Neutral Citation: [2015] IEHC 114

THE HIGH COURT

COMMERCIAL

2013/49 COM

BETWEEN

ALAN FARRELLY & AUSTIN KENNY

PLAINTIFFS

AND

TOM KAVANAGH

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered the 25th day of February, 2015

1. This is a case brought by two property developers, the plaintiffs, against the defendant, the Receiver appointed over their lands in Greystones, Co. Wicklow. The plaintiffs represented themselves throughout the proceedings. In their statement of claim they seek relief in the form of the removal of the defendant from his position as receiver over their assets and damages. The plaintiffs advance their case under the headings of negligence and defamation in their statement of claim dated 12th February, 2013. They further advance their claim for defamation in two further notices for particulars dated 20th June, 2014, and 28th October, 2014. Additional details of their complaints emerged from their witness statements dated 26th June, 2014.

2. The first named plaintiff is an architect by profession. He was adjudicated bankrupt on the 10th October, 2011. As of the date of commencement of these proceedings by way of plenary summons on the 15th January, 2013, he remained an undischarged bankrupt. By order of Kelly J. on 6th February, 2014, it was held that:-

> *"…all claims by the First Named Plaintiff, an Undischarged Bankrupt, in these proceedings save those that concern "damaged reputation, stress" as referred to at page 3 of the Statement of Claim herein be and the same are hereby struck out".*

It follows that from this order the first named plaintiff could only advance arguments pertaining to defamation proceedings.

Factual Background.

3. The plaintiffs are the owners of three properties situated in Greystones, Co. Wicklow. They comprise:-

(a) Cleevaun, Hillside Road, Greystones, Co. Wicklow, ("the Cleevaun Development").

(b) 2 Tranquilla Mews, Hillside Road, Greystones, Co. Wicklow ("2 Tranquilla Mews").

(c) Rockview, Hillside Road, Greystones, Co. Wicklow ("Rockview").

4. The plaintiffs wished to carry out a mixed three storey development at Cleevaun and also to develop properties at 2 Tranquilla Mews and Rockview. They borrowed funds from ACC Bank Plc ("ACC") in order to do so and the monies so borrowed were secured by deeds of mortgage and charge over the properties. All three deeds of mortgage were executed, dated respectively: 21st April, 2005, 27th September, 2006, and 30th November, 2009.

5. The Cleevaun Development comprised a three storey building with underground car park. It was a mixture of retail units, commercial units, apartments, a theatre and a dance studio. The underground car park serviced the commercial and the residential units. By 2009 the development had been substantially built but it had not been completed. As with many property developers in Ireland, by 2009 the plaintiffs had fallen into very significant arrears with ACC. While some of the units in the Cleevaun Development had been let, there were vacant units and not all the tenants were paying full commercial rent. Certainly, the rental income was not sufficient to meet the repayments due under the loans to ACC. As the development had not yet been completed, the question of realising ACC's security was a complex one. ACC proposed that a report be commissioned by a debt insolvency practitioner and accountancy firm to advise the best approach to dealing with the situation. In January, 2010 ACC requested the defendant to assess the situation and advise ACC as to the best course of action to be taken. The plaintiffs have misunderstood the role of the defendant at this time, early 2010. In evidence, they characterised his role as being a manager of the property. Prior to his appointment as a receiver, his role was merely has an advisor to ACC.

6. There was evidence that in March, 2010 ACC was informed by the plaintiffs' accountant that it would cost several hundred thousand euro in order to complete the development. Accordingly ACC bank decided to appoint the defendant as receiver over the properties pursuant to the three deeds of mortgage. He was appointed on the 11th May, 2010, as a receiver over the three properties. While the defendant had some familiarity with the properties because of his prior advisory role, he proceeded to engage the services of Lisney to assist him in the management of the properties and to market and sell the properties. The defendant instructed The Building Consultancy to prepare a report on the Cleevaun Development. Arising out of the reports from Lisney and The Building Consultancy it became apparent that there were significant difficulties with the Cleevaun Development in particular. These related to the title, failures to comply with the planning permission for the development, fire safety issues, the fact that no management company had been incorporated for the development (which was a multi unit development), the fact that rents were not being paid by some of the tenants and that many of the leases were not commercially valuable leases. The defendant was informed that it would cost €355,000.00 to complete the developments and comply fully with the requirements of the planning permission and all fire safety requirements. All of these issues impacted upon the saleability of the Cleevaun Development.

