COURT OF APPEAL

UNAPPROVED
NO REDACTION NECESSARY
Neutral Citation Number: [2022] IECA 159
Appeal Number: 2019/72

Edwards J.
Whelan J.
Faherty J.

BETWEEN/

OLIVER DONLON

APPELLANT

- AND –

AENGUS BURNS, MICHAEL MCATEER, GRANT THORNTON AND O'BRIEN LYNAM SOLICITORS

RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 12th day of July 2022

Introduction

1. By the within proceedings the appellant contested the validity of a deed of appointment dated 6 February 2013 whereby the first and second named respondents ("the receivers") were so appointed by Ulster Bank Ireland Limited ("Ulster Bank") pursuant to powers contained in three separate security instruments each made between the appellant of the one part and Ulster Bank of the other part: a deed of mortgage dated 12 October, 2004 (the 2004 mortgage) and two deeds of mortgage both dated 12 March, 2009. O'Regan J. in an *ex tempore* judgment delivered on 15 January 2019, held that the purported appointment of the receivers on 6 February 2013 pursuant to the 2004 instrument was invalid and same could not be relied upon by the respondents for the purpose of exercising powers vested in

receivers under the latter instrument. She rejected his arguments that the appointment of the receivers under the 2009 instruments was invalid.

2. The appellant instituted the within proceedings as a litigant in person and maintained that status throughout the proceedings before the High Court. At the date of the hearing of this appeal he was legally represented.

Background

3. The appellant is a farmer and was a shareholder and director of a limited liability company Oliver Donlon Developments Limited ("the company"), Clarehall, Ballymore, County Westmeath, which was engaged in construction and property development. At all material times the appellant and the company were customers of, *inter alia*, Ulster Bank.

2004 Instrument

4. On 12 October 2004, the appellant executed a mortgage/charge in favour of the bank. A memorial of same was registered in the Registry of Deeds. Clause 8 of the 2004 mortgage provides:

> "Section 17 and 20 of the Conveyancing Act 1881 shall not apply to this Mortgage and the statutory power of sale and other powers shall be exercisable at any time after demand."

Clause 16 provides –

> "A demand or notice hereunder shall be in writing signed by an officer or agent of the Bank and may be served on the Mortgagor either by hand or by post."

5. The properties secured by the 2004 instrument are identified in the Schedule and appear to be lands described in a deed of transfer and conveyance made on the 16 July 1998

made between Eileen Walsh and Richard Walsh of the one part and Oliver Donlon and Margaret Donlon of the other part and comprising three parcels:

(1) All the lands comprised in Folio 11713F of the Register of Freeholders County Westmeath.

(2) Part of the lands of Ballynagarbry (Pim) comprising 13.46 acres or thereabouts in the Barony of Clonlonan and County of Westmeath identified by reference to a map attached to a deed of transfer and conveyance dated 26 August 1993.

(3) Part of the lands of Toorphelim comprising 7.686 acres or thereabouts in the Barony of Clonlonan, County Westmeath identified by reference to a map attached to the deed of 26 August 1993.

The 2004 mortgage appears to have been executed by the appellant and duly witnessed.

2009 Instruments

6. On the 20 May 2008, Ulster Bank offered the appellant a facility in the amount of €600,580. The purpose of same was to restructure an existing loan of the company drawn in connection with a housing development at Moate and the restructuring of an existing overdraft facility.

7. Ulster Bank offered the company overdraft facilities by virtue of a facility letter of the 26 February 2009 limited to €460,000 with the limit set to revert to €400,000 on the 31 March 2009. The purpose of same was expressed to be for "Working Capital". Two mortgages were created on the 12 March 2009. Each identifies the appellant as mortgagor. The first identifies the mortgaged property thereunder in the Schedule as Folio 10611F comprising 53.35 acres at Clare Hill, Ballymore, Co. Westmeath. The second identifies the

mortgaged property thereunder as part of Folio 7269F County Westmeath 28.5 comprising acres at Clare Hill, Ballymore, County Westmeath (Plan 10 thereof).

8. Following the creation and registration of the 2009 securities a further overdraft facility was granted by Ulster Bank to the company by letter of the 21 August 2009. The overdraft limit was expressed to be €460,000 as "[c]ontinuation of temporary increase in overdraft facility to fund working capital requirements". That limit was expressly stated to revert to €400,000 on the 30 November 2009. The said overdraft was granted in respect of working capital. On the 25 January 2011, the bank offered a further facility to the company in the sum of €380,000 subject to review on the 1 March 2011. Same was expressed to be for "Working Capital Expenses". It is clear from the facility letters that the bank separately continued to hold an all monies debenture dated 22 February 2006 providing a floating charge over the assets of the company.

9. On the 5 March 2009 the appellant granted a guarantee to the bank in respect of the debts of the company. Its terms included that Mr. Donlon: -

> "… unconditionally and irrevocably guarantees to discharge on demand the Debtor's obligations with interest from the date of demand." (Term 1.1)

The amount recoverable pursuant to the deed of guarantee was expressed thus: –

> "… shall not exceed the total of [€1,948,100] together with interest on that sum since the date on which interest was last compounded in the books of the Bank and interest on that total from the date of demand and expenses." (Term 1.2)

Demand letters

10. The letters of demand are dated the 5 February 2013 and addressed to the appellant. The first invokes the 2004 mortgage. The others reference in the context of the 2009 charges, *inter alia*, the "[f]acility letter dated the 20th day of May 2008 made between Oliver Donlon

and Ulster Bank Ireland Limited". The first states that at close of business on the 5 February 2013, interest and principal in the total sum of €563,020.20 was due and owing to the bank. A formal demand was made for payment of same together with interest. The second, also dated 5 February 2013, refers to the borrowings of the company and the guarantee of the 5 March, 2009. Reliance is placed on the three facility letters above referred to pertaining to the company namely, those dated 26 February 2009, 21 August 2009 and 25 January 2011.

11. The deed of appointment is dated the 6 February 2013 and recites that the first and second respondents were appointed as joint receivers and managers pursuant to the powers contained in the three deeds of mortgage. The evidence of the appellant, which was not contradicted by the respondents at trial, and which was accepted by the trial judge and is not the subject of appeal is that the demand letters were received by him on the 7 February 2013 – the day following the receivers being appointed.

The Company

12. The company is not a party to the within proceedings. However, it would appear from the papers that on the 22 February 2006 the company executed an all monies debenture over its assets in favour of the bank as referenced above.

