Neutral Citation: [2015] IEHC 366

HIGH COURT

[Record Number redacted]

BETWEEN

PAUL McCANN

PLAINTIFF

AND

A, B AND C

DEFENDANTS

JUDGMENT of Ms. Justice Donnelly delivered the 27th day of April, 2015

1. The plaintiff is the receiver purportedly appointed by EBS Limited ("the EBS") over various properties of the first defendant. The second defendant is the former domestic partner of the first defendant.

2. The present proceedings were instituted by the plaintiff on 29th April, 2014. In the plenary summons and by way of notice of motion, the plaintiff sought the following reliefs:

> "(1) an order requiring the defendants, their servants or agents to vacate the first premises and the second premises [as set out in a schedule to the plenary summons and identified in paragraph 8 of this judgment] and to deliver possession thereof to the plaintiff;
>
> (2) an order requiring the defendants, their servants or agents to cease to hold themselves out as being the parties entitled to deal with, manage or collect the rents in respect of the third, fourth, fifth, sixth, seventh and eighth premises [as set out in the schedule and this judgment] and to cease demanding rent of the tenants in occupation of the said premises;
>
> (3) an order restraining the defendants, their servants or agents from entering or attending at any of the eight premises [as set out in the aforementioned schedule and this judgment] or dealing with the said premises in any manner whatsoever or purporting to deal with the said premises in any manner whatsoever;
>
> (4) an order restraining the defendants, their servants or agents from interfering with the sale of the first premises or the second premises by the plaintiff or otherwise interfering with the receivership of the plaintiff in respect of any of the premises;
>
> (5) where necessary, a declaration that the appointment of plaintiff as receiver of the eight premises is… valid;
>
> (6) an order requiring the defendants to account to the plaintiff for all monies received by the defendants their servants or agents by way of purported collection of rent in respect of any of the eight premises…."

3. The plaintiff no longer seeks these orders against the third defendants. As the plaintiff now wishes to put the first and second premises on the market, he seeks final orders from this court. The second defendant seeks an order, *inter alia*, setting aside the plaintiff as receiver and preventing the EBS appointing further receivers as she contends that the mortgage deeds are void and untenable and are insufficient to support the deed of appointment of the plaintiff.

4. The plaintiff issued proceedings on 7th May, 2014. The plaintiff sought the above reliefs by way of notice of motion. Those reliefs are now sought as final orders of this court. The attitude of the first defendant to these proceedings is that they are of no interest to him. He did not enter an appearance in answer to service of the proceedings. Instead, he sent e-mails to the plaintiff indicating a firm desire not to be brought into these legal proceedings. Further reference to these e-mails will be made at the conclusion of this judgment.

5. The second defendant stated to the court that she consents to the application before the court being an application which will lead to a final order. She has expressly waived any entitlement to seek a statement of claim. I am quite satisfied in all the circumstances, including the fact that discovery was made by the plaintiff, to proceed to deal with the case on the basis that final orders are being sought. Therefore, the plaintiff must satisfy me on the balance of probabilities that he is entitled to the orders sought.

Factual background

6. In order to understand the nature of the case and in particular the nature of the submissions made by the second defendant, it is necessary to set out in some detail the factual background. I will attempt at this juncture to set out such facts as appear undisputed and where disputed, I will avert to same.

7. The first defendant and the EBS were involved in a series of financial transactions involving various loans and security to be provided over same. I will set out the transactions that I believe are relevant to the issues between these parties.

8. By letter of loan offer dated 20th October, 2005, the lender, namely the EBS (known at the time as EBS Building Society), offered to advance to the first defendant a loan of up to €8,318,000 for a term of 25 years approximately at an interest rate of 3.12% variable as set out therein, repayable in accordance with the terms of the letter of loan offer and secured, *inter alia*, by means of a first legal mortgage and charge over the following properties of the first defendant:

> (i) the property at [redacted] ("the first premises");

(ii) the property at [redacted] ("the second premises");

(iii) the property at [redacted] ("the third premises");

(iv) the property at [redacted] ("the fourth premises");

(v) the property at [redacted] ("the fifth premises");

(vi) the property at [redacted] ("the sixth premises");

(vii) the property at [redacted] ("the seventh premises");

(viii) the property at [redacted] ("the eighth premises").

9. The first defendant accepted the loan offer on or about the 16th November, 2005. The purpose of the loan was to refinance the first defendant's eight residential investment properties. On 13th December, 2005, the EBS advanced to the first defendant the sum of €8,318,000.

10. An indenture of mortgage and charge was made on or about the 6th January, 2006, between the first defendant and the EBS ("the first mortgage"). The first defendant created a mortgage in favour of the EBS over eight properties consisting of the second, third, fourth, fifth, sixth, seventh and eighth premises and including a property at [redacted] ("the ninth premises") which is not the subject of these proceedings but is relevant to certain of the submissions of the second defendant.

11. By a further indenture of mortgage and charge made on or about the 10th January, 2006, ("the second mortgage") between the first defendant and the EBS, the first defendant created a mortgage in favour of the EBS over the first premises.

12. On or about the 10th May, 2006, the first respondent, in a series of further letters of loan offer, restructured his loans with the lender. These are known collectively as the 2006 loan offers.

13. By virtue of the 2005 loan offer, the 2006 loan offers, the first mortgage and the second mortgage, the following, *inter alia*, was agreed between the parties:

(i) The first defendant covenanted to pay to the EBS on demand (or on the happening of any event of default) all monies then owing or which may from time to time be or become due and owing or payable by the first defendant to the EBS in any manner whatsoever;

(ii) In order to secure the repayment of the secured monies to the EBS, the first defendant charged unto the EBS his interest in the eight premises;

(iii) The secured monies would immediately become payable by the first defendant to the EBS and the security would become immediately enforceable and all the borrower's rights to deal for any purpose with the mortgaged property or any part thereof would cease immediately on demand by the EBS for repayment of the monies or upon the happening of certain events including:- the failure of the first defendant to pay on the due date any money payable or interest due to the EBS; the failure of the first defendant to comply with any term or condition of any offer letter or facility from the EBS; and/or the default by the first defendant in observing or fulfilling any of his obligations or material covenants or conditions under the indenture of mortgage or under the loan offer;

(iv) The EBS could at any time after the secured monies had become payable and the security had become enforceable appoint by writing under its seal or under the hand of any director, general manager or security for the time being of the EBS or by writing under the hand of any branch manager of the EBS any person or persons to be a receiver or receivers or receiver and manager of the eight premises or any part thereof.

14. In a letter dated the 16th September, 2008, to the EBS from [redacted], the solicitors then acting for the first defendant, it was confirmed that none of the eight premises was a family home within the meaning of the Family Home Protection Act, 1976 ("the Act of 1976") and that the mortgage of the properties therein is not affected by the Act of 1976 because the first defendant was not and never had been married.

15. On the 11th March, 2008, a consent order was made in proceedings before the Circuit Court (Her Honour Judge Flanagan) on foot of terms of settlement reached between the first defendant and the second defendant. The terms of settlement provided that the second defendant, together with the two children of the first defendant and second defendant, were to vacate the second premises by the 1st February, 2008, upon which they were to take up residence in the first premises until 31st January, 2009. Thereafter, the terms of settlement provided that the second defendant and the children were to reside at the ninth premises. This aspect of the order, i.e. the situation with regard to the ninth premises, was registered in the Registry of Deeds on 11th November, 2008.

16. Thereafter, additional terms of settlement were reached on the 2nd June, 2008. Those terms provided that:

"[i]n the event that the settlement cannot be complied with that the Applicant and the children X and Y will reside permanently at [redacted] [*the second premises*] and will enjoy the house as the family home indefinitely."

17. It was also agreed that the second defendant would take over the running of the property portfolio comprising the first, third, fourth, fifth, sixth, seventh and eighth properties and also, the ninth property and a further property at [redacted]. It appears from papers placed before me that an affidavit of judgment dated 21st May, 2009, was registered in the Registry of Deeds on 15th June, 2009, which referred to the order of the 11th March, 2008, and described the second defendant as grantee and gave as a description the nine properties referred to above as well as certain others.

