the Court to give the Defendant specific leave to bring the application.

Nonetheless, the case is a useful pointer to another Judge's view of admissibility of copy documents in a case similar to the present one, particularly as there were no redactions in the body of one of the documents relied upon, namely a Deed of Assignment, which appears to be the deed of conveyance or assignment that completes the transfer and is therefore analogous to the Deed of Transfer with which we are concerned in this case.

So to a certain extent, this judgment represents a precedent in which copied documents and documents that are redacted may be admitted.

Judge Murphy at paragraph 25 of her judgment addresses the standard of proof and she says that:

> *"The first issue which arose on this application is the requisite standard of proof. The Defendant or Applicant maintained that the required standard of proof is that required in interlocutory application, namely prima facie evidence of the matters sought to be established. The Plaintiff, or Respondent (Mr. English) on the other hand submits that in the circumstances of this case, the requisite standard of proof is balance of probabilities. The Court is satisfied that the Plaintiff/Respondent is correct and that in the circumstances of this particular case, the appropriate and requisite standard of proof is the balance of probabilities."*

So notwithstanding that that was an application that was not a full plenary hearing and was heard on affidavit, nonetheless that is a standard of proof that the Court applied.

In that case, similar arguments were made in relation to commercial sensitivity as a justification for the redaction and, ultimately, Judge Murphy allowed copy redacted deeds to be used as proof and her decision appears at paragraph 55 onwards.

> *"The approach taken by the Plaintiff to this application has been to raise a multiplicity of issues concerning execution and redaction as set out above. Counsel has raised many hares relating to these issues. He has invited the Court to speculate that the redacted portions of the Mortgage Sale Deed and the Deed of Novation may reveal that there is some wider context to these transactions, that there may be other parties involved that without sight of the redacted portions of those deeds, one cannot be sure that the underlying agreements between Promontoria Holdings and the various Ulster Bank entities are valid. All of the issues raised by Counsel for the Plaintiff would be properly and validly raised if the Plaintiff were a party to the deeds with an entitlement to challenge their efficacy, but he is not a party to the deeds. He is a third party whose only entitlement is to be shown that the "stranger knocking on his door" claiming possession has in fact acquired the interests of Ulster Bank Ireland Limited.*
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> *56. In this application what the Plaintiff has singularly failed to do is engage properly with the evidence that is actually before the Court. The Court has sworn uncontroverted evidence that Promontoria (Aran) has acquired Ulster Bank Ireland's interest in the Plaintiffs' loans and security underpinning them. The evidence shows the mechanism by which they were acquired, the Defendant has underpinned its uncontroverted evidence by exhibiting the relevant portions of each deed and the entirety of the Deed of Conveyance and Assignment of the Plaintiff's mortgage. It has revealed the identities of all of those who executed the deeds or where relevant, fixed the seal of the company thereto. In addition, it has exhibited all relevant Deeds of Powers of Attorney.*
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> *57. Deeds are not hearsay. They constitute real evidence of transactions between parties. On their face, all of the deeds exhibited are valid and show that transfer of the Plaintiff's loan facilities and security from Ulster Bank Limited via a mortgage sale deed between it and Promontoria Holding, which was subsequently novated to Promontoria (Aran) Limited, which was followed by a transfer by Ulster Bank to Promontoria (Aran) and the conveyance and assignment of the Plaintiffs' mortgage to Promontoria (Aran) Limited.*
>
> *The evidence furnished to the Plaintiff by the Defendant is prima facie proof of transfer, the evidence furnished permits*

the Plaintiff, should he choose to challenge the validity of the deeds, he could do so by the simple means of checking in The Companies' Office that these deeds, which are valid on their face, have in fact been executed in accordance with the Constitution and rules of each corporate entity involved. He has not done so, or having done so, has found no irregularity with which to challenge the validity of the various deeds. The Plaintiffs' failure to challenge deeds which are valid on their face amounts in the Court's view to an acceptance of the validity, if only by inference.

59. It is important to remember what was at issue in this case. This case concerns the chain of title showing the transfer of the Plaintiff's loans and security from Ulster Bank to Promontoria (Aran). The Court in its judgment on the 16th November 2016 was not satisfied for the reasons set out that Promontoria (Aran) had established that chain of title.