13. Any claims purportedly brought on behalf of the company could not be brought in the absence of it being a plaintiff in these proceedings. On the basis of the evidence, transcripts and documentation including submissions put before this court, none of the exceptions to the rule in *Foss v. Harbottle* (1843) 2 Hare 461 apply such as would entitle the appellant to pursue a derivative suit on behalf of Oliver Donlon Developments Limited. The decisions of the Supreme Court in *Battle v. Irish Art Promotion Centre Limited* [1968] I.R. 252 when considered with that court's later decisions in *Coffey v. The Environmental Protection Agency* [2014] 2 I.R. 125 and *Allied Irish Bank plc v. Aqua Fresh Fish Ltd.* [2018] IESC 49

as followed by this court in *Munster Wireless Ltd. v. A Judge of the District Court & Ors*, [2019] IECA 286 make clear that, save in exceptional circumstances not established in this case, in the words of Finlay Geoghegan J. in *Aqua Fresh Fish* at para. 37;

> "… it is in accordance with the interests of justice and our principles of fair procedures that the right of any litigant to be represented by a third party should, subject to any different statutory entitlement, continue to be confined to a right to be represented by a lawyer who has a right of audience before our courts."

No further reference will be made to the company in that particular context hereafter. I am satisfied that the claims pursued and reliefs sought by the appellant were brought primarily on his own behalf.

The Pleadings

14. By plenary summons which issued on the 2 December 2013, the appellant claimed that the receivers were "appointed illegally" (para. 1) and that their appointment was invalid. It pleads that the third and fourth named respondents "showed gross negligence in their action against the plaintiff in the exercise of their due care" (para. 3). Damages were claimed together with costs. On 20 December 2013, an appearance was entered. The litigation was thereafter not progressed for some time. Ultimately, in January 2016 the respondents brought a motion to dismiss the proceedings by reason of the appellant's inordinate and inexcusable delay in prosecuting same. That motion was grounded on an affidavit of the first named respondent sworn on the 12 January 2016 which exhibited, *inter alia*, copies of the mortgages/charges dated the 12 October 2004, 12 March 2009 and 12 March 2009 together with the deed of appointment of the receivers of 6 February 2013. In addition, there was exhibited the loan facility documentation recited above in respect of the loans advanced by Ulster Bank to the appellant and/or the company. The subsequent devolution of title from

Ulster Bank, which is not in dispute in this appeal, including the global deed of transfer of the 12 February 2015 and the relevant receiver novation deed were also exhibited.

15. In his replying affidavit, sworn on the 24 January 2016, the appellant accepted that there had been delays in the prosecution of the litigation but contended that the respondents' actions had contributed in the greater part to same. He raised a variety of issues in the said affidavit including a contention that "the agreements upon which the defendant's (*sic*) claim to be appointed were superseded by further agreements and so contained no power to appoint." (para. 8)

16. The Statement of Claim contended that the appointment of the first and second named respondents as receivers was invalid. It also pleaded that the appellant had no recollection of signing "…the March 2009 Agreement but does understand that there was a February 2009 Agreement." (para. 6) It was pleaded that the terms and conditions pertaining to the facilities "are incapable of sustaining the appointment of a receiver over the plaintiff's property or that of Oliver Donlon Developments Limited." It was pleaded that the facility letter of the 25 January 2011 "according to its Terms and Conditions superseded all prior agreements… means that the first and second named defendants could not be validly appointed." (para. 8)

17. The second aspect pertained to alleged unlawful conduct on the part of the invalidly appointed receivers/respondents which, he pleaded, *inter alia,* had damaged his good name "by making it public knowledge that they had been appointed receivers over the plaintiff's properties." (para. 1) Apart from issues raised concerning the company, which cannot be properly dealt with in the within proceedings since the company is not a party to the litigation in the first place for the reasons stated above, the appellant pleaded that the first and second respondents had accepted their appointments "<u>without making the enquiries that would be</u>

reasonably expected to ensure the validity of their appointment." (para. 5) (emphasis added) The appellant pleads that damage had been suffered by him.

18. The respondents' defence traversed all claims and denied that the deeds of mortgage were incapable of sustaining the appointment of the first and second respondents as receivers over the appellant's lands. At para. 14 it is pleaded: -

> "… the Defendants expressly plead that at all material times they acted within their lawful authority and were not at any material time guilty of any wrong such as to vest the Plaintiff with any valid or sustainable cause of action against them or otherwise entitle the plaintiff to issue proceedings against them."

Further, at para. 16 it is pleaded –

> "… if the Plaintiff suffered the alleged damages … (which is denied) the Defendants deny that the circumstances in which they were suffered by the Plaintiff vests the Plaintiff with the alleged or any entitlement to maintain or prosecute the present proceedings against the Defendants."

Order to produce instruments for inspection within 6 weeks

19. On the 25 June 2018, Mr. Justice Cross made an order in the High Court that the respondents produce to the appellant for inspection the relevant security instruments "within six weeks of the date hereof". The appellant had put the validity of his signature to the March 2009 Agreements in issue having pleaded (para. 6, Statement of Claim) that he had "no recollection of signing" same.

20. It appears that the appellant was facilitated in inspecting some only of the original documentation at meetings to the fourth respondent's premises on the 12 July 2018. However, the originals of both mortgage deeds dated 12 March 2009 were not made available to him for inspection prior to the hearing date. Further instruments were made

available to the appellant for inspection on the 27 September 2018 and the 12 November 2018.

21. In an affidavit sworn by the appellant on the 4 December 2018 grounding a motion to compel compliance by the respondents with the order for inspection in relation to both mortgage deeds dated 12 March 2009, the appellant deposed that he had attended for the inspection of same on the 12 July 2018 accompanied by "my Document Expert Mr. Dave Madden to inspect the aforesaid documents". It is clear that albeit a motion was issued by the appellant on the 4 December 2018 returnable for the 15 January 2019 for the production of the two instruments in question he had not been afforded any opportunity by the respondents to consider same prior to the hearing commencing on the 15 January 2019. The motion was returnable to the hearing date.

22. The instruments which the appellant sought to inspect had previously been lodged in Land Registry as part of dealings to secure the registration of charges as burdens on various folios. As of the hearing date on 15 January 2019, the said order had only partly been complied with by the respondents. I am satisfied that this was prejudicial to the appellant. The order the subject of this appeal recites that the Court had risen on 15 January 2019 to allow the original security documents to be obtained from the Central Office and brought to the High Court for inspection of same by both parties under the supervision of the Court Registrar and that the said inspection had taken place. Following upon the said inspection, the judge thereupon gave liberty to the appellant to amend his statement of claim to specifically plead and pursue the claim contending for the invalidity of the appointment of the receivers pursuant to the 2004 security over the properties therein specified - in addition to the appointments pursuant to both 2009 mortgages - on the basis that he had only received a demand letter in respect of the alleged indebtedness arising thereunder subsequent to the appointment of the receivers. Following the said inspection and amendment the hearing

immediately proceeded on the same day and judgment was delivered *ex tempore* immediately upon the conclusion of the hearing.