18. The first mortgage was registered in the Registry of Deeds in favour of the EBS on 28th April, 2008. This registration referred to the second to eight premises inclusive referred to above and also to the ninth premises. That latter property was apparently wrongly included and there was a subsequent deed of rectification dated 20th May, 2011, between the EBS and the first defendant. That deed of rectification is in issue in these proceedings and will be referred to in greater detail later in this judgment.

19. The second mortgage was registered in favour of the EBS on 7th October, 2008. This registration related to the first premises.

Both mortgages were registered prior to the registration of the affidavit of judgment referred to above.

20. In a letter to the first defendant, dated 10th September, 2008, the EBS demanded repayment in full of the secured monies. Thereafter, the EBS issued proceedings against the first defendant seeking possession of the eight premises.

21. On 29th October, 2009, the High Court (Dunne J.) made an order for the possession of these eight properties. The EBS did not take possession of the properties on foot of the order. Instead, they purported to appoint a receiver over those properties.

22. The plaintiff's case is that by virtue of the indentures of mortgage and deeds of appointment, the plaintiff (a chartered accountant in the firm of Grant Thornton) was appointed by the EBS as receiver over the properties of the first defendant on 26th May, 2010. By letter dated 31st May, 2010, the receiver wrote to the first defendant at his solicitor's address advising him of his appointment as receiver of the eight premises. In his affidavit sworn on 15th April, 2014, the plaintiff avers that from May 2010 to March 2014, the receivership progressed in an unremarkable manner and neither the first defendant nor any other party was obstructive. The eight premises were managed in the usual manner and any rental profit was used to reduce the indebtedness of the first defendant to the EBS.

23. In February 2014, the plaintiff engaged Hooke & MacDonald, estate agents and auctioneers, in respect of the sale of the first premises and second premises. Ms. Clare Graves of Grant Thornton notified the first defendant by e-mail dated 13th February, 2014, of the plaintiff's intention to place these premises on the market for sale. On 20th March, 2014, the first defendant e-mailed Ms. Graves expressing concern that he had not been informed of the receiver's decision to place the two premises on the market. By replying e-mail dated 21st March, 2014, Ms. Graves advised the first defendant that she had already informed him of such decision. Further, Ms. Graves advised that the first and second defendants should arrange a time with the receiver's agents when they could both attend and advise what fixtures and fittings each party owned and arrange a date for removal of same.

24. By letter dated 31st March, 2014, the second defendant wrote to the EBS claiming to be "the person legally appointed to oversee [A]'s financial affairs." She stated:

> "I have learned with dismay and alarm that the property portfolio as indicated by the list annexed hereto was not only to be sold but that several of the properties are in disrepair and dilapidated."

Further, it was claimed that the receiver "grossly neglected their duty to maintain the properties" and were not validly appointed. The second defendant informed the EBS that as of 31st March, 2014, she had moved back into "the family home" namely the second premises.

25. On 31st March, 2014, Hooke and MacDonald contacted the receiver's office to inform him that the tenants of the third premises had been in contact to say that a woman identifying herself as Catherine Doyle of Capital Properties had attended at their rented property on 29th March, 2014, and told the tenants that they were the new agents with effect from 1st April, 2014. It was unclear at that time whether the woman was truly Ms. Doyle or the second defendant. The locks on the property were changed on all unit doors and the tenants were given keys. Notices were then placed in the property with the words "Notice: Removal of Implied Right Access." Similar actions took place in all eight premises.

26. In his affidavit sworn on 15th April, 2014, the plaintiff stated that he was advised by Hooke & MacDonald that they contacted all the tenants in the properties managed by them to confirm that they remained the only agents and were informed by the tenants that they continued to be pursued by a woman who stated that she was connected with Capital Properties and who in fact succeeded in obtaining rental payments from three parties. In respect of the two premises placed on the market, the locks were also changed and in one case, a CCTV camera was placed on the door. The plaintiff avers that all attempts by his office to contact Ms. Catherine Doyle through Capital Properties were unsuccessful. In her oral submission before this court, the second defendant accepted that she had changed the locks and was responsible for stopping the attempts by the receiver to sell the premises. The reasons she gave for this were in her submission that she had put so much of her life into these properties and she was shocked at the condition she found the properties in. When she found out the premises were being put on the market she was shocked and felt she had to do something. She submitted she did not then act with legal knowledge.

27. At about 5pm on 31st March, 2014, an e-mail was sent from an e-mail address apparently linked to Capital Properties to Ms. Graves and to a staff member at Hooke and McDonald with an attached letter from "Capital Properties". Capital Properties did not identify its client but listed all the eight premises and purported to "remove" all "implied rights of access" to the properties and further stated that An Garda Síochána would be called in the event of trespass and any agent acting on behalf of Grant Thornton would be prosecuted. The letter also sought a copy of the deed of appointment. An e-mail sent the same day at 5.43pm made similar requests and also alleged that Hooke and MacDonald were "in breach of the Non Fatal Offences Against the Person Act, 1997" arising out of an alleged complaint by a tenant to Capital Properties. By reply on 31st March, 2014, Ms. Graves furnished a copy of both deeds of appointment and asked the writer to contact her as she had been unsuccessful in her attempts to contact Capital Properties.

28. Grant Thornton informed the tenants that the receiver had not instructed Capital Properties or any related party to act on his behalf. Tenants were advised that that they should continue to pay into the nominated account.

29. The plaintiff arranged for Ktech, a security company, to attend at the eight premises to change the locks. In respect of the first and second premises which had previously been vacant, Mr. Kevin McGarry of Ktech informed Grant Thornton that there were now people in occupation of the premises who refused admittance and claimed to be the "original owners" of the property.

30. On 3rd April, 2014, the plaintiff's solicitors wrote to the first and second defendants and also to the third defendant by letter dated 11th April, 2014, advising them, *inter alia*, that they were interfering with the receivership and have trespassed on the properties the subject of the receivership. They were also informed that neither they, nor any other person directed by them, had any right or entitlement to possession of the properties or to the rental income derived therefrom. The letters also sought an undertaking to the effect that the defendants would desist from such interference and surrender possession of the properties to the plaintiff.

The plaintiff 's case

31. Mr. Mark Hughes, senior manager with the commercial unit of the EBS swore an affidavit in these proceedings setting out the factual background for the purpose of establishing the validity of the appointment of the plaintiff as receiver over the properties the subject matter of the proceedings. He exhibited the letter of offer, the acceptance duly signed by the first defendant and the standard commercial loan conditions under which the eight properties as set out above were to be secured by means of a first legal mortgage and charge in favour of the EBS. Mr. Hughes also exhibited the indenture of mortgage and charge made on the 6th January,

2006, which covered the second to eighth premises inclusive and the indenture of mortgage and charge made on the 10th January, 2006, which covered the first premises. A letter dated 16th September, 2008, from [redacted], solicitors acting for the first named defendant, confirming that none of the properties set out above was a family home within the meaning of the Act of 1976, was also exhibited.

32. Thereafter, Mr. Hughes detailed the manner in which the first defendant restructured his loans with the EBS. He confirmed the matters agreed between the parties as set out above. He set out that in breach of the covenants, terms and conditions of the said first mortgage and second mortgage, the first defendant defaulted in the payment of the secured monies and the secured monies therefore became due and owing in their entirety.

33. Mr. Hughes said that in accordance with the terms of the first and second mortgages, the rights of the EBS to appoint a receiver therefore became enforceable. He said that the EBS also became entitled to take possession of the eight premises. He referred to the proceedings that EBS took against the first defendant and the order for possession they obtained on the 29th October, 2009, in relation to the eight premises.

34. He said that the EBS did not take possession of the eight premises but chose instead to appoint the plaintiff as receiver over the properties. He exhibited true copies of the deeds of appointment dated the 26th May, 2010. The first deed of appointment related to the first premises which had been charged in the second mortgage. The other deed of appointment related to the second to eighth premises inclusive, as referred to and comprised in and charged by the first mortgage.

35. The plaintiff himself swore an affidavit on the 15th April, 2014. In that affidavit, he averred to the various loans and the indentures of mortgage and charge and the history of the proceedings between the first defendant and the EBS which led to his appointment as receiver. He claimed his entitlement to act as receiver through the mortgage deeds and deeds of appointment as outlined above.

36. The plaintiff confirmed that he had been in contact with the first defendant through his former solicitors Arthur McLean Solicitors, through his accountant Eugene Murphy Sphere Accounting Services, and by e-mail to a particular e-mail address outlined.

