[2020] IEHC 71

**THE HIGH COURT**

**[2019/4606 P]**

**BETWEEN**

**EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY, STEPHEN TENNANT AND NICHOLAS O'DWYER**

**PLAINTIFFS**

**AND**

**PAUL WHITE AND JANE GLEESON AND PERSONS UNKNOWN OCCUPYING 96 AVOCA PARK, BLACKROCK, CO. DUBLIN**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Mark Sanfey delivered on the 20th day of February, 2020**

**Introduction**

1. In this application, the plaintiffs seek interlocutory injunctive relief requiring the first and second named defendants ("the defendants"), their servants or agents or anyone in occupation of premises situate at 96 Avoca Park, Blackrock, Co. Dublin ('the premises') to surrender vacant possession of the premises which the plaintiffs say are the subject of a mortgage security executed by the defendants in consideration of loan facilities previously advanced to them by Allied Irish Banks plc ('AIB').

2. The proceedings commenced on 11th June, 2019. The present application was first returnable before this Court on 15th July, 2019, and was heard by me on 7th February, 2020.

**The Plaintiffs**

3. It is asserted on behalf of the first named plaintiff that it holds the mortgagee's interest in the premises under a deed of mortgage executed by the defendants on 12th August, 1998 ('the mortgage'), and it is further asserted that the first named plaintiff acquired the original loan facilities and mortgage in respect of the premises which the defendants had agreed and concluded with AIB.

4. The first named plaintiff asserts that one of the loan facilities which the defendants had with AIB was a mortgage loan facility agreed between AIB and the defendants on 10th March, 2008 ("the 2008 loan") in the amount of €2,750,000. While the grounding affidavit for the plaintiffs is somewhat equivocal in this regard, it is clear from the documentation that the sum of €2.75m was loaned to the first named defendant only, and the second named defendant was not a party to this loan. The first named plaintiff contends that it acquired the rights, interests and benefits of AIB in the loan facilities and mortgage security which the defendants had with AIB by means of a deed of transfer of 2nd August, 2018, which was subsequently amended by an "amendment and restatement" deed of 22nd October, 2018.

5. The second and third named plaintiffs are receivers who were appointed by AIB Mortgage Bank on foot of the mortgage/charge of 12th August, 1998 following what the plaintiffs say is the defendants' default in repaying the loan facilities secured by the mortgage. The instrument of appointment of the second and third named plaintiffs was dated 13th October, 2017. This date assumes some significance in the light of arguments made on behalf of the defendants.

6. Following the acquisition by the first named plaintiff of the defendants' loan facilities and mortgage from AIB, the second and third named plaintiffs were appointed as receivers over the premises under a Receiver Novation Deed of 2nd August, 2018.

**The Defendants**

7. The defendants are husband and wife and formerly resided at 3 Willow Terrace, Blackrock, Co. Dublin. There was no suggestion before me that the premises the subject of these proceedings are or were at any time a family home. The plaintiffs assert that there was default on the part of "the defendants" in repaying their loan facilities to AIB, although it is clear that letters of demand of 15th December, 2016 and 3rd April, 2017 upon which the plaintiffs rely were in fact addressed to the first named defendant only.

8. For the purpose of this application, the first and second named defendants were represented by the same firm of solicitors and counsel. However, that firm of solicitors, at a time when they were acting only for the second named defendant, wrote to the solicitors for the plaintiffs on 19th June, 2019, stating that … "the purpose of this correspondence is to put you on formal notice that our client [i.e. the second named defendant] has a legal interest in the properties at 96 Avoca Park and 14 Roney Beach. Although estranged, our client has a beneficial interest in all and any property owned by Mr. Paul White". That firm of solicitors subsequently entered an appearance for both the first and second named defendants on 28th June, 2019. Apart from the replying affidavit of the first named defendant Mr. White, this letter appears to be the only instance in which the position of either of the defendants was set out in any way.

**The Application**

9. The second and third named plaintiffs ('the receivers') became aware that there were occupiers of the premises who were unknown to them. The receivers accordingly wrote to 'the occupiers' at the premises by letter of 7th November, 2017 informing them of their appointment as receivers and asserting that all rental payments must now be paid to them in their capacity as receivers. The occupiers were further advised that rent should not be paid to any party other than the receiver unless the occupiers were otherwise notified by the receivers in writing. The receivers also wrote to the first and second named defendants on 7th November, 2017 requesting various items of documentation, including copies of all tenant leases or rental agreements, rental accounts, details of compliance with PRTB registration, and so on.

10. The receivers say that since these letters were sent, they have received no cooperation at all from either the occupiers of the premises or from the defendants. The receivers became concerned that there was a large number of individuals occupying the premises, and to date have been unable to ascertain the number of these occupants.

11. The plaintiffs rely on Clause 5 of the mortgage which contains covenants on the part of the defendants, and in particular Clause 5(j) in which the defendants covenanted:

> *"(j) not to convey, transfer, assign, demise or let or part with the possession of the mortgage property or any part thereof or any interest thereon without the prior consent in writing of the Bank".*

12. The plaintiffs say that no such written consent was ever requested by the defendants or granted by AIB or the plaintiffs, and accordingly any purported letting of the premises is invalid and of no legal force or effect. The receivers assert that it is evident that the defendants have no defence to the proceedings, or to the plaintiffs' entitlement to seek the reliefs identified in the notice of motion.