The Judgment

23. The key observations and findings of Ms. Justice O'Regan in her *ex tempore* judgment delivered on the 15 January 2019 included that "the mortgage documents are standalone documents and they are what we must look at, they being the documents relied upon by Ulster Bank when they first appointed the receivers in February 2013." (p. 1) The appellant had argued that the language contained in the facility letter dated the 25 January 2011 had the effect of superseding all prior agreements, arrangements or correspondence between the Ulster Bank and the appellant in relation to the facility. She noted that the appellant accepted her analysis that the facility in question pertained to the specific overdraft facility granted by the bank to the company Oliver Donlon Developments Limited. Terms or provisions contained in the said facility letter could not be availed of by the appellant in relation to his own personal borrowings and liabilities. "He accepted that. He accepted that in fact there was no facility or arrangement entered into between himself and Ulster in 2011 of any description." (p. 1)

24. The judge separately and, in my view correctly, concluded that a like provision in the facility letter of the 20 May 2008 which pertained to the appellant's personal indebtedness and gave rise to a restructuring of existing facilities did not assist the appellant's contentions noting: -

> "It doesn't impact on the fact that mortgages existed and were executed validly and were registered on the basis that if there was any default in any particular facility past or future, then certain rights might be triggered at the behest of Ulster on foot of those mortgages and charges." (p. 1)

25. The judge then considered the appellant's contention that the appointment of the receivers was invalid. She accepted the appellant's evidence that the letters of demand were not received by him until the 7 February 2013 although he had received a telephone call on the 6 February advising him that the appointment of the receivers had taken place. She rejected his contention that this sequence of events adversely impacted on the validity of the appointment of the receivers under either of the 2009 mortgages. "That is not reflected in … clause 11 of the two 2009 facilities." (p. 2)

26. However, she accepted his arguments in regard to the invalidity of the appointment of the receivers pursuant to the terms of the 2004 mortgage noting: -

> "Clause 8 of the 2004 facility says that sections 17 and 20 of the Conveyancing Act shall not apply to the mortgage and the statutory powers of sale and other powers shall be exercisable at any time after demand…. Mr. Donlon is correct vis-à-vis the mortgage of the 12th October, 2004, his point is well made and it is a valid point." (p. 2)

27. With regard to the provisions of the two 2009 mortgages, the Court was satisfied that once there was a failure to discharge the monthly repayments the bank was entitled to appoint a receiver "… without a prior demand being made. That is effectively the import of section 11 of the two mortgages of 2009." (p. 2) She was satisfied that there was evidence before her that there had been default on the appellant's own personal account at the date the letters were sent on the 5 February 2013. "Therefore there is evidence before me that suggest the bank were entitled under the two charges of 2009 to appoint a receiver." (p. 2) Elsewhere, she observes at p. 3: -

> "… I am satisfied that the receivers were properly appointed insofar as the 2009 mortgages are concerned…"

28. The appellant had pleaded adverse medical and other injuries suffered by him including distress, impact to his health and relationships. In that regard the judge observed: "… the evidence that you have tendered is merely the documents associated with your affidavit of discovery" (p. 3). She went on to note that he had suffered from certain material health issues from 2011 to 2013, "… so they all predated this event in February 2013." She noted that he had been commenced on certain medications in December 2011. She concluded, "… I cannot say that they followed from the appointment of the receiver, that is in my view incorrect, under the 2004 mortgage…". (p. 3)

29. The appellant had contended that he was entitled to damages because of publication concerning the appointments and that he had suffered alleged loss or damage to his good name in the locality and had difficulty obtaining credit in his ordinary dealings as a farmer by reason of same. On the issue of publication, the judge observed that in her view the receiverships were valid in respect of the properties charged pursuant to the 2009 instruments. She inferred that the appellant himself appeared to have published "…to at least one third party the fact that a receiver was appointed, because that's what it says in the document you furnished." (p. 3) She also attached weight to the fact that the appellant previously had been sued by creditors in advance of any appointment of a receiver and judgments had been registered against some folios by suppliers prior to the 6 February 2013. She concluded: -

> "You have made a valid claim under the 2004 mortgage. There should be no activity by the receivers in respect of that mortgage or in respect of the property the subject matter of that mortgage." (p. 4)

She further concluded –

> "… I find that no appreciable damages result or have been tendered to the court as a result of the error occasioned in respect of the 2004 mortgage on a stand-alone basis."

30. On the issue of costs she concluded at p. 5: -

> "The appointment of the receivers was challenged. It was successful insofar as one third of that challenge was made and it was unsuccessful insofar as two thirds of that challenge was made."

She concluded that "… insofar as the claim related to the challenge to the receivers, I will afford one third of those costs to the defendant to be taxed in default of agreement." (p. 6) She otherwise awarded "the entirety of the costs in respect of the damages claim which took up a small portion of the court's time and of the defendants' defence" (p. 6) to the respondents.

Notice of Appeal

31. Three net grounds of appeal are raised in the Notice of Appeal dated the 26 February 2019:

(1) That the judge erred in refusing to grant the appellant sufficient time to examine the Property Registration Instrument with an expert trained in examining documents. As a result he contended that due process was denied to him, the hearing ought to have been stayed pending the inspection of the documents with such a properly trained expert and he had not obtained effective access to justice.

(2) That the first respondent had exhibited to the Court a document "which put at issue the Defendants (*sic*) claim to be validly appointed as receiver over certain of the Plaintiffs (*sic*) land. When the Plaintiff sought more information regarding the docket and asked to examine the original, the

Honourable Court ordered that an inspection should be allowed." It is contended that "the Court erred in not compelling the Defendants to adhere to the provisions of an Order of the Court itself."

(3) Notwithstanding that the Court had decided that the first and second respondents were not validly appointed as receivers over certain of the appellant's lands pursuant to the deed of mortgage of the 12 October 2004, the Court erred in granting no relief "the Court should have granted compensation to the Plaintiff against the First and Second named Defendants, for that specific matter, which amounted to an act of trespass over the Plaintiff's property."

Ground 1 was, quite properly, not pursued at appeal stage. Ground 2 was pursued only to a limited extent.

32. The appellant, essentially, appealed against parts only of the orders made by the trial judge including the order granting him and the solicitor for the respondents, Mr. Collins, liberty "to view the original property registration instrument no. D2009LR054229U in relation to the first and second mortgage deeds dated 12 March 2009" and *inter alia,* her refusal to award him any damages in respect of the wrongful appointment of the first and second respondents as receivers under the 2004 instrument. He further appealed the order as to costs. His counsel sought to expand the ambit of the appeal at the hearing before this court.