37. The plaintiff set out the unremarkable history of the receivership between May 2010 and March 2014. He went on to aver to the manner in which these proceedings arose in the aftermath of the notification of the decision to sell the premises.

38. By virtue of the foregoing, the plaintiff submitted that he has established his entitlement as validly appointed receiver to the orders sought.

The second defendant's case
39. The second defendant represented herself throughout the proceedings. She swore an affidavit on the 28th May, 2014. In that affidavit, she claimed that by virtue of the family law court orders made on the 11th March, 2008, she had the first legal charge over the properties as set out therein. Much of the affidavit contains submissions of law and those specific details will be addressed at the relevant point in this judgment. At this point, it is sufficient to say that the legal submissions relate to issues regarding the defects in the loan offers and the deeds relied upon by the plaintiff.

40. The second defendant said that the EBS throughout the period between the 2005 loan offer and the present had acted in a grossly negligent way misrepresenting itself and in turn had caused damage and loss to herself and her children. She claimed that the plaintiff unlawfully trespassed on the properties listed above.

41. She claimed that the plaintiff acted negligently by accepting his appointment without carrying out due diligence on the paperwork that supports the instrument of his appointment. She also said that the properties were in a severe state of disrepair contrary to the obligations of law of the plaintiff. She said that she took vacant possession of what she says is the family home, i.e. the first premises, due to damage and loss incurred "due to the failure by the plaintiff to comply with the Family Court Orders giving rise to both myself and [her children] living in substandard accommodation for the years subsequent to the invalid appointment of the receiver." The second defendant said that it was for these reasons that she took vacant possession of the first premises. She seeks an order dismissing the plaintiff's claim.

42. Shortly before the hearing commenced, the second defendant swore another affidavit on the 17th November, 2014. In this affidavit, apart from exhibiting various loan offers, the second defendant again asserted matters that were more properly the subject matter of submissions and these are dealt with in the course of this judgment. The second defendant also exhibited and referred to various Registry of Deed search results in which she said that numerous loans had not been vacated. She also said that the schedule of documents listed to support the certificates of title sent by the solicitors in these proceedings did not contain deeds of release or vacates in relation to those loans. She said that this was a breach of contract by the EBS and was a clear breach of the law.

43. In that affidavit, she also made a counterclaim insofar as she claimed an order setting aside the plaintiff as receiver, an order restraining the plaintiff, his servants or agents from entering, attending or trespassing on or near the eight properties, a further order restraining the plaintiff, his servants or agents from receiving rent for the eight properties, an order preventing the EBS appointing further receivers and an order instructing the EBS and the defendants to engage in mediation to find an equitable solution to the problems set out.

44. In light of the above, the court views the second defendant's case as based upon two main planks. In the first place, she said that when taken together the loan offers and mortgage deeds are so full of errors (factual and legal), so flawed and/or so self-contradictory that they are null and void and/or cannot be relied upon to give legal justification to the appointment of the plaintiff as receiver. Her other argument is that she had a beneficial interest in these properties that takes priority over any interest that the EBS might have.

The issues between the parties
45. The issues raised by the second defendant are wide ranging and interrelated. Due to that interrelatedness, it is necessary to switch between her two issues as outlined in the proceeding paragraph rather than proceed in a linear fashion. Furthermore, as the plaintiff's objections were trenchantly directed towards the lack of standing of the second defendant to make many of her arguments, I will deal with that in due course.

In camera proceedings
46. An issue arose in the course of the proceedings relating to the family law proceedings between the first two defendants. I raised the issue that these were matters which were more properly dealt with *in camera*. Although the second defendant initially indicated

that she had no issue with them being dealt with in public, she later confirmed that she did have an issue. In any event, I had already indicated that it was my view that those matters should not be aired in public. During the course of the proceedings, the court sat *in camera* to hear the evidence of, and the submissions relating to, those proceedings. As those matters were *in camera* and as this judgment will necessarily refer to them, it is therefore necessary that the parties names and indeed the premises should be redacted from this judgment and that there should be as minimal as possible reference to the family law proceedings as is consistent with the requirements to give reasons for the proper adjudication on the issues raised. I propose to discuss with the parties the form in which this judgment can be disseminated in public.

Objections to the evidence

47. The second defendant objected to the evidence from Mark Hughes as he is not an officer of the bank. She relied in her affidavit on a submission that under the Bankers' Books Evidence Acts, the plaintiff's deponent is not entitled to swear the affidavit. Counsel for the plaintiff relied upon *Permanent TSB plc t/a Permanent TSB v. Beades* [2014] IEHC 81 where this issue was raised. She submitted that McGovern J. dealt fully with the legal position in holding that there was no need to rely upon the Bankers' Books Evidence Acts where the evidence was given by way of affidavit or orally in that the records provided *prima facie* evidence. She also submitted that Mr. Hughes was in any event an employee of the EBS bank.

48. The relevance of the above mentioned *Permanent PTSB* as authority for the proposition that the production of the bankers' books is sufficient even without reliance upon the aforementioned Acts is now questionable arising from the decision of O'Malley J. just over a week later in *Ulster Bank Ireland Ltd v. Dermody* [2014] IEHC 140. It is unsurprising that O'Malley J. did not refer to the Permanent PTSB decision in her own judgment given the short period of time separating them. O'Malley J. held that the evidential rules regarding hearsay applied to bank records. In the absence of compliance with the Bankers' Books Evidence Acts, the production of the bank records is hearsay and therefore inadmissible to prove the truth of their contents.

49. O'Malley J. stated that for the purpose of the said Acts, an employee may be considered to be an officer of the bank. That was applied by Costello J. in *O'Donnell v. Bank of Ireland* [2015] IEHC 228. Mr. Hughes is the senior manager of the commercial unit of the EBS. He is an employee, therefore the relevant books are admissible under the said Bankers' Books Evidence Acts. This court notes, however, the observation of Edwards J. in *The Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2010] IEHC 152 that sometimes reliance on the statement contained in documents may be properly characterised as non-hearsay original evidence. That may require individual attention to each document and its purpose. Sometimes the proof of the existence of a deed is all that may be required in a given case.

50. Apart from the issue of whether the evidence could properly be admitted under the Bankers' Books Evidence Acts, the second defendant made a further objection to the evidence. This submission appears to be that as this is a final hearing that the provisions in respect of O.40 r.4 should apply. That rule requires that affidavits shall be confined to such facts as the witness is able of his or her own knowledge to prove, and shall state his or her means of knowledge thereof, except on interlocutory motions, on which statements as to his or her belief, with the grounds thereof, may be admitted.

51. In so far as he is proving the existence of deeds and documents, the evidence of Mark Hughes is not hearsay evidence. However, in so far as Mr. Hughes attempted to rely upon the truth of the contents of the bank's records, he was relying on hearsay evidence. Section 4 of the Bankers' Books Evidence Act, 1879, specifically permits evidence of bankers' books to be given by way of affidavit. I take the view that the phrase "able of his own knowledge to prove" includes a situation where an officer within the meaning of the said Acts who has access to the books and records of the bank and has made a diligent perusal of them for and on behalf of the lender produces them to the court for consideration. Thus, the officer of the bank is entitled from his or her own knowledge to put the facts before the court, i.e. the existence of the bankers' books and the statutory exception to the hearsay rule provided by the Bankers' Books Evidence Act, 1879, permits the contents of the documentation to be relied upon.

52. The plaintiff also swore an affidavit and he gave evidence of the fact that he was appointed receiver and he exhibited the true copies of the deeds of appointment. He gave evidence of his direct involvement in relation to the various premises and the property services companies he hired to manage them. It is true to say that he did give some evidence of matters that he did not appear to have first hand knowledge of. These relate mainly to incidental matters that are not disputed by the second defendant. Insofar as he gave evidence relating to e-mails to and from his office, I am satisfied that even if not directed to him, the facts of the receipt of the e-mails and indeed the reference to their content are matters of which he has direct knowledge. Much of his affidavit concerned the third defendant with which this case is no longer concerned. I am satisfied that there is no issue with regard to any minor matter that may not be within his direct knowledge. Therefore, in the above circumstances, this objection on behalf of the second defendant is rejected.