13. In his grounding affidavit, the second named plaintiff Mr. Tennant asserts that 'the defendants' have not made an attempt to discharge 'their indebtedness' to the first named plaintiff, and states that, as of 2nd May, 2019, that indebtedness amounts to €3,072,699.79. He says that, notwithstanding this indebtedness, the defendants… "continue to derive a substantial income from the premises". Mr. Tennant asserts that "damages are not clearly an adequate remedy for the plaintiffs, more particularly because [the receivers'] immediate right to access to and possession of the premises is being denied".

14. The first named defendant swore a replying affidavit on 23rd July, 2019. He gives his address as 14 Roney Beach, Gorey, Co. Wexford, and states that he makes the affidavit on his own behalf and on behalf of the second named defendant with her knowledge and authority. Importantly, he states the following:

> *"4. I say that I wish to reserve the position of the Defendants in relation to the validity or otherwise of the transfer of any interest of any third party to the first named plaintiff ("Everyday"). Likewise I wish to reserve the position of the defendants vis-a -vis the validity or otherwise of the appointment of the second and third named plaintiffs ('the Receivers'). For the avoidance of doubt, the validity of these matters is not accepted and the Plaintiffs are put on full proof of same. I am advised that it is appropriate to address these matters by way of submission from counsel and I respectfully say that counsel will make such submissions as are necessary in due course.*
>
> *5. By way of specific reply to paragraph 4 of Mr. Tennant's affidavit, as is clear from the exhibits thereto, no debt is due by the Second-Named Defendant to the Plaintiffs or any of them and/or their predecessors in title. It is denied that the Defendants have in any way obstructed the Receivers from recovering the possession of the premises, it is also denied that they are entitled to possession. At paragraph 4 the extent of the acts of obstruction that have been identified by Mr. Tennant is that the premises have been let by the defendants to approximately 16 people, which is denied in part."*

15. The first named defendant goes on to make the case that the defendants have let the property with the knowledge and consent of Allied Irish Banks since 2002. He does not however argue that AIB consented in writing to any letting of the property. The first named defendant states that the property "was let to one individual only. It is accepted that he has now caused approximately 15 people to occupy the premises. I make oath and say that your deponent is a stranger to the circumstances in which the property came to be occupied by anyone other than a single tenant".

16. The first named defendant avers that the loan facility of 10th March, 2008 was offered to and accepted by him solely, and that the second named defendant has no debt to either AIB or the first named plaintiff in this regard. The first named defendant makes the point that the offer of mortgage loan of 10th March, 2008 is addressed to him only. The first named defendant relies on the fact that the special conditions attached to the offer of mortgage loan state that "the existing home loan…must be cleared in full on drawdown of the facility now offered". He asserts that this shows that "… the secured monies referred to at Clause 4 of the Mortgage was [sic] repaid on behalf of the Second-Named Defendant. The subsequent lending was to your deponent solely. The Second-Named Defendant did not seek nor was offered any loan thereafter". While the special conditions require that the second named defendant provide a letter of guarantee for €2.75m prior to drawdown of the loan, the first named defendant asserts that … "there is no provision in the mortgage dated 12th August 1998 suggesting that the mortgage is a continuing security for any future guarantee by either of the parties."

17. The first named defendant asserts at para. 17 of his affidavit as follows:

> *"In the circumstances, it seems clear that Mr. Tennant is in error when he says that the defendants have a joint debt, that we have both defaulted or that any debt owed by your deponent is secured against the interests of the Second- Named Defendant in the property in suit. As such, the receivers herein were not validly appointed in respect of any assets of the Second-Named Defendant either by AIB on 13th October 2013 nor by Everyday on the 2nd of August 2018. In the circumstances, the Receivers have no standing to make any claim in respect of the Second-Named Defendant and are guilty, inter alia of trespass".*

18. In response to the averment by Mr. Tennant to the effect that no defence exists to the plaintiff's claim, the first named defendant describes "the intended defence" at paragraph 23 of his affidavit as follows:

"(a) There is no debt due to the Plaintiffs by the Second-Named Defendant.

(b) The Plaintiffs do not enjoy the benefit of any security over any property of the Second-Named Defendant.

(c) The Second-Named Defendant is not bound by any negative pledge clause limiting her entitlement to alienate her interests including by way of lease to the parent occupants or any other party.

(d) The receivers herein, have not been validly appointed over the assets/interests of the Second-Named Defendant and it is impossible for them to purport to possess and/or manage the property jointly, without the consent and agreement of the Second-Named Defendant.

(e) The Second-Named Defendant is entitled to the benefit of rent or any other form of payment in respect of her interests in the property.

(f) The mortgage of 12th August 1998 insofar as it concerns the second named defendant has been discharged and the Second-Named Defendant is entitled to redemption by way of counterclaim.