In this application, Jonathan Hanly and Karen McCrave, both Directors of Promontoria, have averred ownership by Promontoria (Aran) Limited of the Plaintiff's loans and security and have substantiated their evidence by exhibiting all relevant deeds such that the claim and title is now clear."

It is important to note that that case was heard on affidavit and the evidence was uncontroverted. Also, the admissibility of the Copy Deed of Assignment in that case per se was not identified as a significant issue, and of particular note in the statement is paragraph 57, where Judge Murphy records that deeds are not hearsay.

Counsel for the Plaintiffs argue that the best evidence rule applies and that where the original is available, a copy is inadmissible and Mr. McEntagart referred to the Court to Primor plc v Stokes Kennedy Crowley 1996 2 IR 459, where Judge O'Flaherty stated the following:

"It should be emphasised that documentary evidence needs to be proved in a Court like every other evidence. While the general rules of evidence with regard to admissibility, i.e. relevance, hearsay, opinion, apply to documentary evidence. Additional requirements include proof of contents and proof of due execution, (Fennell, The Law of Evidence in Ireland, page 296).

The best evidence rule operates in this sphere to the extent that the parties seeking to rely on the contents of the document must adduce primary evidence of those documents, i.e. the original document in question. The contents of the document may be proved by secondary evidence if the original has been destroyed or cannot be found after due search. Similarly, such contents may be proved by secondary evidence if production of the original is physically or legally impossible."

I ruled during the course of the hearing that the Court would admit into evidence a copy of the Deed of Transfer. In so doing, I took the view, which I restate here, that while production of the original was physically possible, it was legally impossible in the sense that this would give rise to entirely and admittedly unnecessary publication of the details of third party loans and security in the schedules. It would be an entirely unwarranted incursion into the privacy of persons not involved in these proceedings were that to happen. This is particularly so where the Plaintiffs in this case did not make any specific point or raise any particular issue on the text of the document, or the schedules, insofar as they referenced their loans and their property and they did not seek to controvert the making or execution of the deed by any positive evidence of their own.

The Defendants called Ms. Siobhan Hallissey to prove the Deed of Transfer of 11th December 2015 via a copy with only the schedules redacted. At the time of execution, she worked for SFM, a corporate service provider to Promontoria (Arrow). She was not a signatory or signing witness to the document, but stated it was signed by her colleague, Jonathan Hanly. The copy shows his signature on behalf of Promontoria. She was present in the room with A&L Goodbody Solicitors when this and other related documents were signed and she understood the nature of the document. She had reviewed a soft copy in advance. She saw it signed and a paralegal was present who she saw witness the signature of Mr. Hanly. The copy shows a paralegal, K. Dally, witnessed Mr. Hanly's signature. Ms. Hallissey then confirmed that the copy produced in evidence, subject only to redaction of the schedules, was a copy of the original. She confirmed that the unredacted parts of the schedules, pages 109, 110, 217 and 218, were the same as the original and were part of the original when it was executed. These are the pages that relate to the Plaintiffs' loans and the Plaintiffs' securities. She confirmed and adopted her witness statement which reads in the relevant part, paragraph 2:

"Ms. Hallissey was present at the relevant completion meeting between NALM and the Second Named Defendant (Promontoria) and so witnessed the Global Deed of Transfer dated 11th December 2015 being executed by the parties thereto.

3. Ms. Hallissey will confirm that she has reviewed the redacted versions of the Global Deed of Transfer and the Deed of Novation appended to this précis, copies of which have already been discovered, as against the originals of those documents and will confirm that the redacted versions are respectively copies of the originals."

I am satisfied on this evidence that the Copy Deed of Transfer dated 11th December 2015 with redacted schedules put in evidence is indeed receivable in evidence and has been proven to be a true copy of the original.