7. The defendant instructed Lisney to seek to market both the vacant units in the Cleevaun Development and in the other properties

and to seek to sell the entire Cleevaun Development. While a number of offers were received, they were all considered by Lisney and the Receiver to be unacceptably low or to require certain works to be carried out to the premises and accordingly they were rejected. There was one offer to lease a unit at Rockview by Ms. Kelly Callaghan and this was accepted by the Receiver who in due course entered into a lease of the unit with Ms. Callaghan. Mr. Ross McParland was prepared to purchase units four and six of the Cleevaun Development, however he required that a management company be established in order that important matters could be regularised in the normal way in this multi unit development. The defendant was prepared to allow Mr. McParland into possession of the units and the sale was to close once a management company had been established.

8. The defendant employed Lisney to manage the properties and they immediately instructed agents to clear up the Cleevaun Development and to maintain the grounds on a regular basis. Lisney engaged with the tenants on behalf of the defendant but from the commencement of the receivership most of the the tenants ceased to pay any rent. This had an additional significant, detrimental impact on the saleability of the Cleevaun Development.

Sales of the three properties
9. 2 Tranquila Mews was marketed and sold by Lisney on behalf of the defendant in early 2011 for the sum of €202,000.00. The plaintiffs complained that the sale price was inadequate and further that the monies realised by the sale were not used to complete some of the outstanding works at the Cleevaun Development. Ultimately, of course, this was a matter for ACC as the charge holder and not a matter for the defendant as receiver.

10. Rockview was not offered for sale as there were planning issues in relation to this development and there were arrears of rent due from the tenants of Rockview (with the exception of Ms. Callaghan). The defendant is currently marketing the property for sale.

11. Lisney were able to market the unoccupied units of the Cleevaun Development for sale and were also seeking offers for the entire development in its existing condition. Any offers that were made were unacceptably low and Lisney could not recommend acceptance of the offers to the defendant. As the defendant had a duty to obtain the best price reasonably obtainable, in the light of these advices, he did not accept any of them.

12. There was a lease of a studio area to Greystones Studios Ltd. The first named plaintiff and his wife were the directors and shareholders of the company. They disputed whether any rent was due under the lease and declined to pay any rent. Ultimately the defendant sought to forfeit the lease and instituted proceedings seeking vacant possession from the tenant. There was a similar difficulty with a lease to Mrs. Ramona Farrelly, the wife of the first named plaintiff, who held a unit under a short term business letting agreement dated 24th June, 2008. The Receiver instituted Circuit Court proceedings against her also. Proceedings were also instituted against tenants Ms. Patricia Meenan and Mr. Keith Sunderland trading as Sweeney Todd who had paid no rent from the commencement of the receivership. There was also a difficulty with the lease of the theatre. The theatre was leased to Greystones Theatre Ltd. of whom the first named plaintiff and his wife were the directors and shareholders. However, the company had been struck off the register for failing to make annual returns in December, 2011 and had ceased to trade. Nonetheless Mr. and Mrs. Farrelly refused to deliver up possession of the theatre to the defendant.

13. In April, 2012 the defendant accepted the reality of the situation and realised that it simply was not possible to sell the Cleevaun Development while there were issues with the tenants, Circuit Court proceedings seeking possession of the premises were in being, there was a history of the non payment of rent, there were breaches of planning permission and issues with fire safety compliance and there was no management company. He took advice from Lisney and was advised to take the property off the market. He decided to attempt to resolve some of these issues before seeking to market the property again. From April, 2012 until the following year he tried to resolve matters in relation to vacant possession with the tenants but was unsuccessful.