(g) Also by way of counterclaim, the Defendants, or each of them, are entitled to damages for trespass and/or interference in their economic interests.

(h) The Plaintiffs are bound by the conduct and acquiescence of their predecessors in title and are estopped from objecting to the letting of the property which has been continuous for 17 years.

(i) It will also be asserted that insofar as the loan facility letter and/or the mortgage will permit the transfer, assignment etc. of the debts of the Defendants without their contemporaneous consent; that the said transfer/assignment was exercised unreasonably, in breach of the duty of good faith owed by AIB and that the clause(s) permitting such a transfer are an unfair term within a consumer contract. In that regard, on three occasions before the said transfer, the defendants sought to discharge certain debts due to AIB and it will be asserted that where AIB had determined to accept a lessor sum than they were entitled to recover, they were duty bound to act reasonably toward the defendants herein.

(j) The Second-Named Defendant is also entitled to seek exoneration by way of equitable relief in respect of her interests in the property in suit."

19. The second named plaintiffs swore a brief replying affidavit of 10th October, 2019. The folio relating to the premises was exhibited to this affidavit, and in part 2 of the folio, the first and second named defendants are acknowledged as "full owners". Part 3 of the folio shows the charge "stamped to cover £340,000" in favour of AIB registered as of 29th September, 1998, and also shows the first named plaintiff as the owner of this charge as of 13th December, 2018.

20. The second named plaintiff goes on to make the point that the deed of mortgage of 12th August, 1998 was in respect of both present and future loan facilities, and notes that the first named defendant "acknowledges that the second named defendant executed a letter of guarantee…". The second named plaintiff asserts that, by virtue of the terms of the deed of mortgage, the legal and beneficial interests of each of the first and second named defendants in the premises are validly charged and secured in favour of the first named defendant as successor in title to AIB.

21. In relation to what the second named plaintiff describes as the "unlawful occupation of the subject property by unknown individuals", the second named plaintiff states that it is the plaintiff's belief … "that Mr. White and/or Mr. White and the Second named Defendant are receiving rental income from the unknown occupants and are retaining the rental income for their own benefit". There was no affidavit in reply to this second affidavit of the second named plaintiff.

**The Plaintiff's Submissions**

22. Counsel for the plaintiffs placed particular emphasis on the fact that the first named defendant in his affidavit made no attempt to dispute the amount currently stated to be owing on foot of the 2008 loan facility, or the assertions by the second named plaintiff that there had been an almost complete lack of cooperation or response by the defendants to any approaches made by the receivers, which left them no alternative but to apply to court in circumstances where the first named defendant himself asserts that he is unaware of how many people are present in the premises. Counsel made it clear that the plaintiffs accepted that the €2.75m the subject of the 2008 loan was advanced to the first named defendant and not to the second named defendant. Notwithstanding that, it was submitted that the 1998 mortgage continued to act as a security for the 2008 loan. The 1998 mortgage contained a covenant by the mortgagor, the first and second named defendants, not only to repay the present loan, but "… to repay any future loan pursuant to any relevant letter of offer …". The term "future loan" was defined as meaning "… any loan or loans of a specific principal sum or sums offered at any future time or times on the security of this mortgage by the bank to the mortgagor and agreed and accepted in writing by the mortgagor in any relevant letter of offer…". The term "the mortgagor" included the first and second named defendants. The mortgage also contained an interpretation clause which stated that "… where two or more persons together constitute the mortgagor the covenants and agreements on the part of the mortgagor herein expressed or implied by law in this mortgage shall be deemed to have been entered into jointly and severally by the said persons".

23. The special conditions of the 2008 loan to the first named defendant stated that the bank would rely on a number of properties as additional security for the 2008 loan. These properties included the premises. Counsel submitted therefore that the 1998 mortgage, to which the second-named defendant was a party, continued to be a security in respect of any future loan as defined in the mortgage, and that this bound the second named defendant notwithstanding that the 2008 loan was not made to her.

24. Counsel for the plaintiffs went on to submit that the evidence of registration of the charge against the premises in favour of AIB was, pursuant to ss. 31 and 62 of the Registration of Title Act 1964, conclusive evidence of the title of the party registered in the absence of fraud or mistake. He placed particular reliance in this regard on the decision of the Court of Appeal in *Tanager DAC v. Kane* [2019] 1 IR 385. Counsel submitted that the charge was "unassailable", and asserted that at no time since 2008 had either of the defendants either sought to have the mortgage varied in any way to clarify that her interest was not the subject of the charge under the 1998 mortgage. Counsel also submitted that, in any event, it was clear from the execution by the second named defendant of a letter of guarantee in accordance with the conditions attached to the 2008 loan to which I have referred that the second named defendant was not in a position to assert that she was unaware of the terms of the 2008 loan, or that she did not remain bound by the security of the mortgage.