[Proof of Contents]
Counsel for the Plaintiff then made a further argument that the witnesses who prove execution can authenticate that but cannot prove the contents and that the contents are not admissible evidence. Counsel relied on the authority of the *Leopardstown Club Limited v Templeville Developments Limited* 2010 IEHC 152 and the judgment of Edwards J. To emphasise the distinction between receivibility on the one hand and admissibility. A quote appears from their submissions where Edwards J. Stated:

"It ostensibly confuses the concepts of receivibility and admissibility respectively and conflates the two. Whether a document is hearsay or is not hearsay has nothing to do with whether the author has been called to prove it. The contents of a document introduced as testimonial evidence will still be hearsay even if the author is called to prove it. They are the recorded words of a person who is in a position to give first hand evidence of what he has recorded. The correct approach is to separate out and deal individually with issues of receivibility on the one hand and issues of admissibility on the other hand. In many cases, but subject to what I have to say below, a document will not be receivable in evidence unless the author is being called to prove it. That having been said, even if a document is receivable, it may not be admissible. However, the converse does not obtain. Issues of admissibility do not call for consideration at all if a document is not capable of being received in evidence by reason of inadequate proof."

However, I take the view that this case does not assist the Plaintiffs. The documents with which Judge Edwards was concerned in

that case are listed at paragraph.1 and they were as follows.

Firstly, a letter from Templeville's architect, Toal Ó Muiré, recording a minute of a meeting with officials from Dun Laoghaire Rathdown Co. Co. Held on 4th November 2017, attended by himself and Philip Smith on behalf of Templeville.

Secondly, Mr. Halpenny's attendance note concerning what occurred at that meeting.

Thirdly, Mr. Smith's witness statement in these proceedings. Fourthly, Mr. Smith's witness statement in the arbitration proceedings.

It will be immediately apparent that the contents of those documents would have contained hearsay evidence and it is apparent from further reading of

Judge Edwards' judgment that where it is hearsay evidence, yes indeed the proof of the contents must be found elsewhere, but it is very different where the document is a deed. At paragraph 5.13 in his judgment, under the heading "Use of a Document As Original Evidence", Judge Edwards stated the following.

> *"Where a document is produced by a party who proposes to rely upon statements it contains not as evidence of their truth by way of an exception to the hearsay rule but to show some legitimate purpose that the statements, whether or not they be true, were in fact made, then the document is properly to be characterised as non hearsay original evidence (otherwise original evidence).*
>
> *The circumstances in which a document may be produced as original evidence are many. Some important examples are:*
>
> > *(A) where the making after statement contained in a document is a fact in issue. A clear example of this would be in the case of an alleged libel. The plaintiff in such a case would want to rely upon the defamatory document, for example, a newspaper, not just the physical thing but also upon its contents. However, he would certainly not be relying upon the truth of the contents because his whole case is that they are false and misleading.*
> >
> > *(B) To establish the literacy of the author of the document.*
> >
> > *(C) To establish a state of mind of the recipient of a statement contained in the document.*
> >
> > *(D) Where the document contains a statement using words said to have a particular legal effect.*
> >
> > *(E) To establish the falsity of a statement contained in the document.*
> >
> > *(F) where a statement contained in the document provides circumstantial evidence."*

I reiterate Category D mentioned by Judge Edwards; where the document contains a statement using words said to have a particular legal effect. The Deed of Transfer in this case is a document, the wording of which has a particular legal effect and as Judge Murphy said in the English case at paragraph 57, "deeds are not hearsay, they constitute real evidence of transactions between parties". The Plaintiffs' argument in this regard is therefore misconceived as the contents of the deed are not hearsay.

Turning to that deed, as proven, it describes itself as being between National Asset Loan Management Limited as assignor and Promontoria (Arrow) Limited as assignee and it is dated 11th December 2015 and carries the heading "Deed of Transfer (Global Assignment Deed)" in respect of the Arrow portfolio. It then sets out the parties. It sets out recitals, the interpretation of terms and at Clause 3, under the heading "Transfer", it states the following:

> *"3.1. The assignor unconditionally irrevocably and absolutely transfers, conveys, assigns and delivers to the assignee with effect from the completion date, to the extent that it has any right, title, interest or benefit in and to the relevant GAD loan asset and to the extent capable of transfer, conveyance, assignment and/or delivery, all its rights, title, interest and benefit in and to each of the GAD loan assets, subject to the subsistence rights of redemption of the obligors including, without limitation...."*

And then it goes on to add additional clauses. It is not necessary to go beyond that opening part of the transfer clause, that is to say Clause 3.1.