Locus Standi, privity of contract, res judicata and jus tertii

53. Counsel for the plaintiff submitted that the second defendant has no *locus standi* to challenge any of the matters concerning the validity of the mortgage and the rights of the EBS thereunder. Counsel submitted that there is no privity of contract between the EBS and the second defendant that permits her to pick apart the contractual documents between the first defendant and the EBS. Counsel referred to the fact that in his response to the proceedings, the first defendant does not challenge these. She said that judgment has been entered against that defendant for circa €9 million. Furthermore, she said that the High Court (Dunne J.) has already granted an order for possession against the first defendant in relation to the property. In essence, counsel submitted that these are not the arguments of the second defendant to make.

54. Allied to that argument, counsel relied upon *jus tertii*. In particular, she relies upon McMahon and Binchy, *Irish Law of Torts*, (Tottel Publishing, 3rd Edition, 2005) at p. 671 para. 23.45 as follows: "it will not normally be a good defence for a person sued for trespass to allege that the plaintiff has no right to possession of the lands in question because the right (*jus*) rests in a third party (*tertii*)." Counsel submits that where she has made a *prima facie* case of entitlement to possession, then the second defendant is not entitled to make the argument that the right to possession lies with the first defendant.

55. The second defendant did not address those arguments directly at the initial hearing into this matter. Her arguments were directed towards difficulties with the documentation between the EBS and the first defendant and between the plaintiff and the EBS. Insofar as the second defendant raised anything that could possibly give her a right, this was in relation to the terms of settlement of the family law proceedings. That family law settlement is dealt with below from para. 66 onwards.

56. I had asked the parties to return to court for a further hearing to address two discrete matters. The second defendant took the opportunity to address other issues such as *res judicata*. She relied upon the definition of *res judicata* in Henry Murdoch, *Dictionary of Irish Law* (Bloomsbury Professional, 5th Edition, 2009). She further relied upon *Belton v. Carlow County Council* [1997] 2 ILRM 405 and made the point that the parties were not the same as neither the plaintiff nor herself were parties to the earlier proceedings. She also submitted that the issues were not substantially the same.

57. In reply, counsel for the plaintiff made reference to the issue of the possession being *res judicata.* An issue of *res judicata* may arise between parties to an action. She agreed that neither the plaintiff nor the second defendant was party to the earlier action. However, she said that the issue of the validity of the mortgages was *res judicata* as the question of its validity was substantially the same. She said that the lender, namely the EBS, and the second defendant were the only parties to the mortgage. They were the only parties that could litigate the validity of the mortgage. She referred to the written submissions of the second respondent filed in response to the court's request and said that it was clear that the issues being argued were contractual issues. It was submitted that this was an attempt to re-litigate the original contract by a third party, namely the second defendant. In that sense, she submitted that the issue was *res judicata*.

58. It is clear that the loan agreements were made between the first defendant and the EBS and that the second defendant was not a party to those loans or to the subsequent mortgages. The validity of those mortgage deeds has already been determined and that is certainly a finding by a court which is binding upon the first defendant. Thus, the matter is clearly *res judicata* against the first defendant.

59. The determination by the court that the EBS was entitled to orders of possession was a determination made in the context of an action between the EBS and the first defendant. They were the parties to the mortgage. It is a court finding that the mortgages were valid and created an entitlement to possession of the EBS. It is also important to note that the definition in Henry Murdoch, *Dictionary of Irish Law* (Bloomsbury Professional; 5th Edition, 2009) relied upon by the second defendant refers to "parties and their privies" being estopped from denying the state of affairs established by a judgment. Privy in the same dictionary is defined as follows: "[a] party is the privy of another by blood, title or interest where he stands in his shoes and claims through or under him". In the *Belton* case referred to by the second defendant, it was held that the shareholders of a company and the company were not privies as their interests were different.

60. I am quite satisfied that the appropriate characterisation of the main plank of the second defendant's case is that she is saying that she was the first defendant's privy as regards the entire contractual dealings between the EBS and the first defendant. She is attempting to stand in his shoes to argue matters of contract law/conveyancing law that are clearly matters for the parties to the original transaction. However, in so relying the plaintiff is faced with the issue of *res judicata*.

61. Insofar as the second defendant relies upon arguing the rights of the first defendant (as an agent or otherwise), she cannot dispute the validity of the mortgages. She purported to do so in her letter of the 31st March, 2014, referred to above, *i.e.* a person legally appointed to oversee his affairs. The validity of the mortgages are *res judicata* against him and therefore *res judicata* against the second defendant insofar as she asserts a right through him. Therefore, as regards each and every argument she makes about his contractual rights, those are arguments that she is not entitled to make as that matter is *res judicata*.

62. Even if I am incorrect in so holding that the matter is *res judicata*, I am of the view that the principle of *jus tertii* is also determinative. In circumstances where the first defendant does not have an entitlement to possession of the properties, the second defendant cannot assert that he (the first defendant) has in fact such a right. Furthermore, as the second defendant claimed that she was the person legally entitled to act for the first defendant, it is clear that she cannot have a greater right to possession than he might have. In circumstances where the High Court has ruled that he has no entitlement to possession, the person purporting to act for him cannot have that greater right to possession.

63. The plaintiff having produced a *prima facie* case of entitlement to possession, reliance by the second defendant upon the first defendant's right to possession is simply untenable. It is only the first defendant who can argue against that right to possession and as referred to above, there is already in existence a judicial determination that the first defendant is not entitled to possession.

64. In addition, I have carefully considered the mortgage deeds and the deeds of appointment of the plaintiff as receiver. It is quite clear that on their face that the deeds provide for the said appointment and they are in order. Indeed, the second defendant's arguments were not directed towards that particular point but towards the overall validity of the appointment based upon the invalidity of the mortgage deeds (for arguments that I deal with below).

65. As I have said, my determination above is subject to the important caveat that the second defendant seeks to defeat the order for possession by making an argument that she in fact was entitled to possession herself as she had an interest in the property of which the EBS was aware at the relevant time. This submission refers to the settlement of family law proceedings between herself and the first defendant which I now address.

The beneficial interest

The family law proceedings

66. Under this heading, the second defendant's claim amounts to one that, arising from the outcome of the family law proceedings, she had a beneficial interest in the property. This is a claim that her right to possession is independent of the right to possession of the first defendant. It is that independent claim which requires the court to deal with it, despite the findings made above.

67. Family law matters were settled between the first and second defendant. On the 11th March, 2008, as part of the settlement agreement, the Circuit Court received and filed the terms of the consent. The court also made the orders where applicable set out in the terms of the consent. Insofar as it is relevant, the first defendant transferred to the second defendant a joint legal and beneficial interest in the property situate at [redacted] (the ninth premises) so that they would hold it as joint tenants free from encumbrances. The consent terms provided for the second defendant and the children to vacate the second premises by a given date and to take up residence in the first premises in the stories above the basement. The first defendant was to reside below the basement. That was to continue until the 31st January, 2009, at which stage the second defendant and the children were to take up occupation of the ninth premises. In the meantime, the ninth premises was to be vacated by any tenants then in occupation.

68. Additional terms of agreement were subsequently drawn up between the parties. This agreement was purportedly dated the 2nd June, 2008. The agreement placed before the court is not executed or made a rule of court. The agreement was apparently entered into in the event that the settlement reached in January 2008 could not be complied with by the first defendant. It was said in that second agreement that if the original agreement could not be complied with, that the second defendant and her children would reside permanently at the second premises and "will enjoy the house as the family home indefinitely".

69. The additional terms of agreement said that the second defendant would take over the running of the property portfolio consisting of the eight premises at issue in these proceedings and the ninth premises. It was agreed between the first and second defendants that the profits derived from running the portfolio would service payment for the costs and expenses set out as payable by the respondent in the earlier agreement. It was further agreed that the first defendant would reside at the first premises and that the

second defendant would discharge all outgoings on that property from the proceeds of the business during the first defendant's residence in that property.

70. The second defendant's arguments under this heading are not straightforward. She submits that the difficulties that the first defendant had with complying with the agreement were due to the activities of the EBS. She says that this in turn caused her great difficulties. At one point, she identified her family law solicitor who is one of the leading solicitors in that area and said that his advices were that there was no point in pursuing the first defendant as the EBS had charges over his properties. She however submits that those charges were erroneous.