25. Counsel for the plaintiffs placed particular emphasis on the manner in which the defendants have chosen to meet the present application. It was submitted that the defendants do not seek to deny that a sum of more than €3m is due and owing, or that no repayments have been made for some considerable time. Counsel also submitted that the defendants did not impugn the plaintiffs' security in their affidavit, other than in the manner set out in paras. 4 and 5 of that affidavit, to which I have referred above. It was pointed out that the defendants had not replied to all the matters set out in Mr. Tennant's second affidavit. Counsel suggested that it was "absolutely clear" that the defendants had no defence and were simply seeking to delay yielding up possession of the property in the interests of retaining as much rent from the occupiers as possible.

26. Counsel went through the bank's powers at Clause 7 of the 1998 mortgage to demonstrate that the exercise by the mortgagee of the powers is appropriate in the present circumstances, in as far as there has been a breach by the defendants of the covenants in the mortgage, and in particular a breach of Clause 7.01(h) which entitles the bank to exercise its powers to enter into possession of the property if the mortgagor "conveys, transfers, assigns, demises or lets or parts with possession of the mortgaged property or any part thereof without the express prior consent in writing of the bank…".

**Submissions of the Defendants**

27. Counsel for the defendants submitted that the application of the plaintiffs was effectively an application for a mandatory injunction, in that it required the defendants to yield up possession of the premises. In those circumstances, it was submitted that the appropriate test to be applied was the '*Maha Lingam standard'* set out by Fennelly J. in *Maha Lingam v. Health Service Executive* [2005] IESC 89, in which he stated:

> *"It is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action".*

28. Counsel referred to the decision of the Supreme Court in *Charleton v Scriven* [2019] IESC 28, in which the defendant appealed against the grant of an injunction by this court to receivers in respect of properties which were the subject of the mortgages under which the receivers were appointed. At the heart of the appeal was a technical issue about whether it was arguable that the receivers were not validly appointed on foot of the mortgages. The Supreme Court had to consider the standard to be applied in assessing the strength or otherwise of the receivers' case, and whether the receivers had met that standard. Counsel submitted that the decision of the Supreme Court in that case was authority for the proposition that, where the relief sought by the receiver was mandatory in nature and would, in practice, bring the proceeding to an end, the receivers would have to establish that they had a strong arguable case; it would not be sufficient to comply with the criteria normally applied in relation to the grant or refusal of an interlocutory injunction as set out in the Supreme Court decision of *Okunade v Minister for Justice, Equality and Law Reform* [2012] 3 IR 152.

29. Counsel submitted that it could not be said that the plaintiffs had a "strong case" for a number of reasons. He submitted that the receivers had not met the onus of proof in a number of respects. He sought to demonstrate this by pointing to a number of inconsistencies in the documentation proffered by the plaintiffs.

30. Firstly, the instrument of appointment of the receivers was dated 13th October, 2017. The instrument itself correctly recited the "deed of mortgage/charge dated 12th August, 1998 made between (1) Paul White and Jane Gleeson together; (the 'borrower') and (2) Allied Irish Banks plc (the 'charge')". It goes on to state that the borrowers "charged in favour of the bank by way of fixed mortgage/charge the property described in the schedule of the charge and as specified in the schedule hereto…". However, the schedule sets out the following details:

> "ALL THAT AND THOSE the mortgagees interest under a Deed of Mortgage/Charge dated 12 August 1988 between (1) Paul White & Jane Gleeson and (2) Allied Irish Banks plc and therein described as follows
>
> ALL THAT AND THOSE the premises and dwelling house known as 96 Avoca Park, Blackrock, in the County of Dublin and being all of the property comprised in folio 122784F Co. Dublin and held in Fee Simple".

31. Counsel points out that the date in the schedule is quite simply wrong, referring as it does to "1988" instead of "1998".

32. Secondly, counsel referred the court to the deed of 2nd August, 2018 by which the first named plaintiff acquired the loans and security from AIB. This deed sets out that the first named plaintiff was acquiring, *inter alia, "… all right, title, interest, benefit and obligation of the sellers in the security documents including without limitation to the mortgages, charges, security assignments and other security interests constituted by the other documents listed in schedule one hereto…*".

33. It is clear from the redactions made to the schedule that a large number of loans and securities were transferred by this deed of 2nd August, 2018. However, among the securities to which reference is made in the schedule is a reference to "mortgage dated 12th August 1996 between (1) Paul White and Jane Gleeson and (2) Allied Irish Bank plc". Once again the date is erroneous: "1996" rather than "1998". It should be noted that the schedule goes on to include among the securities transferred to the first named plaintiff as "guarantee from Jane Gleeson undated".

34. Counsel then referred the court to the novation deed of 2nd August, 2018, by which the second and third named plaintiffs were appointed by the first named plaintiff to act as receiver. Counsel pointed out that notwithstanding that the instrument of appointment of the receivers was 13th October, 2017, the schedule to the receiver novation deed gives the "date of deed of receiver appointment/letter of agency appointment" as "02/11/2017" in respect of the premises.

35. Counsel submitted that, in those circumstances, a substantial case could be made by the defendants that the first named plaintiff was not in fact a valid holder of the mortgage, as the schedule to the transfer wrongly identified the date of the mortgage; and that the appointment of the second and third named plaintiffs as receivers was null and void, in circumstances where the schedule to the instrument of appointment incorrectly sets out the date of the mortgage, and the novation deed gives an incorrect date for the appointment of the receiver. In all the circumstances, counsel submitted that it could not be said that the plaintiff had a "strong case", and that the plaintiffs therefore were not entitled to interlocutory relief.