I am quite satisfied that the effect of that clause was for NALM to transfer to Promontoria (Arrow) Limited all NALM's interest, rights and entitlement in the Plaintiffs' loan and security to Promontoria. It does so, of course, by reference to the loan facilities and securities that are set out in the schedule. These are of course the redacted schedules that they set out at pages 109 and 110, the facility letters referable to Vitgeson under the connection ID number 0910.

It sets out the relevant mortgages at pages 217 and 218, again under the same connection number.

Even if that proven copy deed could not be relied upon, I would accept the Defendants' contention that by their acts, the Plaintiffs are not contesting the validity of the assignments, or did not contest the validity of the assignments after they received notification of the assignments in December 2015, and by their acts in meeting thereafter with Promontoria or Promontoria's representatives to try and buy their loans, or to do a deal, and by the fact that they did not at those meetings contest the validity of the transfers, or reserve their rights to do so. The result of that is that the Plaintiffs are, in the Court's view, estopped from challenging the validity of the assignment of the loans and security by NALM to Promontoria.

[Section 28 (6)]

The next argument pursued was that the purported assignment fell foul of Section 28(6) of The Supreme Court of Judicature Act 1877 on the basis of a lack of adequate notification to the Plaintiffs. It will be recalled that Section 28(6) reads, insofar as relevant as follows:

> *"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor or trustee or*

other person from whom the assignor would have been entitled to receive or claim such debt or chose in action shall be, and be deemed to have been, ineffectual in law, subject to all equities which would have been entitled to priority over the right of the assignee of this Act had not passed. To pass and transfer the legal right to such debt or chose in action from the date of such notice and all legal and other remedies for the same and the power to give a good discharge for same without the concurrence of the assignor."

[Mortgagor Consent]
The loan facilities and indebtedness and security are unquestionably choses in action and the Defendants in their evidence and their argument rely on two notifications to satisfy the requirements of Section 28(6). The first of these is a letter dated

11th December 2015 from NAMA to William Farrelly, which Ms. Mangan accepted in evidence she had seen and it also appears that a copy of that went to Vitgeson. This refers in its heading to Notice of Assignment and it has connection ID 910, connection name Vitgeson Limited and it then, in its text, notifies the recipient that on and with effect from the 11th December 2015, the assignor assigned to Promontoria (Arrow) Limited all of its right, title, interest and benefits in and to, and then it itemises the principal amounts due and the security and mortgage and all payments and all claims and suits in action. The assignee is identified in the second page as Promontoria (Arrow) Limited and a contact address given.

In the second letter, the first one being described as a "goodbye" letter, the second as a "hello" letter, there is a letter from Promontoria's agent, Capita Assets Services dated 16th December 2015 to Mr. Farrelly and this states that:

"As detailed to you in a recent letter, NALM sold amounts owing to it in respect of your facilities and the facilities letters guarantee, security documents and all other rights and obligations relating to the facilities with NALM to Promontoria (Arrow) Limited. The transfer of your facilities to Promontoria all took place on 11th December 2015 (the sale date) and from this date, amounts owing in respect of the facilities will be owed to Promontoria."

It is abundantly clear from that that the point made under Section 28(6) cannot succeed, particularly as

Ms. Mangan accepted that she had seen and considered these letters, and also that the reference in them to the connection ID 910 clearly relates to the Plaintiffs loan facilities and the security in question. These letters, individually and together, satisfy the requirements of Section 28(6) as to notification.

The transfer or assignment of the loan facilities and mortgage from NALM to Promontoria was therefore effectual in law to pass to Promontoria the legal right to the debts and choses in action "and all legal remedies for the same and their power to give good discharge for same without the concurrence of the assignor."

[Mortgagor Consent]
One of the arguments that was made on behalf of the Plaintiffs, particularly toward the end of the case, was that the consent of the Plaintiffs as mortgagors was required before these assignments could be valid. There is no basis in the documentation for any such requirement of consent and in particular, there is no provision in any of the mortgages that stipulates that there should be no assignment of the mortgagee's interest right or entitlement without the consent of the mortgagor and that argument is unsustainable.