33. The respondents filed their response on the 11 April 2019. The respondents expressly rely on the terms and reasoning of the judge's judgment. There is no cross-appeal. The respondents deny that the appellant led any evidence with regard to his claim against the

fourth named respondent, "in respect of which there are no grounds of appeal identified in the appellant's notice of appeal." (para. 7)

The standard of review

34. Of note in the context of the facts and circumstances obtaining in this case is the judgment of Collins J. in *Betty Martin Financial Services Limited v. EBS DAC* [2019] IECA 327 where he emphasised at para. 39:

> "… while as a matter of principle, *'great weight'* is to be given to the views of the High Court Judge, the ultimate decision on this appeal is for this Court."

General observations

35. There is no cross-appeal by the respondents against the findings of the trial judge that the first and second named respondents were not validly appointed as receivers pursuant to the provisions of the mortgage instrument dated the 12 October 2004 over the properties specified in the Schedule thereto. That is quite proper in the circumstances and in light of the uncontroverted facts and terms of the relevant instruments in this case.

Self-Represented Litigant

36. With regard to litigants in person, the paper written by Master Bell, "Judges, Fairness and Lay Litigants" [2010] Judicial Studies Institute Journal No. 1 is well known having been cited by Clarke J. in *ACC plc v. Kelly & Anor.* [2011] IEHC 7, which in turn was cited with approval by this Court in *Rippington & Ors. v Cox & Anor*. [2017] IECA 331 at para. 8. The key excerpt provides: -

> "The primary principle applied by judges in cases involving self-represented litigants is the principle of fairness. Fairness is the touchstone which enables justice to be done to all parties. A judge in proceedings involving a self-represented litigant must balance the duty of fairness to that litigant with the rights of the other party and with

> the need for a speedy and efficient judicial determination as is feasible. Achieving this balance is one of the most difficult challenges a judge can face. While a trial judge's overarching responsibility is to ensure that the hearing is fair, it is not unfair to hold a self-represented litigant to his choice to represent himself. A litigant who undertakes to do so in matters of complexity must assume the responsibility of being ready to proceed when his case is listed. If he embarks upon the hearing of his case, he is representing to the Court that he understands the subject matter sufficiently to be able to proceed. Although it may later become patently obvious that he does not, litigants who choose to represent themselves must accept the consequence of their choice. While the Court will take into account the litigants' lack of experience and training, implicit in the decision to represent himself is the willingness to accept the consequences that may flow from that lack. Indeed, to hold to the contrary would mean that any party could derail proceedings by dismissing his representatives.
>
> It is the Court's duty to minimise the self-represented litigant's disadvantage as far as possible, so as to fulfil its task to do justice between the parties. However, the Court should not confer upon a personal litigant a positive advantage over his represented opponent nor is it the position that the party with the greater expertise must be disadvantaged to the point at which they have the same expertise effectively as the other party. That would be a perversion of what is required, which is a fair and equal opportunity to each party to present its case." (pp. 5-6)

37. Of course, in this instance it can be readily inferred that Mr. Donlon's decision to self-represent stemmed primarily from his financial circumstances at the time. He did not freely choose to self-represent. Nevertheless, it is clear from the decision of Clarke in *ACC Bank plc v. Kelly* that irrespective of the circumstances that lead to an individual litigating in person "… the overriding requirement that the conduct of the trial must be fair to both sides,

and that the fact that a person is for whatever reason, unrepresented cannot be allowed to operate as an unfairness to the represented party." (para. 2.7)

38. It follows from that that the appellant must be confined to the grounds of appeal raised or reasonably to be construed as arising from the terms of his Notice of Appeal.

Legal Submissions

39. The appellant filed two legal submissions. The first dated the 30 August 2019 was filed in the Court of Appeal but not served on the respondents. The second submission, more extensive, dated the 19 March 2020 was served on the respondents. The submissions ranged somewhat outside the specific grounds of appeal contained in the Notice of Appeal of the 26 February 2019. It was unsatisfactory on the part of the appellant to file with the Court of Appeal Office written submissions whilst overlooking to furnishing a copy of same to the respondents. However, I am satisfied that the respondents had adequate sight of same ahead of trial.

Observations as to the law

40. It is well settled that the appointment of a receiver pursuant to contract is void *ab initio* unless done in compliance with the terms of the relevant contract instrument.

41. These were plenary proceedings. They are conducted by means of pleadings and a hearing on oral evidence with witnesses available for cross-examination. The appellant was aware for some months prior to the 15 January 2019 of the designated hearing date, and it was incumbent upon him to ensure that he had such witnesses before the Court as he considered necessary to prove the claim being advanced in his plenary summons and statement of claim. To an extent the appellant adopted a somewhat unorthodox approach at the trial of the action, perhaps by reason of unfamiliarity with the processes involved. He purported to rely on various documentation including material obtained in discovery when,

under the Rules of the Superior Courts, proof of his contentions required oral testimony. The evidence suggests that the appellant had proceeded on the basis that the hearing would not proceed on 15 January 2019 because the Motion concerning non-compliance with a documents inspection order was before the High Court for determination that day.

42. In the ordinary way, if necessary witnesses were unavailable, steps could have been taken by him in advance to alert the Court and to seek either the taking of evidence in commission or interrogatories or such other measure or step as was appropriate depending on the exigencies that had arisen. No such application was brought. The approach of the trial judge in relation to the inspection of both mortgage instruments dated the 9 March 2009 as comprised the dealings registered against the relevant Folios, namely Folio 10611F County Westmeath and Folio 7269F County Westmeath suggests she sought to adopt a pragmatic approach. However, it was not reasonable for the respondents to fail to ensure full compliance with the inspection Order made in June 2018 and which allowed 6 weeks to make the documents in question available for inspection. The approach of allowing the motion to be listed for the same day as the trial of the action was unfair to the appellant and caused him to be somewhat wrong-footed. That aspect ultimately may have implications for costs.

43. So far as one can ascertain, it would appear that as of 2018 the appellant had a document expert "Mr Dave Madden" referred to at para. 7 of the appellant's affidavit sworn on the 4 December 2018, less than six weeks prior to the hearing of the action. That individual did not give evidence at the hearing. It appears likely that since the motion to compel compliance with the inspection order was listed for hearing on the morning of the trial, the appellant inferred that the plenary hearing would not proceed. That assumption was incorrect.

44. It was incumbent on the appellant to have Mr. Madden and any other relevant witness in court to give testimony with regard to any issue being pleaded or claim arising in the course of the hearing in connection with the validity of any of the mortgage instruments or securities. He had to formally prove any claim in connection with the signatures on the said instruments and whether and on what basis it was contended that the signatures were not his own. It was for him to call any witnesses to support the remedies and reliefs he claimed.