36. Counsel made it clear that the defendants were relying on the fact that the second named defendant was not a party to the 2008 loan, and submitted that, in order for the mortgage to be binding upon her, she would have to have consented to the terms of the loan in writing. Counsel submitted that there was in fact no evidence that she had agreed to provide continued security in respect of the 2008 loan to the first names defendant by way of mortgage.

37. In all the circumstances, counsel contended that the defendants had in fact a strong defence to the action and that the application of the plaintiffs should be refused.

38. In response, counsel for the plaintiffs complained that the points about the errors in the documentation relied upon by the plaintiffs had never been canvassed in correspondence or affidavits prior to the hearing. It was submitted that the defendants did not dispute the debt owed by the first named defendant, nor did they impugn the mortgage on which the plaintiffs rely. It was not disputed by or on behalf of the second named defendant that she had executed the guarantee which the special conditions to the offer of mortgage loan of 2008 required, and which is recorded in the deed of 2nd August, 2018 as having been transferred to the first named plaintiff.

39. Counsel submitted, as regards the apparent errors in the documentation, that the erroneous inclusion of '1988' rather than '1998' in the schedule to the instrument of appointment was clearly a typographical error, and no more. It was submitted that this was not a substantial challenge to the appointment of the receivers, and should be regarded as being '*de minimis*'. Counsel asserted that the same reasoning applied to the reference to '1996' rather than '1998' in the deed of transfer. An 'amendment and restatement deed' which was executed on 22nd October, 2018 by the parties to the earlier deed of transfer in order to amend certain aspects of the deed of transfer of 2nd August, 2018, correctly identifies the property in a schedule relating to the properties transferred, although it does not refer to the mortgage. Counsel pointed out that the defendants, although relying on the error in the deed of transfer, were not parties to that deed.

40. In relation to the alleged error in the schedule to the novation deed of 2nd August, 2018, counsel pointed out that, although the instrument of appointment was dated 13th October, 2017, the receivers had in fact accepted their appointment on 2nd November, 2017. There was a signed acceptance by both receivers to that effect appended to the

instrument of appointment. It was submitted that, in these circumstances, the date of '02/11/17' on the schedule to the instrument of appointment was not an error at all.

41. Counsel submitted that, given that the first named plaintiff's title under the mortgage was unassailable and clearly bound the second named defendant in respect of future loans to either her or the first named defendant, together with the substantial arrears due to the first named plaintiff, the plaintiffs did indeed have a strong case which warranted the grant of the injunction. It was submitted that the second named defendant was bound by the mortgage whether or not she specifically assented to the terms of the 2008 loan to the first named defendant, but that it was in any event clear that she was aware of those terms, as she had not disputed that she had executed a personal guarantee in compliance with the special conditions attaching to the 2008 loan.

42. Counsel repeatedly emphasised the manner in which, according to the plaintiffs, the defendants had failed to engage with the receivers and were even at this stage unable or unwilling to identify the occupiers of the premises or even specify how many occupiers there were. Counsel submitted that, in circumstances where the premises represented an investment for the first named defendant and was not a family home, it would be appropriate in all the circumstances to grant the reliefs sought.

**Discussion**

43. It was strongly urged by counsel for the plaintiff that I should grant the reliefs sought in the notice of motion – primarily, the return of possession of the premises to the second and third named plaintiffs – in view of the situation whereby the plaintiffs cannot identify the parties in occupation and the first named defendant avers that the person to whom the property was let 'has now caused approximately fifteen people to occupy the premises'. It appears that the Health Service Executive and Dun Laoghaire Rathdown County Council have inspected the property, but are not taking any type of enforcement action.

44. In *Scriven*, Clarke C.J. sought to … "distinguish between the reliefs sought which simply seek to retain the position that the receivers are entitled to collect the rent, on the one hand, from any relief which might be designed to allow the receivers to move on to selling the property on the other".

45. Clarke C.J., in considering the appropriate standard to be applied in an application by a receiver for an interlocutory injunction, went on to state as follows: -

> *"6.11 So far as the balance of convenience is concerned, it seems to me that where all that is involved is the collection of rent, the balance favours those sums being paid to the receivers and retained by them, pending the resolution of the proceedings. In those circumstances, Mr. Scriven is protected in the event that the receivers ultimately lose the case because the monies can then be paid over to him. I would, in those circumstances, hold that an interlocutory injunction was appropriate, but only one which was sufficient to ensure that the monies were paid over to and*

*retained by the receivers pending the trial of the action. I propose that the parties be heard further on the precise form of any such order.*