[Appointment of Receiver]
Moving on then to the appointment of the receiver, Promontoria purported to appoint Mr. O'Brien as receiver under the mortgages on 21st and 24th October 2016 at a time when the transfer of the mortgages of registered land had not been registered, although the applications to the Property Registration Authority for registration had been lodged sometime prior on the

2nd February 2016. The Plaintiffs therefore contended that the appointment, other than in respect of the 2015 mortgages, were invalid because (A) there was no contractual power to appoint in the mortgages and (B) the statutory power of appointment under The Conveyancing Act 1881 (As Amended) did not apply.

[Contractual Power to Appoint]
As to the first issue, both parties agreed in principle that a contractual power, if there was one, could be used to appoint notwithstanding non registration. This indeed arose in a case of Kavanagh and *Bank of Scotland v McLaughlin* 2015 3 IR 355, a case which was dealt with before the Supreme Court and in her judgment, Judge Laffoy at paragraph 109 stated the following:

"Bearing in mind that the only issue which was determined in the High Court and consequently the only issue which arises on the appeal in relation to enforcement of the securities given by the McLaughlins to Bank of Scotland Ireland, which are now vested in Bank of Scotland, is whether Bank of Scotland was entitled to appoint to the receiver. It is appropriate to consider that issue first by reference to the narrow argument advanced on behalf of Bank of Scotland and the receiver, namely that Bank of Scotland had a contractual entitlement to appoint a receiver independently of the provisions of the Act of 1964. Having regard to the terms of Clause 9.1 of the 2006 charge, which has been quoted earlier, as a matter of contact between Bank of Scotland (as successor in title to Bank of Scotland Ireland) and the McLaughlins,

Bank of Scotland unquestionably had a power to appoint a receiver independently of the powers conferred by the Act of 1964. There is nothing in the Act of 1964 which limits or restricts the contractual power to appoint a receiver once it is exercisable and accordingly, I am satisfied that the fact that Bank of Scotland is not registered on the relevant folio as owner of the 2006 charge did not prevent it appointing the receiver as receiver over the registered properties secured by that charge."

The Court, therefore, has a task of construing the mortgages, that's to say the pre 2015 mortgages. There were some variations in the form of wording used, although I have come to the view that in terms of meaning, there was no material difference between the different forms. Taking again as a first example the mortgage dated 13th January 1994, the relevant provision appears on page 3 and the relevant words read:

"It is hereby agreed and declared that the provisions of The Conveyancing Act 1881 (As Amended by the Conveyancing Act 1911) shall in their application to this security be modified as follows:"

And then follows modification items (1) to (8), which purport to modify the various provisions of the Conveyancing Act 1881. The wording used in another sample deed, which is somewhat later in time, a mortgage of 9th November 1999, and I should mention that

these two mortgages are selected because those are the ones selected by Counsel for the purpose of argument. The relevant clause there is 8, "Powers of Bank".

> *"8.1. The Bank shall have the statutory powers conferred on mortgagees by the Conveyancing Acts with and subject to the following variations and extensions, that is to say"*

And then the powers as modified are set out at (a) to (d).

Counsel for the Plaintiffs thus argued that there was no express provision within these, applying the Conveyancing Act with modifications in addition to the statutory rights under The Conveyancing Act.

I pause here to note that The Conveyancing Act was repealed, of course, by the Land and Conveyancing Act 2009 with effect from the 1st January 2010. However, both parties agreed that this repeal did not have the effect of invalidating the incorporation of provisions of The Conveyancing Act or provisions with modifications by reference in pre existing mortgages and as Judge Laffoy said in the case of *Kavanagh and Lowe v Lynch* 2011 IEHC, 348 at paragraph 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 and the happening on which power of sale by Bank of Scotland was exercisable. For reasons I will elaborate on later when considering the security of Permanent,*
>
> *I consider that the repeal of Sections 15 to 24 of the Act of 1881 by Section 8 of The Land and Conveyancing Law Reform Act 2009 does not have the impact contended for by Counsel for the Defendants."*

And she further elaborated on that at paragraph 7.4 in her decision, where she states:

> *"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. I may 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 repeal of Section 62(7) of the Act of 1964..."*

... And that refers to The Registration of Title Act 1964 and the provision which allowed a party seeking possession to adopt a summary procedure in proceeding in court...