71. She submits that she had to leave the second premises and go to the first premises for the purpose of generating an income from the second premises. She says that she had to leave the first premises as the circumstances were extreme. She says that in moving from the second premises, she was not relinquishing the family home but that the matter was done under pressure from the EBS because the portfolio was underperforming.

72. A great deal of the second defendant's submissions concerned the dates upon which the EBS registered the said indentures of mortgage and charge in relation to the properties. This is dealt with later in this judgment.

73. Counsel for the plaintiff in her general response to these claims by the second defendant pointed to the fact that these arguments were based upon the first defendant's entitlements. It was submitted that the first defendant could not pass on to another person an entitlement he did not possess.

74. Counsel submitted that the only order made by the court was that of the 11th March, 2008. This was the only one that was registered in the Registry of Deeds. The further agreement as exhibited is apparently not executed. It is an exhibit in the affidavit of the plaintiff having been sent to him by the second defendant. No further copy has been given to the court. In submissions to the court, the second defendant concentrated on the original agreement and the court order made subsequent to same. I am therefore satisfied that the only settlement which has been proven is that of January 2008. I am further satisfied that that was the only settlement which was made the subject matter of a court order.

75. However, even if one was to accept that later agreement had been duly executed, it does no more than purport to create a right of residence and to provide that the second defendant was to take over the running of the portfolios. As will be demonstrated, neither of this has any impact on the rights at issue between the plaintiff and the second defendant.

Deed of Rectification

76. The first mortgage had included "the ninth premises" *i.e.* [redacted]. By deed of rectification between the EBS and the first defendant, there was an acknowledgement that this had been included in error. Under that deed, the EBS surrendered, released and confirmed unto the first defendant the erroneously included ninth premises to the intent that the said property would be held by the first defendant freed and discharged from the first mortgage. That deed stated that in all other respects, the first mortgage was ratified and confirmed.

77. The plaintiff submitted that this was simply an error and an unfortunate one but that it had no bearing on the issue. Counsel described the issue as a red herring.

78. On the other hand, the second defendant submitted that this is a crucial aspect of her case. In her first affidavit, she begged to draw the attention of the court "to the erroneous inclusion of [the ninth premises]…" and the "erroneous exclusion of [the first premises]…" In her second affidavit, she again referred to the erroneous inclusion of the ninth premises. She went on to say that in spite of the fact that no mortgage or security should have been taken against the ninth premises, the charge was registered in the Registry of Deeds. She said that this had not been rectified to date, so current public records show an outstanding charge in favour of the EBS on this property.

79. For the reasons set out later in this judgment, I am satisfied that there is no merit in the submission regarding the searches showing an outstanding charge in favour of the EBS. Furthermore, even if it could be proven that no deed of rectification had been executed or registered, this would not have the effect of rendering the original mortgage deed ineffective against the remaining properties. The plaintiff is not seeking any orders against the ninth premises so its erroneous inclusion on the mortgage is irrelevant.

80. At the hearing, the second defendant made further submissions in relation to the effect of this erroneous inclusion of the ninth premises. Indeed, the second defendant did not accept that it was entirely erroneous as she submitted that the EBS at the date of the deed thought it was entitled to the charge. At the hearing, she submitted that the effect of the "erroneous registration" was that the completion of the family law agreement was stopped or frustrated by this registration. To a large extent, this argument was tied up with her argument that the entire registration of the mortgages by the EBS frustrated the completion of the family law agreement. Again, in the interests of a logical progression of arguments, I will deal with this under the next succeeding heading.

The Circuit Court Settlement and Order

81. As indicated, the settlement and order primarily relate to the ninth premises which is not the subject matter of these proceedings. The first defendant agreed to transfer a joint and beneficial interest therein free from encumbrances to the second defendant so that they would be joint tenants free from encumbrances. It later provided that the second defendant was to have a sole right of residence (up to 1st February, 2009) in the property save for the top floor. That top floor was to continue to be let by tenants.

82. The second defendant maintains that the registration by the ESB of the ninth premises thwarted the carrying out of the agreement between herself and the first defendant. The mere stating by the second defendant that this thwarted the carrying out of the agreement does not amount to credible evidence that it did so. No concrete, tangible evidence in that regard is before the court. In all the circumstances and having carefully considered the matter, I do not accept that there is any sufficient evidence to support that proposition. In my view, this was an error that was subsequently rectified and it had no bearing on the agreement between the parties. More importantly, it did not affect in any way the obligations between the first defendant and the ESB arising out of the agreements between them. Following on from that, it does not affect the rights of the plaintiff in this case.

83. The said settlement agreement of January 2008 also provided for interim residence of the second defendant and the children. She was to vacate the second premises and then go to the first premises. It was thereafter that she was to go to the ninth premises.

84. In relation to that settlement, it can be seen that the only purported right to be transferred was a purported right in the ninth premises. I am quite satisfied that the settlement and court order can in no way be interpreted as meaning that any interest of the first defendant in the premises at issue was purported to be transferred to the second defendant.

85. The second defendant made a further submission. While she accepted that the family law agreement does not mention the portfolio, she submitted that the financial value agreement between herself and the first defendant was substantial. She said that this was particularly so since she was not married to him but nonetheless obtained a very sizeable financial settlement. She submitted that the performance of that family law agreement was subject to the performance of the portfolio. In my view, there is nothing unique or unusual about that.

86. The "performance" or the "fulfilment" of many family law (or indeed other) settlements may as a matter of reality be subject to the continuation of the generation of income (or the maintenance of capital) by a particular party. The effect that a subsequent loss of income generating power may have on the contractual or family law agreement is to be resolved as a matter of contract or, if relevant, family law. In my view, there is no merit in the argument that the property rights of the second defendant *vis à vis* the plaintiff or *vis à vis* the EBS were affected in the legal sense by any matter concerning the performance of the portfolio. The entering into a contract or agreement by two parties cannot by that reason alone affect the rights and liabilities of those parties towards their creditors who are not themselves party to the contract or agreement.

87. Finally, and for clarification, the second agreement purportedly dated June 2008 does not, on any reasonable interpretation, purport to transfer the first to eight properties to the second defendant. At most she was to take over the running of those premises. The only matter that it purported to give her was a right to reside permanently in the second premises. It can be observed that the first defendant could not transfer an interest that he did not have.

Priority

88. The main submission by the second defendant is one based upon priority. The second defendant argues that she has a priority over the EBS's interest in the circumstances regarding the settlement agreement and court order as set out above. As I have already ruled that the settlement agreement and the court order do not give her a beneficial interest, there should be no necessity for me to deal with this issue further. However, in the interest of providing some clarity and finality to all the issues to be brought to do so, I think it is appropriate that I proceed to rule upon these issues as if they could have relevance.

89. The second defendant refers to the fact that the first mortgage was stamped by the Registry of Deeds on the 27th April, 2008, and that the second mortgage was stamped on the 7th October, 2008. She submitted that those dates were some considerable time after the date of the execution of the first and second mortgages. The second defendant referred to various letters exchanged between EBS, the solicitors for the EBS and [redacted] Solicitors who were then the solicitors for the first defendant. The second defendant's argument was that her settlement was reached prior to the charges being registered in favour of EBS and that therefore, the protection given by the registration should be defeated in equity. She submitted that the EBS had notice of the settlement. She maintained that the notice under which the registered charge is defeated by the unregistered charge is both actual and imputed.

90. The Circuit Court order is stamped by the Property Registration Authority on the 11th November, 2008. That registration is noted in the Registry of Deeds search exhibited at YWS5 by the second defendant and a separate search placed before the court by the plaintiff dated the 3rd July, 2014, as affecting the ninth premises. Thus, it can be seen that on the face of the deed and of the registration, there is no affect on the properties the subject matter of these proceedings. Indeed, at one point in her submissions, the second defendant referred to herself as possessing a charge over one property over which the EBS had still had a charge (apparently a reference to the ninth premises).