*6.12 Indeed, I would go further and suggest that, having regard to the underlying principle of attempting to fashion an order which runs the least risk of injustice, there may very well be a very important distinction to be made in receivership cases between situations where the receivers concerned simply intend to maintain the situation pending a trial and ones where the substance of the interlocutory order sought is one designed to, in practice, bring the proceedings to an end. There is considerable logic in the view that, for example, a receiver who wished to obtain possession of residential property or a family farm so that it could be sold would need to make out a strong arguable case for it to be appropriate, having regard to the greatest risk of injustice test, to allow such an order to be made. On the other hand, where the matters are essentially financial or where there are strong grounds for believing that a receiver is necessary to ensure that property is properly managed and maintained pending a trial, very different considerations may apply."*

46. In *Scriven*, the principal point raised by the defendant was that the appointment of the receivers in that case was invalid on the basis that there was a difference between a 'receiver and manager' and a 'receiver', and that the appointment of the receivers as simply 'receivers' rather than 'receivers and managers' was arguably an invalid appointment "…such that it would be properly concluded that the receivers did not have a sufficiently strong case to warrant the grant of an injunction which, it was argued, was essentially mandatory in nature". [Clarke C.J. at para. 6.1].

47. As Clarke C.J. points out, this point arose in *McCarthy v. Moroney* [2018] IEHC 379. In that case, McDonald J. assessed the strength of the case that could be made for the validity of the appointment of the receiver in the circumstances before him, having regard to the imperative stressed by Gilligan J. in *The Merrow Limited v. Bank of Scotland* [2013] IEHC 130 of observing any formalities provided for in a debenture or deed of mortgage in appointing a receiver. In McCarthy v. Moroney, it was accepted by counsel for the receivers that the reliefs sought by them, while negatively worded, were mandatory in nature. Similar reliefs were sought in *McCarthy v. Langan* [2019] IEHC 651, in which Allen J. assessed the strength of the receiver's case regarding the validity of his appointment, ultimately finding the appointment to be valid.

48. In the present case, I am satisfied that the reliefs sought by the plaintiffs in the notice of motion are mandatory in nature, and that, in those circumstances, it falls to the court to assess whether or not the plaintiff has a strong case which is likely to succeed at the hearing of the action.

49. The points on which counsel for the defendants particularly relied in order to show that the receiver did not have a strong case were those relating to the inconsistencies in the documentation exhibited by the receivers. Essentially, it was argued that the receivers

did not have a strong case that their appointment was valid, given what appear to be errors in the documentation.

50. The instrument of appointment of 13th October, 2017, as we have seen, incorrectly ascribes the year '1988' to the mortgage rather than the correct year '1998'. The defendants also rely on the fact that the schedule to the novation deed refers to the 'date of deed of receiver appointment' as '02/11/17', rather than 13th October, 2017, the date of the instrument of appointment.

51. The instrument of appointment contains the following recital, prior to setting out the appointment of the receivers: -

*"WHEREAS*

*A. By deed of mortgage/charge dated 12 August 1998 made between (1) Paul White and Jane Gleeson together (the 'Borrower') and (2) Allied Irish Banks p.l.c. (the 'Charge'), the Borrowers charged in favour of the Bank by way of fixed mortgage/charge the property described in the Schedule of the Charge and as specified in the Schedule hereto (the 'Mortgaged Property') as security for the payment in discharge of the monies and liabilities therein specified…"*

52. It can be seen that the recital correctly records the date of the deed of mortgage/charge as 12th August, 1998. The property which is identified as having been charged is the "property described in the Schedule of the Charge and as specified in the Schedule hereto". The deed of mortgage/charge does not in fact have a 'schedule' as such, but 'mortgage particulars' set out the details of the 'mortgaged property' as defined in the deed. These particulars are as follows: -

"(a) Mortgage particulars.

| | |
|---|---|
| Part 1: | [the mortgagor] |
| Name(s) of the mortgagor(s): | Paul White and Jane Gleeson |
| Address(es) of the mortgagor(s): | 96 Avoca Park, Blackrock in the County of Dublin. |
| Part 2: | [the mortgaged property] |

ALL THAT AND THOSE the premises and dwelling house known as 96 Avoca Park, Blackrock in the County of Dublin and being all of the property comprised in folio 122784F County Dublin and held in fee simple."

53. The schedule to the instrument of appointment is set out as at paragraph 30 above. It is clear that these particulars correctly describe the property itself, although the date of deed of mortgage/charge – '1988' – is incorrect.

54. The recital in the instrument of appointment makes it clear that the only purpose of the schedule to that document is to identify the property – not the deed of mortgage/charge,

which is correctly identified in the recital to which I have referred at paragraph 51 above. In those circumstances, the erroneous reference to '1988' is irrelevant to the description of the property in the schedule, which is correct. I am therefore of the view that this error, while unfortunate, does not invalidate the appointment of the receiver.

55. The references in the novation deed, by which AIB and others novated their agreements with the receivers as regards appointment to the first named plaintiff, to '02/11/2017' is clearly a reference to the date of acceptance of those appointments. There is in fact no 'deed of receiver appointment' as referred to in the schedule, as the instrument of appointment of 13th October, 2017 is not a deed. The first named defendant is identified in the schedule, as is the property, which is correctly described. The schedule in my view correctly records the date of appointment of the receivers, as it records the date of acceptance of their appointment. In my view therefore, the date in the schedule is not in fact incorrect.