> *"A distinction between the impact of the repeal of Section 62(7) of The Act of 1964 which provided a statutory remedy to the owner of registered lands to apply to Court in a summary manner for possession of the land when repayment of the monies secured by the charge have become due (Dunne J. In Start Mortgages) and the impact, if any, of the repeal of the Act of 1881 of the drafting device universally availed of by draftsman of security documents of conferring powers on mortgagees by incorporating statutory provisions in force at the time of the creation of the security with or without variation.*
>
> *Also, 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 and by Counsel for the Defendants."*

And in this case, Counsel for the Plaintiffs did not seek to make the case that the repeal of the 1881 Act (As Amended) had the effect of invalidating the provisions of the mortgages.

Turning briefly then to the Conveyancing Act 1881, Section 19 provided in subsection 1 that:

> *"A mortgagee, where the mortgagee is made by deed, shall by virtue of this act have the following powers to like extent as if they had been in terms conferred by the mortgage deed but not further.*

1. A power where the mortgage money has become due to sell up concurrent sale."

I don't need to fully quote that. The second one is the power to insure and keep insured. Thirdly, a power when the mortgage money has become due to appoint a receiver of the income of the mortgage property or of any part thereof. (Iv) then deals with the power and possession to cut and sell timber. Then subsection (2) reads:

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

So that sets forth a statutory power of modification.

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

So it does seem from that that there are certain key features to Section 19. If the mortgage is silent, for example, as to the powers of a mortgagee, then

Section 19 applies and there is, therefore, not necessarily any need for a Deed of Mortgage to have said anything in order for the statutory powers to apply.

Secondly then, under Section 19(3), if a contrary intention was expressed in the deed, then Section 19 will not apply. No such contrary intention appears in the two deeds that I have mentioned. In construing these mortgages, as with any other contract, the Court seeks to ascertain what was the intention of the parties at the time of the contract at the time it was made, and that is done by reference to the words that were used and insofar as there is any uncertainty, the Court can have regard to their context and the other terms of the document and have regard to the document as a whole.

In the mortgage of 13th January 1994 just quoted, the words "the provisions of the Conveyancing Act 1881 in their application to this security" in the context of the clause, and in their plain and ordinary meaning denote a common intention that The Conveyancing Act 1881 (As Amended) was to apply to the mortgage. This construction is supported by the fact that Section 19 applies where a mortgage is silent on the subject of mortgage powers and mortgagee powers.

The deed then expressly provides for modification. In my view, it follows that the power to appoint a receiver as modified is a contractual right, that it can be availed of and by the mortgagee, notwithstanding that the transfer of the mortgage has yet to be registered. The same applies to the wording used in the 1999 mortgage quoted earlier. The mortgagee enjoys the statutory powers but also has a modified contractual power in relation to the appointment of a receiver.

What the mortgagee or assignee cannot do prior to registration of the assignment is to exercise the power of sale or transfer. This is because of the effect of Section 64(2) of The Registration of Title Act 1964. And this, in its amended form, reads:

> *"There shall be executed on the transfer of a charge an instrument of transfer in the prescribed form, but until the transferee is registered as owner of the charge, that instrument shall not confer on the transferee any interest in the charge."*

I should also mention subsection (4), which reads:

> *"On registration of the transferee of a charge, the instrument of transfer shall operate as a conveyance by deed within the meaning of The Conveyancing Acts and the transferee shall:*
>
> > *(a) have the same title to the charge as a registered transferee of the land under this Act has to the land, under transfer for valuable consideration or without valuable consideration, as the case may be.*
> >
> > *(b) have, for enforcing his charge, the same rights and powers in respect of the land as if the charge had been originally created in his favour."*

So until registration takes place, the assignee of the mortgage does not have such interest in the mortgage property as would entitle it to sell or convey.

Accordingly, I find that as a matter of construction, Promontoria had the contractual power to appoint Mr. O'Brien receiver. All of the appointments confirm that "*The receiver shall have and be entitled to exercise the powers conferred on him by the security documents and by law.*" The receiver therefore enjoys the right and power to receive the income and rentals from the property or any part. It was not disputed that as matter of law, such a receiver also has the power to enter into possession to exercise such rights.