91. Counsel for the plaintiff categorised the registration issue as a red herring based upon this fact, *i.e*. the second defendant does not have a charge over any of the properties (namely the first to eight premises inclusive which are the subject matter of these proceedings). Nonetheless, in an effort to be as comprehensive as possible for the assistance of the court and the second defendant, counsel for the plaintiff refers to Wylie, *Irish Land Law* (Bloomsbury Professional, 5th Edition, 2013) at para. 13.101 *et seq* in relation to the summary of the priorities between mortgages/charges on unregistered land. Counsel correctly submitted that even if the court order could somehow be interpreted as affecting these premises, the EBS still have priority insofar as its mortgages were registered prior to the registration of the court order. Those mortgages were executed prior to the family law settlement. They were registered after the date of the family law settlement/court order but prior to the registration of the Circuit Court order.

92. The second defendant relied upon a claim that the EBS had notice of the family law settlement agreement. She claimed that the EBS acted expeditiously at that point in 2008 after the family law agreement with full knowledge and with intention to dispossess her children of their lawful interest in the portfolio. She reliesd upon the case of *O'Connor v. McCarthy* [1982] 1 IR 161. In that case, it was held by Costello J. that the registration of a memorial of the second contract in accordance with the provisions of the Registration of Deeds Act, 1707, conferred on the second contract priority in relation to the first contract in accordance with the provisions of section 5 of the Act of 1707 subject to the application of the equitable doctrine of notice. Priority may be displaced where the first purchaser establishes that at the relevant time the second purchaser or his solicitor had actual notice of the existence and nature of the contract.

93. The second defendant's submissions under this heading were driven by her belief that the EBS only acted in 2008 to register their interests on the properties because they had notice of the family law agreements. There is simply no evidence of that in the papers. The correspondence between the EBS and the then solicitors for the second named defendant who were the solicitors for the first defendant, was in the nature of the usual, even if somewhat late, request that the solicitors fulfil their undertakings with respect to the registration of the properties.

94. The material relied upon by the second defendant simply establishes that the EBS wrote on the 14th March, 2008, saying that on a current review of their records it came to their attention that the then solicitors for the second defendant held the deeds for the eight properties. They asked for confirmation of the current registration. The solicitors replied on the 1st April, 2008, confirming they held the title deeds and that the mortgages had been registered in favour of the EBS. In fact, the mortgages were only registered on the dates referred to above. The second defendant does no more than assert her belief that this correspondence was initiated with a view to dispossessing herself and her children. I do not consider that the material relied upon by the second defendant amounts to evidence that the EBS had notice of the family law agreement. I therefore reject her contention that there is actual notice. I also reject her contention that such notice can be "imputed" or "inferred" on the facts.

95. Therefore, I am quite satisfied that the mortgages of the EBS being registered prior to the registration of the order of the Circuit Court and without notice as regards that settlement or order, take priority over any claim that the second defendant might have had a beneficial interest in premises numbering one to eight of para. 8 above. Of course, as I have already found, the second defendant has no beneficial interest in those premises.

96. A feature of the submissions made by the second defendant was that she referred to the advice she had received from her own solicitor who had represented her in the Circuit Court process. She said that her solicitor had advised her that there was no point in

pursuing the first named defendant as the EBS had charges against his properties. She then submitted that these were erroneous charges. It is not entirely clear when this information was given to her. If she had notice of the EBS charges then, even if her charge had been registered first in circumstances where she had actual notice of the exiting charges, then she would not have a priority. I do not make any decision on that matter as I do not need to.

97. In conclusion, I am satisfied that the second defendant did not have a proprietary right in any of the relevant properties. Furthermore, there is no basis for contending that the EBS had notice of any supposed property right at all.

98. As there is no proprietary right or right to possession on her own behalf, it is clear that the issue of the validity of the contract and the mortgages are clearly *res judicata* insofar as the second defendant is claiming rights through the first defendant. She is not entitled to argue his right to possession where he in fact has no such right to possession.

99. The above should end the matter. However, again for the sake of completeness, I have decided to address the issues raised by the second defendant as if she had a right to raise them. This will give clarity and finality to each of the parties as to the view of this court regarding all of these submissions.

Other issues

Negligence of Receiver
100. The second named defendant made certain submissions in relation to the alleged negligence of the plaintiff in his capacity as receiver. These related to the condition in which she found certain of the properties when she returned to them in March 2014 when she heard of the plaintiff's intention with regard to the sale of the properties. She made reference to certain photographs that she had of the properties.

101. In her oral submissions to this court on the second day of the hearing, the second defendant confirmed that she was relying on the issue that the receiver was invalidly appointed. She submitted that the matter of negligence was "for another day". She said it was not a pivotal point on which she was trying to remove the receiver from the property. In fact, she explained that the receiver's negligence was why she had acted in the manner she did.

102. Insofar as negligence was raised, the plaintiff replied that this is not a matter for the second defendant to argue or to claim upon. The plaintiff says, while denying any such negligence, that this is a matter that can only be relied upon by the borrower, *i.e.* the first defendant.

103. The argument of the plaintiff has substantial merit but the fact of whether there was or was not negligence is not something I have to consider on the basis of the submission of the second defendant.

The defects in the mortgage deed
104. The second defendant argues that there were defects in the mortgage deed and the contract upon which it is based. These will be dealt with in the following sub-headings.

The mortgage was not executed by the EBS.
105. The second defendant argued that neither mortgage deed is executed by the EBS. She submitted that for this reason, the appointment of the plaintiff as receiver was invalid. The mortgage deeds were executed by the first defendant.

106. The plaintiff submitted that there is no requirement that the deed be executed by the grantee to take effect. She relied upon this as a matter of long established first principles of the common law. She also relied upon the case of *Taite v. Beades* [2013] IEHC 440, a decision of McDermott J. delivered on 30th September, 2013. In that case, McDermott J. referred to the Statute of Frauds (Ireland) Act, 1695, in holding that it was only necessary that a signature be provided by "the party to be charged therewith". For the sake of completeness, counsel also relied upon Barry Magee, *Investigating Unregistered Title* (Bloomsbury Professional, 2012) at para. 6.42 in which it was stated that it was not uncommon for a deed not to be executed by the grantee. It is only required in very particular circumstances, none of which exist here.

107. The second defendant made no attempt to supplement her assertions of the legal position which she made on affidavit. I am quite satisfied that this point has no merit. It is a matter which is well established in law. The grantee is not obliged to execute a deed save in very particular circumstances. None of these circumstances exist here. I therefore reject the contention made by the second defendant in this regard.

The mortgages are not stamped prior to drawdown
108. The second defendant submitted that the mortgages were not stamped in the Registry of Deeds prior to the drawdown contrary to the terms and conditions of the 2005 and 2006 loan offers. The second defendant referred to it generally and she also pointed to point 6 of the loan offers. This condition states "that the Borrower's solicitor be satisfied that the security required can validly be implemented and that any property given as security herein is properly stamped to cover this Loan and complies with all relevant planning permissions, building and fire safety regulations." There is little or no amplification of the point that the second defendant makes under this heading.

109. The plaintiff submitted that this is not a proposition that is known to the law. I agree that nothing has been put forward by the second defendant to support her contention. In any event, I reject that it represents the law that even if there was a breach of the loan offers (and I am satisfied there was not), that this would have affected the borrower's duties or the validity of the mortgages themselves.

110. Furthermore, the plaintiff submitted that where there is an agreement for a legal mortgage, the lender enjoys an equitable mortgage up to the date of creation of the legal mortgage. Therefore, up to the date of completion, there is an equitable mortgage over the property. The plaintiff relied upon Wylie, *Irish Land Law*, (Bloomsbury Professional, 5th Edition, 2009) at p. 613, para. 12.43 in support of this general principle.

111. In light of all of the foregoing, I hold that the stamping of the document subsequent to the drawdown does not invalidate the mortgage.

The failure of four properties to appear on searches
112. The second defendant carried out a search in the Registry of Deeds which only showed up four properties (including the wrongly registered ninth premises). In her affidavit of 28th May, 2014, the second defendant refers to the Registration of Title Act, 1964.

That Act relates to registered land in the Land Registry. The actual search had come from the Registry of Deeds. Therefore, the Act of 1964 does not apply.

113. The plaintiff relied upon the mortgage deed and the fact that it is stamped and refers to eight properties. Furthermore, counsel referred to the memorial deed which refers to the eight properties. This was a memorial deed that the second defendant in fact had in her possession and had furnished to the plaintiff. In any event, the plaintiff wrote to Bernie Casey in the Registry of Deeds. This letter dated 12th June, 2014, stated that the property description was incorrect and they had amended their records accordingly. The Registry of Deeds regretted any inconvenience its error caused.