56. I have referred to the deed of 2nd August, 2018 by which the first named plaintiff acquired the mortgage and loan from the defendants at paras. 32-33 above. Counsel for the defendants points out the erroneous date in the schedule of '12th August, 1996' and submits that this error goes to the validity of the transfer of the mortgage to the first named plaintiff. It is asserted that this error raises – at a minimum – a serious question as to whether the first named plaintiff is in fact the holder of the mortgage relied upon to appoint the receivers, such that it cannot be deemed that the plaintiffs have a 'strong case likely to succeed at trial'.

57. In essence, the defendants argue that the error in the schedule misidentifies the mortgage such that it cannot be said that the mortgage was transferred to the first named plaintiff at all. As against that, the plaintiffs submit that the reference to '1996' rather than '1998' is merely a typographical error, and cannot be said to invalidate the transfer.

58. The schedule to the deed of transfer correctly identifies the parties to the mortgage as "(1) Paul White and Jane Gleeson and (2) Allied Irish Bank plc." The date and month of the mortgage – '12th August' – are correct. The only error is the inclusion of '1996' rather than '1998'. The amendment deed of 22nd October, 2018, which amends the deed of transfer, correctly identifies the property. The folio of the property exhibited by the second named plaintiff to his second affidavit of 10th October, 2019 shows that the mortgage/charge was registered by AIB in September 1998, and that the first named plaintiff was registered on the folio on 13th December, 2018 as the owner of the mortgage/charge.

59. Section 31(1) of the Registration of Title at 1964 is as follows: -

> *"The register shall be conclusive evidence of the title of the owner to the land as appearing on the Register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed,*

*document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the Register to be rectified in such manner and on such terms as it thinks just".*

60. Section 64 of the Register of Title Act 1964 is as follows: -

*"(1) The registered owner of a charge may transfer the charge to another person as owner thereof, and the transferee shall be registered as owner of the charge.*

*(2) 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."*

61. In *Tanager DAC v. Kane*, the Court of Appeal considered the operation of s.31(1) and the question of whether a defendant could challenge the registration of Tanager as owner of the charge registered on the folio having regard to the statutory provisions by which the Register is to be treated as conclusive. Baker J., in giving the judgment of the Court of Appeal, stated as follows: -

*"[60] The provisions of s. 31(1) of the 1964 Act that make the entry on the register conclusive evidence of title are subject to the jurisdiction of the court to direct the rectification of the register on the ground of actual fraud or mistake.*

*...*

*[62] The first observation to be made with regard to the power of rectification is that the jurisdiction is limited to rectification in the case of actual fraud or mistake, and s. 31(1) of the 1964 Act expressly excludes from the power of rectification any argument that might derive from the knowledge of the registered owner of any 'deed, document, or matter relating to the land'. The purpose of that restrictive power is to remove from registered title the vexed question of express or implied notice of any equities that might affect the ownership of land, precisely the type of issue that made and continues to make the conveyancing of unregistered land complex and, at times, uncertain."*

62. The plenary summons in the present case makes it clear that the plaintiffs are seeking possession of the premises. If this Court is disposed to grant the reliefs sought in the notice of motion, possession will be yielded up to the plaintiffs by the defendants. In the circumstances, the comments of Baker J. in relation to the proofs to be satisfied by the plaintiffs seeking possession are apposite: -

*"[69] A plaintiff seeking an order for possession must adduce proof, inter alia, that he or she is the registered owner of the charge. It is registration that triggers the entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of*

*the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the register, and of the statutory limits to rectification."*

63. In the present case, the defendants do not argue that a mistake occurred, in the sense that some security other than the mortgage of 12th August, 1998 was intended to be transferred to the first named plaintiff. It is not suggested that the register is incorrect by reason of fraud. They contend simply that the mortgage was not transferred to the first named plaintiff due to the error in the date.

64. In my view, the provisions of s.31 and s.62 of the Registration of Title Act 1964 as quoted above, and the effect of those sections as confirmed by the Court of Appeal in *Tanager*, make it clear that the first named plaintiff is entitled to rely on the registration of it as the owner of the mortgage. This Court must, and does, accept that the registration of the first named plaintiff as owner of the mortgage of 12th August, 1998 is correct. It was not at any stage suggested to me that the defendants intend to apply to court for rectification of the Register, such that the court should consider adjournment of the present application to allow such an application to take place.

65. In any event, it is in my view clear beyond argument, when one considers the totality of the document, that the reference to '1996' rather than '1998' in the schedule to the deed of transfer is indeed a typographical error only. The first named plaintiff acquired the loans, securities and documents set out in the schedule for value. It is not suggested that the entities referred to as 'sellers' in the deed of transfer have any issue with the transfer of the mortgage, or contend that it was not duly transferred by them to the first named plaintiff by the deed. It would seem, on the basis of the evidence in this application, to be the case that rectification of the date in the mortgage might well be appropriate, should an application in that regard be made in separate proceedings involving the parties to the mortgage.