I therefore find that the appointments of Mr. O'Brien as rent receiver were valid and lawful.

it is not, therefore, necessary for me it address the question of whether, if there is no contractual basis for appointment, the completion of registration of the assignment of the charges in respect of the registered land had effect under a Land Registration Rule 60 of a relating back to the dates of appointment so as to validate them retrospectively as being made under statutory powers.

Two other matters were raised by the Plaintiffs that deserve brief mention.

[Marketing the Properties]
Firstly, it is said that the receiver acted unlawfully in undertaking tasks related to bringing the properties to market as he was only a rent receiver. These tasks are outlined in his witness statement and were readily admitted in that he stated: "*Upon appointment, the following agents were instructed to provide drive by marketing appraisals on the various properties in order to prepare proposals to bring the properties to market*."

And then he named CBRE, Sherry Fitzgerald, Raymond Potterton and others as people who were instructed by him or his office.

He then sets out various dates upon which he or his office gave various instructions to CBRE or its' solicitors or in relation to the advertisements, publication of advertisements for the sale of properties and so forth, and on the 10th November,

CBRE were asked to provide a draft marketing brochure which was approved for release and on the 17th November 2016 a marketing update was provided by CBRE in relation to the Blackcastle lands.

So I am satisfied that these tasks were undertaken by Mr. O'Brien and I fully accept his evidence, when he says that he did not undertake these qua receiver but rather as agent for the charge holder and he confirmed, and wasn't challenged on this, that none of the work relative to the matters that I have just outlined would be charged to the receivership. In other words, it falls outside the receivership and I'm quite satisfied that a receiver can undertake other work as agent for a charge holder notwithstanding that this is in apparent conflict with the receiver's deemed agency for the mortgagor in terms of the income and rents qua receiver. See Judge Clarke (as he then was) in *Moorview Developments Limited v First Active plc* 2009 IEHC 2 114 and I adopt the passage from paragraph 16.62 in his judgment. I am satisfied, therefore, that no claim in trespass can be sustained.

[Breach of Undertaking]
Secondly, the Plaintiffs' complaint that the Defendants were in breach of agreed mutual undertakings.

These were interlocutory undertakings, and one of those undertakings, one of the principal ones was that:

> *"The Defendants hereby undertake not to take any steps which might otherwise be taken in furtherance of a receiver's power of sale, including the appointment of an auctioneer or any party to procure a sale, the advertisement of the land for sale, the solicitation of any offers for the purchase of the properties or the negotiation of a sale or any step to contract for the sale of the properties set out in Schedule 1 and Schedule 2 hereto as further referenced in Schedule 3 until the delivery of judgment of the within proceedings."*

Although that is part of a more extensive undertaking that was finalised and perhaps signed by the parties but certainly finalised on the 28th March 2017, that particular undertaking it was accepted was one that was given in or about, I think, November 2016 and the breach alleged by the Plaintiffs was that a "For Sale" advertising hoarding was left in position on the Ballycastle site property and

remained there until it was belatedly removed on the 3rd February 2017.

I am satisfied that this breach was inadvertent and did not of itself cause the Plaintiffs any loss or damage. It is not a breach that was of any real significance and it cannot give rise to any claim for damages.

Finally, while I have some sympathy for Mr. Farrelly and Ms. Mangan, particularly as they had been in the development and property portfolio business for a considerable period of time and were not in any way typical "fly by night" developers, there was in truth no substance or merit behind any of the arguments that were pursued on their behalf in this case.

I will hear Counsel further in relation to the appropriate orders but these will include:

1. An order dismissing the Plaintiffs' claim.

2. Judgment on the counterclaim against Vitgeson Limited for €11,383,442.86.

3. Judgment on the counterclaim against William Farrelly for €15,335,201.88, noting that these figures represent the figures due as per the second table in the witness statement of Ms. Burns and noting further that they do not include any award in relation to the two loan accounts therein numbered 55001303 or 55001981 it is my view that that table in an amended form should form part of the Order so as to give clarity as to the amounts and the accounts to which they relate. That is my judgment.