Appointment of Receiver

45. The appointment of a receiver is a significant remedy to enable recovery of a debt by the mortgagee. Where a mortgage instrument identifies events or steps after which the mortgagee is entitled to exercise the power to appoint a receiver it is implicit that until such events or steps occur the power cannot be validly exercised. Receivers enjoy significant powers and rights historically, by convention and pursuant to statute. It is an office which ought never to be lightly undertaken. The position and power of a receiver appointed out of court derives from and depends upon the provisions specified in the relevant authorising instrument or instruments. It is incumbent on a proposed receiver to take reasonable steps to satisfy himself that the instrument on foot of which a charge-holder, debenture-holder or mortgagee purports to effect such appointment empowers same and further that the appointment is being effected in accordance with the instrument's specific terms and provisions.

46. The receiver cannot blindly assume office without considering and being satisfied that the necessary steps or prerequisite obligations mandated under the appointing instrument for valid exercise the power of appointment have been complied with. As the authorities such as *Ford & Carter Ltd v. Midland Bank Ltd* (1979) 129 N.L.J. 543 (HL), *OBG Ltd v. Allan* [2007] UKHL 21, [2008] 1 A.C. 1 and the decision of the Supreme Court of New South Wales in *Pollnow v. Garden Mews – St Leonards Pty Ltd* (1984) 9 A.C.L.R. 82 make clear,

improperly or invalidly appointed receivers are liable in tort for damages for their acts insofar as they constitute interference with the possession of the mortgagor or their entitlement to deal with the property. In his judgment in *The Merrow Limited v. Bank of Scotland Plc & Anor.* [2013] IEHC 130, Gilligan J. comprehensively reviewed the jurisprudence and leading authors on the importance of the appointment of a receiver complying with all necessary procedural requirements and the consequences of the invalidity of such an appointment.

47. It is incumbent on receivers being appointed out of court to take reasonable steps to ascertain that the instrument on foot of which a mortgagee purports to appoint them for the purposes of enforcing a security has been properly complied with prior to assuming such office and purporting to take possession, manage, exercise control over or effect a sale and disposition of the subject property.

48. As was observed by Gilligan J. in *The Merrow Limited v. Bank of Scotland Plc & Anor.*: -

> "29. Since a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument. This principle has been recognised by the leading commentators in this area and accepted and applied by the courts throughout the common law world."

Failure to comply with the formalities specified in the relevant security instrument renders the appointment of the receiver void *ab initio*. Whereas the instrument under consideration in *The Merrow* was a debenture, the observations of Gilligan J. apply with equal force to the appointment of a receiver out of court pursuant to a contractual instrument purporting to authorise same.

49. It is uncontroversial that receivers must – in addition to acting with honesty and integrity – act in good faith and use their powers for proper and intended purposes. The latter obligation necessarily encompasses making appropriate enquiries to ensure that the appointment itself is a valid one.

50. Since the appellants have not cross-appealed against the finding of the judge that the purported appointment of the first and second respondents as receivers was invalid, it is not necessary to exhaustively review the jurisprudence so helpfully analysed by Gilligan J. in *The Merrow* beyond observing that the practical consequence of the judge's finding is that the appointment of the first and second respondent as receiver over the properties specified in the Schedule to the mortgage instrument of the 12 October 2004 was null and void *ab initio* and of no legal effect.

51. The trial judge appeared to be somewhat unclear as to the identity of the properties but, as stated above, the Schedule to the 2004 instrument clearly identified same as including: -

(1) all of the lands comprised in Folio 11713F, County Westmeath;

(2) 13.46 acres situate at Ballynagarbry (Pim), County Westmeath; and,

(3) 7.686 acres situate at Toorphelim, County Westmeath.

Conduct of the receivers

52. It is noteworthy that the deed of appointment of the 6 February 2013 appoints the first and second respondents as receivers over, *inter alia,* all of the lands specified in the Schedule to the 2004 mortgage including the lands comprised in Folio 11713F, County Westmeath.

53. By letter dated the 21 February 2013 from Messrs. N.J. Downes & Co. Solicitors, Mullingar to the fourth named respondent it was raised that "our client confirmed to us that at no stage was any notice granted to him in relation to the Receiver." This ought to have

put the respondents on enquiry as to whether, in light of the terms of the relevant security instruments, all relevant procedural steps had been complied with prior to the appointment proceeding. It would appear however, that no such enquiry was made, and the respondents elected to stand their ground and insist that their appointment as receivers pursuant to all three instruments was valid. That stance was maintained at all material times over the following six years up to and including the date of the hearing before the High Court on the 15 January 2019.

54. The first respondent on headed notepaper of the third respondent communicated with the appellant on the 9 July 2013 indicating, *inter alia*, that he was at that point engaging a sales agent to bring assets to market which included the lands secondly and thirdly referred to in the Schedule to the 2004 mortgage.

55. In a letter of the 15 November 2013 to the appellant the fourth respondent stated: -

> "Please note that our client is satisfied as to the validity of their appointment and that they are fully entitled to enter into possession of the properties the subject matter of the Deed of Appointment for the purpose of exercising their powers as conferred under the said charge documents and at law."

56. The within proceedings were instituted in December 2013. It was evident to the respondents at that point that there was a dispute with regard to the validity of their appointment under the three instruments. Whereas it was incumbent on the respondents to examine the instruments prior to accepting the appointments in question, it became all the more pressing that they satisfy themselves as to the soundness of their adopted position at a point when litigation had been instituted, impugning the validity of the appointments.

57. In a letter of the 16 November 2015, the fourth named respondents who at that time acted for all respondents, wrote to the appellant stating: -

> "In circumstances where you are seeking, as your principle relief, damages, including aggravated damages against the Defendants, we confirm that the sale of the charged properties do not in any way prejudice your entitlement to proceed with your claim for damages and/or aggravated damages against the Defendants whom we confirm will be fully defending the proceedings on the basis that the first and second named Defendants were properly and validly appointed as receivers over the charged properties and on the basis that you are not entitled to any damages, including aggravated damages against the Defendants."

58. After delays, the Statement of Claim did materialise on the 4 March 2016, almost three years prior to the hearing date. One would expect that the respondents might have seen fit at that point to re-assess the validity of their appointment in light of the terms of the security instruments but that does not appear to have occurred.

59. The trial judge ultimately at the hearing of the action authorised the appellant to amend his claim to explicitly impugn the validity of the appointment of the first and second respondents as receivers under the 2004 mortgage. She upheld the claim that the appointment pursuant to the 2004 instrument was invalid for failure to comply with Clauses 8 and 16 of the mortgage instrument. That finding has been accepted by the respondents insofar as no appeal has been brought against that amendment or against the adverse findings of the judge arising therefrom.

Arguments of appellant in this appeal

60. In the course of legal submissions before this court, counsel for the appellant essentially distilled the arguments and grounds of appeal down to the following three aspects: -

(1) That the trial judge erred in her determination that the receivers had been validly appointed pursuant to the 2009 mortgage instruments.