66. As regards the strength of the case generally, the defendants have asserted their reliance on the matters set out at para. 23 of the first named defendant's affidavit as set out above at para. 18 of this judgment. These matters include the matters already canvassed in relation to the errors in the documentation, to which I have already made reference, and on which counsel for the defendants made it clear he was placing particular reliance. Counsel also placed particular emphasis on the fact that the second named defendant was not a party to the 2008 loan, and submitted that there was no evidence that she had consented to the 1998 mortgage being used as security for a loan to which she was not a party.

67. This Court is obliged to regard the first named plaintiff's ownership of the mortgage as unassailable for the reasons set out above, and the first named plaintiff is entitled to rely on its terms, which appear to authorise the use of the mortgage as security for future loans by either of the first or second named defendants. It appears that the second named defendant was aware of the terms of the 2008 loan, as it seems to be the case that she executed a letter of guarantee of the loan for €2.75m. While the second named

defendant has sworn no evidence in this regard, the first named defendant appears to rely on the execution by the second named defendant of a letter of guarantee as establishing that she was not a recipient of the loan funds:

> *"…the Second-Named Defendant did not seek nor was offered any loan thereafter. As can be seen from Part 2, Special Conditions the Second-Named Defendant was required to give a 'Letter of Guarantee'. It was also stipulated that she should receive independent legal advice. Both of these matters were conditions precedent to drawdown."* [Paragraph 12 of the first named defendant's affidavit].

68. The assertion by the second named plaintiff at para. 6 of his second affidavit that "Mr. White also acknowledges [in his affidavit] that the second named defendant executed a letter of guarantee" has not been controverted by either of the defendants. It would seem therefore that the second named plaintiff may have been aware or on notice of the terms of the loan. Even if she was not, the terms of the mortgage which provide that it is security for any future loans to either the first or second named defendants may render the question of her consent or otherwise academic. Counsel for the plaintiff submitted in the course of argument that it was significant that there was no suggestion that the second named defendant had at any stage prior to the present application argued that the mortgage did not cover the 2008 loan, or that, having discharged the 1998 loan prior to drawdown of the 2008 loan, she was entitled to a release from the terms of the mortgage.

69. This Court does not have to resolve these issues on the present application. The issue for decision is as to whether, on the evidence before the court, the plaintiffs have shown that they have a strong case likely to succeed at trial. For the reasons set out above, and having considered all of the pleadings and affidavits to date, I am satisfied that the plaintiffs have discharged this onus. In particular, I am satisfied that the defendants have not demonstrated that there is, in the words of Clarke C.J. in *Scriven, "…an issue of any substance concerning the validity of the appointment and powers of receivers".* [Paragraph 6.13]. Clarke J. went on to comment as follows:

> *"Where no real case of any substance is made by a defendant which puts forward a credible basis for suggesting either that receivers were not validly appointed or that receivers, although validly appointed, are seeking to exercise powers which they do not have, then it will not matter whether any interlocutory injunctive relief which the relevant receivers seek can properly be characterised as respectively mandatory or prohibitory, where there will be a more than adequate basis for suggesting that a strong case has been made out".* [Para. 6.13]

70. Having been satisfied that the plaintiffs have made out a strong case, consideration must then be given to what order should be made. As Clarke C.J. commented in *Scriven*:-

> *"…it may also be important to have regard to the fact that it is appropriate for a court, in fashioning an appropriate order at an interlocutory stage, to attempt to put in place a regime pending trial which runs the least risk of injustice, having*

*regard to the uncertainty as to what the ultimate result of the trial may be (again, see Okunade). This may involve the court looking at the practical situation on the ground and attempting to determine the course of action which minimises the risk of injustice…".[*Para. 6.14]

71. The current situation with the property is completely unsatisfactory, in that there may be as many as 15 occupiers at present. None of the parties seems to be aware of the situation regarding rent, although I have referred above to the suspicion of the second named plaintiff that the defendants … "continue to derive a substantial income from the premises". Neither the first named defendant nor the second named defendant reside in the property. It is not disputed that the first named defendant is in very substantial arrears in respect of the 2008 loan. Taking all of these circumstances into account, it seems to me to be appropriate that I should make orders which would enable the plaintiffs to take possession of the property.

72. Having said that, counsel for the plaintiffs did suggest that it might be appropriate that, if the defendants and/or other persons in occupation were ordered to surrender possession of the property to the plaintiffs, a stay be placed on any sale of the property pending the determination of the proceedings or agreement of the parties.

73. There is in my view considerable merit in this suggestion. It will allow the receivers to secure the property, and perhaps to regularise the position of the occupiers in terms of entering into appropriate arrangements with them regarding tenure, payment of rent, and so on. Any rent collected could be held by the plaintiffs in escrow pending the determination of the proceedings. A stay on sale would allow the defendants to proceed to a hearing and defend the matter fully, knowing that the disposal of the property would not have occurred prior to the hearing in the event that they were successful. Alternatively, it would provide some time and space to the parties to attempt to come to a mutually satisfactory compromise. I would also be prepared, if necessary, to order a timetable of pleadings and further steps to ensure that the proceedings are progressed and brought to an early hearing.

74. In the circumstances, I propose to hear the parties in relation to the precise orders to be made.