114. The plaintiff also relied upon the more up-to-date search. I am quite satisfied that the mortgage had been executed and had covered the eight properties. I am satisfied that the mortgage was registered and it is stamped as so. I am satisfied that the latest searches show the correct position. I am also satisfied that there was and is no interference with any property right of the second defendant by this error in the search. I am also satisfied on the evidence placed before me that no injustice is or was caused to the second defendant by the failure of the search to show the full extent of the properties mortgaged.

Contradictions within the loan offers
The provision for the Solicitor's undertakings was not in identical form to the provision for security.

Certificates of Title
115. The second defendant in her affidavit of the 17th November, 2014, made reference to discrepancies in the "Loan Offer" and said that these created an ambiguity. There were a number of loan offers between the EBS and the first defendant. In submissions, the second defendant referred in particular to the loan offer of 20th October, 2005. She highlighted that point 6 referred to the security as being all eight properties. She referred to point 10 which said that "subject to a letter of undertaking from the Borrower's solicitor that the EBS will be provided with security over the four properties listed under section 13(ii) at the time of the second drawdown". She then referred to point 13 (ii) which said that drawdown was in relation to four specified properties. She averred and then submitted that this creates a doubt about which properties were to be provided as security and relies upon this as a contradiction.

116. The second defendant also made written (through the affidavit) and oral submissions that there were other breaches of the terms. She referred to the general terms and conditions and in particular that the drawdown may commence when the EBS were satisfied that the terms and conditions of the offer letter had been complied with. She further submitted that the conditions requiring the solicitors to provide the security were violated. She referred to the late dates upon which the mortgage deeds were registered in the Registry of Deeds.

117. The second defendant also referred to point 6 above and the statement that it is a condition of the loan that the borrower's solicitor be satisfied that the security required can validly be implemented and that any property given as security herein is properly stamped to cover this loan, and complies with all relevant planning permissions, building and fire safety regulations. She said that the loan offers set out obligations that both parties had to be in compliance with. She said there was no such compliance. She referred to the date of drawdown as to the loan as being 25th November, 2005, and said that the certificates of title were only dated 9th March, 2006, and that the receipt thereof by the EBS was unknown.

118. She further submitted that the certificates were accompanied by a schedule of title documents but that it did not contain copies of those documents. She said there was a flurry of communication between the solicitors for the borrower but there was no certainty that the EBS was in valid possession. She also submitted that it was vital that the bank be in possession of the certificate of title when drafting the mortgage.

119. She also submitted that the certificates of title failed to set out the number of vacates on prior mortgages. She said that this was vital as the Registry of Deeds was not State guaranteed.

120. She submitted that the documents supporting the certificate of title were insufficient to provide for good marketable title and there was a breach of the Law Society's Guidelines on Conveyancing.

121. The second defendant submitted that the aforementioned discrepancies were a breach of contract. She relied upon them individually and in totality as rendering the contract and the mortgages invalid.

122. The plaintiff submitted that registration under the contracts is the obligation of the borrower. It cannot avail a borrower to say that the delay in registration should give him an advantage. This, it is submitted, flies in the face of conveyancing practice and has no basis in law.

123. I am quite satisfied that in circumstances where a contract puts an onus on one party to provide for security in a certain manner there can be no suggestion that a delay by that party, or by their agent, in so providing the security, will defeat the contract. More particularly, a simple delay in registering the properties put forward as security could not form a basis for saying that such registration was somehow void. If that was the case, there would be no need for a system of priorities as a delayed registration would simply be void. That is not the law. I reject this submission.

124. Insofar as the second defendant argues that there is a discrepancy between what the solicitor undertook to provide security over and the securities themselves, this argument is unsustainable. In the first place, the solicitor's undertaking is simply a method of ensuring that the security which is agreed to be provided is provided. It does not of itself affect the borrower's duty to provide the security to the lender. The solicitor for the borrower is in a tri-partite relationship existing between borrower, lender and borrower's solicitor. The solicitor's undertaking is an important part of the facilitation of commerce. It is a matter over which the courts are conscious that breaches will entail a serious risk to the integrity of the lending system. Alleged breaches may be brought before the courts and adjudicated upon with significant consequences for solicitors if a breach of undertaking is found. Those are matters which will be adjudicated upon where there is an alleged breach. The undertaking is given to the lender and it is the lender who will seek to have it enforced or for damages in lieu thereof.

125. While the enforcement of the undertaking will be a matter for the lender, it may be that a borrower will have an action against the solicitor if the breach has caused the borrower a loss. However, the undertaking, the nature and extent of it, any breach thereof, cannot affect the borrower's duties under the contract.

126. In any event, insofar as there were different undertakings required by the contract, ultimately the borrower gave the security over all of the properties by way of the two mortgage deeds referred to above. The provision of this security accords with the contract and no discrepancy arises.

127. Finally, the mortgage deeds provided for the restructuring of debt. The securities were to be a continuing security in relation to all monies secured thereby or intended to be secured. The first defendant as borrower covenanted to pay on demand or on the happening of any of the events specified in the mortgage, all monies now owing or which from time to time become due and owing or payable by the borrower. I am quite satisfied that there is no substance in the arguments made by the second defendant.

128. I am also quite satisfied that none of the terms in the loan offer relied upon by the second defendant were conditions precedent. There is no suggestion in the wording of the loan offers that that was to be the position and there is no suggestion from the statements themselves that they were to be so. In my view, the binding contract came into being on the acceptance by the first defendant of the terms of the loan offers and from that moment, the parties were subject to certain obligations.

129. A further submission was made by the second defendant concerning the certificates of title. She said that the mortgage deeds described the properties as freehold in their entirety. She submitted that the certificates of title described the first premises as tenure unknown, the second premises as both freehold and leasehold, the third premises as leasehold, the fourth premises as leasehold and the eight premises as tenure unknown. She also submitted that the titles had not been investigated properly to ensure security could be held over them by the EBS.

130. She also submitted the third premises are in fact registered land. She referred to the Land Registry Folio and says that this shows that the particular mews site had been built on a much larger site. She submits that the title was not split and refers to the registered owner.

131. Counsel for the plaintiff submitted in relation to this that she does not have to show the particular title of the first defendant. However, without prejudice to that submission, she submitted that the registered title produced by the second defendant in relation to the mews title is freehold and that there are a number of leases on it. The title has a number of leases upon it. She submitted that it would appear that there is nothing inconsistent with a leasehold title and a freehold title. The leasehold title could be a 99 or 999 year lease. There is no inconsistency between one party having a freehold registered interest and the other party having a leasehold interest that is unregistered. I note that any leasehold interest of the first defendant had to have been created prior to October 2005 (the date of the loan offer) and it is the provisions regarding registration of leasehold interests at that time that are applicable here. Details of the leases and the leasehold interests were not then required to be registered

132. The second defendant said that she knows as a matter of fact that the first defendant is the freehold owner and that same is not registered on the Folio. She submitted that another person is the registered owner. She said that as the first defendant is not the registered freehold owner, he could therefore not have a mortgage over it.

133. This is a situation where the submissions of the second defendant amount to an element of the giving of evidence insofar as she asserts she knows for a fact that the first named defendant is the freehold owner. If he is the freehold owner, then there is no inconsistency at all with the mortgage document itself. Furthermore, if there is a discrepancy between his claim to an interest in the property as being freehold and the Land Registry title, then that might arise between the relevant parties who claim an interest in same. In this case, that might be the registered freehold owner. That registered freehold owner might well be able to claim a right to the possession of the property. That, however, does not avail of the first defendant in this case as he has already lost his entitlement to possession. It is now only a possible matter between the EBS and the registered owner (if that registered owner is in fact making a claim for possession).

134. On the face of the documentation before me, it does appear that there is a discrepancy between the mortgage deed where the mews property is described as freehold and the certificate of title which described it as "long leasehold". The schedule of documents include a reference to the lease set out at 004 of the relevant Land Registry Folio with the exception that it places the date at 1964 instead of 1864. It is clear that the date is a misprint as many of the subsequent assignments pre-date 1964. Taking into account the registration of the freehold interest in someone other than the first defendant, I am quite satisfied that I can draw an inference that the first defendant had a leasehold interest. That means that the description in the mortgage deed as to his interest being freehold is incorrect.