(2) That the trial judge, having determined that the appointment of the receivers pursuant to the 2004 mortgage instrument was invalid, erred in not awarding damages, or at the very least nominal damages, to the appellant for trespass.

(3) That the trial judge erred in respect of costs and failed to have due regard, *inter alia*, to the fact that the appellant had been successful in respect of two motions brought before the High Court in respect of which costs had been reserved.

61. Reasonably, counsel did not advance arguments in pursuance of the first or second grounds of appeal which had contended that the trial judge had not afforded the appellant sufficient time to examine the property registration instruments in question on the morning of 15 January 2019 and had failed to compel the respondents to adhere to the provisions of the inspection order of Cross J. made in June 2018. Accordingly, those grounds need no further concern this Court and were not maintainable though they may have a relevance in relation to the issue of costs.

62. Whilst the Notice of Appeal did not unequivocally identify a distinct ground of appeal contesting the trial judge's determination that the first and second respondents had been validly appointed as receivers pursuant to both mortgage instruments dated March 2009, the appellant argued that it is noteworthy that one of the orders sought in the Notice of Appeal was "[t]o set aside the part of the order refusing the Plaintiffs (*sic*) claim in relation to both deeds of mortgage dated 12 March 2009 and all other reliefs sought by the plaintiff in these proceedings."

63. Counsel for the appellant emphasised that his client in conducting the hearing before the High Court in person had actively engaged in argument in relation to the sequencing of the key events surrounding the appointment of the receivers being effected and the fact that the demand was received by the appellant subsequent to the appointments having been made in relation to all three security instruments. Counsel contended that the appointment of the receivers was invalid under the 2009 instruments as well as under the 2004 security by reason that in each case the demand had been received by the appellant subsequent to the appointments having been effected. He emphasised that this was not a new argument being introduced at the appeal stage and that the decision in *Koger Inc. v. O'Donnell* [2013] IESC 28 relied on by the respondents was distinguishable by reason that in that case new arguments and submissions which had been advanced on behalf of the appellant at the appeal stage were the diametric opposite of contentions advanced before the High Court. Counsel argued that, by contrast, in the instant case, the contention that the appointments of the first and second respondents as Receivers pursuant to both 2009 mortgage instruments was invalid had been pleaded and advanced before the High Court albeit rejected by the trial judge.

64. In support of a contention that the trial judge erred in concluding that the first and second respondents were validly appointed pursuant to the two 2009 mortgage instruments, the appellant's counsel placed reliance on McDermott & McDermott on *Contract Law* (2nd Ed., Bloomsbury Professional, 2017) and directed his arguments toward the appropriate contractual interpretation of the 2009 mortgage instruments relying, *inter alia*, on the principle of commercial sense and the importance of avoiding unreasonable results, market practice and the *contra proferentem* rule. In addition, he advanced the argument that the contract must be viewed as a whole and the documents forming part of the same transaction must be considered together and the contextual principle encompassed by the maxim

noscitur a sociis was relied on. Further he contended that the Court should give effect to every provision in a contract and having due regard to the relevant rules of interpretation.

65. With regard to practice, it was contended that it is customary in banking that a demand is a prerequisite to the appointment of a receiver. In that regard, reliance was placed on the decision in *Woods v. Ulster Bank* [2017] IEHC 155.

66. It was contended that having due regard to the wording in Clauses 11.3 of both 2009 mortgages, same ought not to be construed on the basis that the security was immediately enforceable at the moment the demand was made and prior to receipt of the demand by the mortgagor. Reliance was placed on Clause 1 of both instruments which provided: -

> "The Mortgagor hereby covenants with the Bank that the Mortgagor will, on demand, pay and discharge the Mortgagor's obligations when the same are due to be paid and discharged. The Mortgagor acknowledges that the Mortgagor's Obligations shall, in the absence of express written agreement to the contrary, be due and payable to the Bank on demand."

67. The *contra proferentem* principle may be applicable in circumstances where the language of a contractual instrument is one-sided and ambiguous in the sense of being capable of bearing two or more distinct and contrary meanings. Generally, the principle is not relevant where the meaning of words in an instrument are clear. This particular argument was not advanced at the original hearing nor was it clearly pleaded. It is to be inferred that paras. 26 – 32 of the appellant's second written submission, with particular reference to paras. 29- 32 thereof, encompass the appellant's contentions in support of this argument. The operation of the rule - were it established to be engaged - would presumably give rise to an approach that the less favourable construction ought to be adopted *quo ad* the author of the instrument in construing the respective rights and entitlements of the parties thereunder.

In the instant case that would, presumably, result in an argument for less favourable construction operating with regard to the mortgagee who had undoubtedly drafted the mortgage instrument encompassing the relevant Clauses, namely Clauses 1 and 11 in the first case.

68. The difficulty arising from the new arguments and propositions advanced at the hearing is that the respondents who are professional people have had no opportunity to fully engage with these arguments before the High Court. They simply were not advanced or pursued at the hearing. It would not appear that Clause 1 of the 2009 mortgage instruments was discussed in the course of the High Court hearing or brought to the trial judge's attention nor was it the subject of argument or submission of any kind. This places the respondents at a distinct disadvantage now. If the Court were to embark on a consideration of the merits of the *contra proferentem* point and the cognate new arguments now being advanced or were any of same to find favour with this court this risks giving rise to a situation where the respondents are deprived of their general entitlement to fully argue the issues at first instance and to have a full appeal to this court in the event of any adverse determination. It would be fundamentally unfair to the respondents were this Court now to engage with the arguments counsel for the appellant ably advanced in regard to the 2009 instruments, namely whether, on a true construction of both 2009 instruments, there was an implied contractual or legal obligation to serve a demand in advance of purporting to appoint the first and second respondents as receivers thereunder.

69. One might well rhetorically ask what was the point of serving the demand letters dated the 5 February 2013 in the first instance and what legal or contractual function this step was intended to serve in the context of the 2009 securities if the respondents are correct that there was no need to issue a demand and to ensure that service of same prior to appointment of the receivers.

70. There have been substantial judicial pronouncements in other jurisdictions in regard to aspects of the obligation to serve prior notice on a creditor before a receiver can be appointed, irrespective of the terms and provisions of the mortgage instrument itself and notwithstanding the clauses similar to Clauses 8 and 16 of the 2004 mortgage or their equivalent are not contained in the mortgage instrument. Such issues were not explored or argued in the conduct of this case before the High Court and cannot be embarked on now other than in a manner that risks injustice to the respondents.