135. Does that misdescription invalidate the mortgage? This is a matter upon which I sought further submissions from both sides as it had not been addressed in any detail at the hearing (partly because the plaintiff saw it as irrelevant and the second defendant was arguing that the first defendant was in fact the freehold owner).

136. While maintaining her stance that this was not an issue which should concern the court in light of the *res judicata, jus tertii* and *locus standi* arguments, counsel for the plaintiff submitted that this error does not prevent the mortgage deed from creating a valid security. Counsel relied upon the "all estates clause" contained in s. 63 of the Conveyancing Act, 1881, which insofar as is relevant provides as follows:

> *"63 (1) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same*
>
> *(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained."*

137. Counsel submitted that subject to the terms of the deed, a conveyance passes all the estate that the grantor has or has power to convey in the land. She submitted that while the first defendant purported to convey and grant all of his freehold interest in the third premises by virtue of clause 3.01 of the mortgage deed, if he held only a leasehold interest in that property then s. 63 operates to ensure that all of the estate which he actually held was passed to the lender (subject to the proviso for redemption and other terms of the mortgage deed). Counsel relied upon Wylie and Woods, *Irish Conveyancing Law*, (Tottel Publishing, 3rd Edition, 2005) at para. 18.82 that: *"…a conveyance of the fee simple will pass to the grantee any outstanding term of years vested in the grantor and not merged with the freehold."*

138. Counsel also relied upon para. 18.33 of the same publication to show that if a mortgagor purported to convey a freehold interest which he did not in fact hold, he could be estopped from denying that he had that title. This could also operate where the grantor had no title at the date of the deed but subsequently acquires one.

139. The second defendant relied upon the certificates of title provided to the EBS. She said that the property was erroneously identified in the mortgage deed first schedule as freehold tenure. She submitted again that the EBS breached its own contract by the inclusion of the third premises. She submitted that neither the certificate of title nor the certificate of charge for the third premises

was registered in the Land Registry as either ought to have been. She submitted that its true status as registered land invoked statutory obligations with regards to its registration. She pointed to various obligations and also to the effect on charges where it is not registered.

140. The second defendant then submitted that this had an effect on the contract between the EBS and the first defendants as there was no conclusive list of securities.

141. The second defendant's arguments, both written and oral, are clearly premised upon the fact that she regards the land as being registered land and that statutory obligations are placed upon a party. It is clear that the freehold title is a registered title. The leasehold interest of the first defendant is not. There is no inconsistency in having a registered freehold title held by one person and an unregistered leasehold interest held by another in the circumstances of the creation of those interests as exists here. In that respect, the argument of the second defendant falls at the first hurdle.

142. In relation to s. 63, I am satisfied that it operates to ensure that whatever estate the first defendant held was conveyed to the EBS. There is no contrary intention expressed in the conveyance. In my view, s. 63 (2) requires that there would have to be an express opt-out of the "all estates clause" established by the said section. No such intention is to be found in the deed. Therefore, I am of the view that any misdescription of the first defendant's title in the mortgage deed does not affect the validity of the deed.

Conflict of Interest of Solicitors

143. At the rehearing, the second defendant made an argument about a conflict of interest regarding the solicitor who acted for the first defendant and who also had given an undertaking to the EBS. She said that this solicitor came off record for him during the later proceedings. This is a new argument and not presented before. I do not believe that this has any real merit in the context of this case. Undertakings are an important factor in the practice of commercial and conveyancing law. They are solemn obligations entered into by solicitors who by so entering render themselves liable to damages (and indeed censure) should they not be complied with. I do not see how they could create a conflict of interest that would in any sense invalidate the mortgage or contract in respect of which they were given.

The Building Societies Act, 1989

144. This submission by the second defendant was to the effect that the searches she carried out in the Registry of Deeds showed various loans on the premises the subject matter of the proceedings which had not been vacated (nor indeed did the schedule of documents listed to support the certificates of title contain deeds of release or vacates in relation to those loans). Apart from submitting that this was a breach of contract, she submits this was a breach of the law.

145. The second defendant submitted that this is a breach of s. 22 (4) of the Building Societies Act, 1989. She quoted a subsection to the effect that a society shall not make a loan under this section if the security of any freehold or leasehold estate or interest is subject to prior mortgage, unless the prior mortgage is in favour of the society.

146. Counsel for the plaintiff submitted that there are a number of flaws in the argument put forward by the second defendant. In effect, there are two methods by which a deed of mortgage can be released. There can be an endorsement on the deed itself that it is vacated or indeed a new deed of release can be created. Under s. 84 of the Building Societies Act, 1976, there was a right, not a duty, to proceed by way of putting a vacate on the order. From 1988 onwards (see s. 18 Housing Act, 1988), that right was granted to all mortgagees. From those dates onwards, lenders had a choice to receipt or vacate.

147. Furthermore, there is a misunderstanding as to the operation of searches. These searches are as against the grantor but there is no index of grantees. This has an effect that you will only get acts by the grantor but not affecting him.

148. Furthermore, even if the subsection was still in operation and did apply to loans such as these, it is clear from the decision in *Re PMPA Garage (Longmile) Ltd. (No. 2)* [1992] 1 I.R. 332 that it would be unconscionable to allow a borrower a defence for an action to recover money to rely on a want of vires on the part of the building society.

149. I accept the arguments put forward by the plaintiff under this heading. The second defendant has not established that there was a breach of the section given the different mechanisms for release of mortgages. In any event, in light of the *PMPA* decision, it would be unconscionable to permit the borrower a defence to an action to recover money on the basis of a want of *vires* on the part of the EBS. I am satisfied therefore that there is no substance in this argument of the second defendant.

Conclusion

150. The second defendant has made many and varied submissions as to why the plaintiff is not entitled to the orders he seeks. This entailed an attack on the validity of the mortgages under which he was appointed as well as a claim of entitlement to possession herself. I have dealt with and rejected each and every argument put forward by the second defendant. I therefore propose to make the final orders as sought by the plaintiff in relation to the second defendant.

151. For the reasons set out in this judgment, it follows that the counterclaims of the second defendant are dismissed.

152. In relation to the first defendant, I sought and was given further submissions regarding the position as to final orders against him in circumstances where the plaintiff moved by way of notice of motion. In this case, the first defendant sent to the plaintiff a number of e-mails which he asked to be placed before the court. In his first e-mail of the 4th April, 2014, he indicated that he had no hand, act or part in interfering with the receivership. In his second e-mail of 6th May, 2014, he again stated that he had in no way obstructed the receivership and indicated that in his view that the matter was "dealt with over four years ago through my acting Solicitor Arthur McLean". In his third e-mail dated the 15th May, 2014, he repeated similar sentiments and went on to say "I feel I am being harassed and drawn into another legal battle". He acknowledged that "Grant Thornton were appointed by the bank EBS" and goes on to say that he will delete his e-mail account if he is contacted further.

153. It appears that at one point when this matter was before the High Court, the second defendant was asked to confirm if the first defendant had attended with her to inspect the mortgage at the relevant offices and she confirmed he was present.

154. It is submitted that the first defendant was fully on notice of the nature of the case to be made and decided not to participate in the proceedings. It goes without saying that the motion had been served on the first defendant.

155. The first defendant has expressed his concern at being dragged into these proceedings. He was aware of what was at stake in the proceedings. It is also the case that any costs in the proceedings are ultimately borne by him subject to any order for costs

against another defendant. Any surplus that might be in the receivership would be diminished by the costs of a full hearing.

156. I am of the view that I have an inherent jurisdiction to treat the hearing as the full final hearing of the matters as I have outlined. It appears that it is just and equitable to treat this hearing as the final hearing in particular in light of the e-mails from the first defendant indicating he did not wish to engage in these proceedings. Furthermore, the cost of any adjournment, further pleadings and further rehearing would fall ultimately on the first defendant in light of the very clear conclusions I have made in this case. It is also the position that the orders I make against the second defendant would extend to all persons having notice of that order. Such an order would include the first defendant when notice is given. Those orders achieve possession by the plaintiff and should end all further obstruction with the receivership. In those circumstances, I will make the final orders against the first defendant as well.