71. It will be for the Courts in this jurisdiction on another day to consider whether any aspect of the line of jurisprudence such as *Lister Limited v. Dunlop Canada Limited* [1982] 1 S.C.R. 726, *McLachlan v. Canadian Imperial Bank of Commerce* (1989) 57 D.L.R. (4th) 687, *Bradshaw Construction Ltd v. Bank of Nova Scotia* [1993] 1 W.W.R. 596, *Royal Bank of Canada v. W. Got Associates Electric Limited* [1999] 3 S.C.R. 408 and other decisions such as *West v. Alberta Treasury Branch* [2005] A.B.P.C. 285, *OBG Ltd. & Anor v Allan & Ors* [2007] UKHL 21, and *Kavcar Investments v. Aetna Financial Services* (1989) 62 D.L.R. (4th) 277 – which considered, *inter alia*, whether the service of a demand for payment in the context of the proposed appointment of a receiver necessarily requires, save where good reasons are demonstrated for not doing so, that a reasonable time be afforded to the mortgagor or creditor to pay on foot of any demand prior to any step being taken to enforce the security whether by way of receivership or otherwise – represent good law in this jurisdiction.

72. I express no view whatsoever in relation to same. Such issues were not explored in the conduct of this case before the High Court and cannot be embarked on now other than in a manner that risks injustice to the respondents. All those issues in relation to the 2009 instruments fall to be determined on another day where both sides have been afforded an

adequate opportunity to consider same and where all such issues are ventilated appropriately and determined in a court of first instance.

73. The section of the Statement of Claim directed towards the alleged invalid appointment of the first and second named respondents had pleaded points which supported arguments not advanced at the hearing in any cogent sense. The decision in *Woods v. Ulster Bank* [2017] IEHC 155 on which the appellant sought to rely on is relevant as regards the 2004 mortgage but is otherwise distinguishable. Baker J. at para. 13 had identified the key issues thus;

> "Submissions were directed on four legal issues arising from the arguments of the parties concerning the security instruments. These are as follows:
>
> (a) Whether the security instruments contained a power on the part of the Bank to appoint a receiver;
>
> (b) Whether the power to appoint a receiver is dependent upon the continuation in force at the date of appointment of the relevant provisions of the Conveyancing and Law of Property Act 1881 ("the Act of 1881");
>
> (c) Whether the Bank was entitled to appoint a receiver before it was registered as owner of the charge on the Milltown Unit;
>
> (d) Whether the deeds of appointment were properly executed ."

One of the features in that case was Clause 8 of the security instrument which was in substantially identical terms to Clause 8 of the 2004 mortgage, a provision which does not appear in either of the mortgages dated the 12 March 2009. It supports the appellant's arguments as regards the 2004 mortgage.

Damages

74. Counsel for the appellant relied on the decision of Cregan J. in *McCleary v. McPhillips* [2015] IEHC 591 where it was held that receivers who had been invalidly appointed were constituted trespassers upon the land and therefore the plaintiffs were entitled to damages for trespass. Reliance was placed also on the decision of the High Court in *Harrington & Anor. v Gulland Property Finance Limited & Tennant* [2018] IEHC 445. Ms. Justice Baker in that case was satisfied that the receiver and the mortgagee had acted in an unprofessional and careless fashion in connection with the appointment of the receiver without checking the underlying documentation. At para. 50 she observes: -

> "A careless or mindless calling in of loans, and more especially, the appointment of a receiver, is something that is not to be encouraged and having regard to the impact that such action may have on individual or small companies is a matter in respect of which I must mark my disapproval."

In that case on the evidence before her she awarded to each plaintiff €20,000 in respect of damages for trespass in circumstances where the receiver had operated as such for a period of approximately five weeks. She concluded at para. 58 –

> "I am satisfied that the correct measure of damages to express my disapproval of the careless actions of Gulland is to award the plaintiffs each the sum of €20,000."

75. The necessary relevant intention to establish trespass to land is the intention to enter the land as *Basely v. Clarkson* (1681) 3 Lev 37; 83 E.R. 565 decided.

76. There was clear interference with the appellant's exclusive possession of his lands comprised in the schedule to the 2004 security instrument *via* the voluntary acts comprised in the appointment of the receivers and their acceptance of that role over same, the letters of 9 July 2013 and 16 November 2015 purporting to effect a sale of same - each of which acts

constituted trespass. That conduct was not resiled from during the ensuing six years and was a continuing state of affairs.

77. I am satisfied that the trial judge fell into error in failing to award any sum to the appellant by way of damages in circumstances where the validity of the appointment was challenged and expressly raised with the respondents from the outset in 2013. The appellant engaged with the receivers otherwise in circumstances where in the context of the company of which he was a director and shareholder and which is not a party to these proceedings, a variety of arrangements were in place and there were entitlements to recover money from local authorities and the like, which sums could be applied in and towards abatement of any debts of the company. This would alleviate the exposure of the appellant as guarantor of any such company indebtedness.

78. The mere fact that the mortgage was registered as a charge on Part 3 of each of the Folios is not an answer to the trespass issue. The mortgagee was at best the registered owner of the security. As the appointment instrument makes clear, the purported appointment extended to all three separate properties specified in the Schedule to the 2004 mortgage. That the first and second respondents sought in the first instance to intermeddle, take possession of and sell two only of the said properties does not constitute an answer to the appellant's claim in trespass which is actionable *per se.*

Receivership of six years' duration

79. The single most concerning aspect of the trespass is that the receivership remained in place over the lands secured by the 2004 mortgage from the 6 February 2013 until the 15 January 2019. The respondents are all highly experienced in the field of receivership and it ought to have been apparent to them from a cursory perusal of the 2004 security instrument

that the appointment in question was void *ab initio*. Their approach was careless in the circumstances.

80. The respondents failed to engage with or appropriately respond to the appellant's complaints which were clearly articulated and communicated to them. That being so, regard must be had to the fact that the appellant had to contend for six years with the receiver having control over the farmlands specified in the schedule to the 2004 instrument which amounted to continuing wrongful interference with Mr. Donlon's interest therein and his entitlement to exclusive possession thereof. This constituted a continuing denial of the appellant's asserted right to undisturbed enjoyment of the property and a continuing interference with his exclusive possession of same. His peaceful possession was further wrongfully and tortuously interfered when the first and second respondents placed – or threatened to place – some or all of his said properties on the market for sale, having first engaged in correspondence disputing and denying that there was any invalidity attached to the said appointment. Such trespass constituting as it does an unjustifiable intrusion upon the appellant's ownership, user and enjoyment of the lands is actionable *per se.*

81. There was some limited suggestion that a member of the appellant's family had been approached by individuals who indicated that they were putting the property up for sale. That was not formally proven at trial.

82. With regard to the medical aspect of the claim, on balance the trial judge's conclusions ought not to be disturbed in the circumstances where medical witnesses were not called. Without going into the details of the medical evidence that was before the High Court and that is alluded to in her judgment, particularly at p. 3, it appears that those conditions predated the events of February 2013. However, this court is entitled to have regard to the fact that the duration of the conduct being so significant it inevitably caused inconvenience, annoyance and adversely impacted on his right to undisturbed user and enjoyment of the

farmlands. Further his evidence to the High Court established that the attendant anxiety and distress experienced by the appellant arose directly as a result of the void appointment. Though the High Court inferred that the appellant had disclosed the appointment of the receivers to one supplier the long duration of the receivership rendered inevitable that its existence would become common knowledge in a rural area. The letter of 9 July 2013 confirming that these lands were being put on the market for sale was in and of itself evidence of publication to third parties of the void appointment by the appellants.

83. In the circumstances it is necessary that the Court mark its disapprobation of such conduct by awarding the appellant a sum in damages for the said conduct and trespass which is actionable *per se*. Having due regard to the approach of Baker J. in *Harrington*, a sum of €30,000 is awarded to the appellant in light of the very lengthy period during which the interference with the user and enjoyment of the lands and trespass continued. That award is made against the first, second and third named respondents only.

84. With regard to the fourth named respondent, who on the 15 November 2013 wrote to the appellant stating, "please note that our client is satisfied as to the validity of their appointment and that they are fully entitled to enter into possession of the properties the subject matter of the deed of appointment for the purpose of exercising their powers as conferred under the said charge documents and at law." They did so, presumably, as instructing agents for the joint receivers and not in a personal capacity.

85. No specific motion was ever brought by the fourth respondents to obtain an order of the court striking out the proceedings against them nor was such an application made at the hearing – so far as can be ascertained. However, I am satisfied on balance that it is in the interests of justice that the proceedings be struck out against the firm. The award in respect of damages for trespass should be against the first, second and third named respondents only on the basis of joint and several liability.

86. The appointment of the first and second appellants as receivers was rendered void *ab initio* by the determination of the High Court and a formal declaration in that regard will be made.

Conclusions and orders proposed

87. In the circumstances it is appropriate to;

(a) grant a declaration that the appointment of the first and second respondents as receivers on the 6 February 2013 pursuant to a deed of appointment and in purported pursuance of powers contained in a deed of mortgage dated the 12 October 2004 made between Oliver Donlon of the one part and Ulster Bank Ireland of the other part was void *ab initio*.

(b) The appellant is awarded €30,000 against the first, second and third respondents for wrongful interference with his exclusive possession and beneficial occupation of the lands in the Schedule to a Mortgage dated the 12 October 2004 made between Oliver Donlon of the one part and Ulster Bank Ireland of the other part.

(c) The proceedings are struck out as against the fourth-named respondents with no order.

Costs

88. I am satisfied in the circumstances that the trial judge erred in making the order for costs as she did - that the respondents recover against Mr. Donlon one third of the costs of the action "in relation to the assertion that the receiver was not properly appointed and all of the costs in relation to the plaintiff's claim for damages including reserved and discovery costs said costs to be taxed in default of agreement" (p. 6) - and same requires to be set aside. The appellant was not legally represented before the High Court and is, accordingly, entitled

to his expenses only in relation to same as against the first, second and third-named respondents. The respondents are not entitled to any costs in respect of the High Court proceedings for the reasons specified hereafter.

89. The appellant is entitled to his costs of this appeal. The same are recoverable as against the first, second and third respondents on the basis of joint and several liability. Notwithstanding that the appellant did not succeed in establishing a right to advance new arguments regarding the appointments made pursuant to the 2009 security instruments, the respondents are not entitled to any order in respect of costs for the reasons hereafter stated:

Having due regard to ss.168 and 169 of the Legal Services Regulation Act, 2015, as amended and O. 99 RSC;

(i) They behaved unreasonably in refusing to consider the invalidity of this appointment when specifically raised with them by Messers. N.J. Downes, solicitors in February 2013.

(ii) They behaved unreasonably in contesting the invalidity of their appointment under the 2004 instrument.

(iii) Their said behaviour endured for almost six years.

(iv) Their conduct was a wrongful interference with the right of the appellant to exclusive possession of the lands in the schedule to the 2004 instrument.

(v) They threatened to sell the said lands when not entitled to do so.

(vi) Then put the property up for sale or threatened to do so when not entitled to do so.

(vii) They failed to comply in a timely manner with the clear order of Cross J. made in June 2018 within 6 weeks therein specified.

(viii) They caused hardship to the appellant, a litigant in person, by failing to ensure that the inspection of the original instruments as comprised of Land Registry dealings by him as ordered by the High Court took place ahead of the hearing of the substantive action on 15 January 2019.

(ix) With regard to the fourth respondent's costs, there was very significant delay in seeking the order to strike the firm out as a party to the proceedings and no motion was brought when the Statement of Claim was served, the same legal team acted for all respondents and there was no suggestion that additional costs were incurred by them in representing the fourth-named respondents. Arguably, with the benefit of hindsight, it might have been more prudent had greater thought and consideration been given to the issues raised in a letter of the 14 November 2013 by Mr. Donlon to, *inter alia*, the first-named respondent particularly wherein that correspondence the appellant raised specifically issues around an appointment in connection with "the date of 12th October, 2004" The fourth-named respondent was cc'd with the said letter. He had asked "[w]hat relevance does this date have on the illegal actions of your company".

This correspondence was engaged in shortly before the plenary summons issued.

90. With regard to the issue of reserved costs, I note that on the 16 February 2017 Ms. Justice Hanlon reserved costs of a motion for discovery and order. There was a further order on the said date directing the respondents to make discovery and costs of same were also reserved. The costs of a motion dated the 29 April 2018 which resulted in orders being made by Mr. Justice Cross on the 25 June 2018 were likewise reserved to the trial of the action. Non-compliance with same gave rise to the appellant issuing a further Motion to compel compliance in December 2018 returnable for 15 January 2019. Finally, there was a motion

to compel delivery of a Statement of Claim, the order is dated the 1 February 2017 and it ordered that the appellant pay the respondents their costs of the motion when taxed and ascertained. Given that there were costs in favour of the appellant in three motions and of the respondents in one, and the appellant succeeded in obtaining inspection of the two instruments on the 15 January 2019 as sought in the motion filed on 11 December 2018 it appears to me on balance that the fairest course of action is that there be no costs payable to or by either side in respect of the said various motions.

91. If any party contends for a different order as to costs, written submissions no longer than 2,000 words should be submitted to the Court of Appeal office within 14 days setting out all reasons is support of same and at the same time copies of the said submission shall be served upon the other parties to this appeal. Replying Submissions are to be served within a further 14 days by delivery to the Court of Appeal Office and to the other parties to this appeal.

92. As this judgment is being delivered electronically, Edwards and Faherty JJ. have authorised me to hereby record their agreement with same.