14. Following further advices from Lisney, in July, 2013, he then decided to try to sell the property in a distressed properties auction organised by Allsop Space ("Allsop"). By letter dated 19th August, 2013, the plaintiffs wrote to Ms. Elaine McParland, a tenant of part of the premises, in the following terms:-

> *"Dear Ms. McParland,*
>
> *It has been brought to our attention that the recent activity around the development is preparation for the sale of the 2 units that you occupy to yourself.*
>
> *I am writing to bring to your attention the fact that we have challenged the validity of the appointment of the Receiver and the legal right that the Bank has to place the property into receivership. There is an ongoing High Court action and as such no sales should take place until this action has been concluded.*
>
> *We hereby give notice that you cease all action in relation to the purchase and that we will be applying to the High Court for injunction against the Bank and Tom Kavanagh and their Agents to cease all activity in relation to the property until the action has concluded.*
>
> *Yours sincerely*
>
> *Alan Farrelly & Austin Kenny"*

Once Allsop became aware of this letter they declined to accept the Cleevaun Development in their auction as they wished to avoid any possible disruption from disgruntled borrowers.

15. By September, 2013 the situation was as follows. The defendant had been appointed three years previously and had experienced very considerable difficulty in trying to realise the security for ACC. Sale in the normal way had proved impossible over a two year period. Attempts to resolve matters with the tenants was proving expensive and unsuccessful. An attempt to sell the Cleevaun Development in the Allsop auction had to be abandoned largely due to the actions of the plaintiffs. The last option available to the defendant was to sell the premises through the new "Click to Purchase" platform devised by Lisney. Click to Purchase was a virtual transaction platform for buying and selling property online which provided the facility for the exchange of contracts to take place electronically in a similar way to a sale by private treaty. Parties who wish to participate must pre-register with Lisney. It is only when they have established that they would be in a position to complete any purchase that they are permitted access to the relevant details in respect of any property in which they have expressed an interest. In relation to the Cleevaun Development the defendant was in a position to provide only limited representations and warranties in respect of compliance with planning laws and building regulations. In order to overcome this difficulty and in the interest of full and proper disclosure a copy of a planning compliance review dated 25th July, 2013, prepared by ORS Consulting Engineers ("the ORS Report") on behalf of the defendant was

made available on the Click to Purchase platform to prospective registered purchasers. A section of the ORS Report comprised part of the plaintiffs' claim in defamation as is more particularly set out below.

16. In the event the defendant accepted the advices of Lisney and marketed the Cleevaun Development on the Click to Purchase platform. Mr. Ross McParland was the only purchaser who registered an interest. He was the only purchaser who had access to the documents on the Click to Purchase site and in particular to the ORS Report. Ultimately, Mr. McParland made an offer to purchase the entirety of the Cleevaun Development. He offered a total of €430,000.00 which was to comprise €178,450.00 for units four and six which he had previously agreed to purchase and €251,550.00 for the balance of the development. Mr. Hugh Markey of Lisney recommended that the Cleevaun Development be sold to Mr. McParland for this sum and he advised that this was the best price reasonably obtainable. On that basis the defendant accepted Mr. McParland's offer and the Cleevaun Development was sold to Mr. McParland in February, 2014.

The Plaintiffs' case as pleaded

17. The indorsement of claim alleges that the defendant was negligent in accepting appointment as a receiver. It was pleaded as follow:-

> "In the role as receiver the defendant has an obligation to act as an independent party and must satisfy himself as to the entitlement and right that a financial institution might have to appoint a Receiver. In this regard he should have asked the bank for the following proof:
>
> 1. That the bank were in possession (sic) all the appropriate documents in original form.
>
> 2. That a full binding, fair and equitable contract (in original form) existed between the parties and signed by both.
>
> 3. That the bank had not sold on to a third party or discharged the alleged loan in any way through securitisation or by any other means.
>
> 4. That the bank had not acted in any fraudulent way whatsoever in its contractual dealings including non disclosure of facts, any intention to sell on or use as signature of the borrowers in any way that would benefit the bank unknownst to the borrower."

At the hearing only the argument that the Receiver should not have accepted his appointment was maintained.

18. The second claim was that the defendant was negligent in managing the assets. It was claimed that the defendant failed in his duty of care to the borrower on the basis of the following:-

> *"1. Failure to approve prospective tenants and act within a reasonable time to secure leases.*
>
> *2. Failure to understand the full complexities of the building and carry out essential works in order to maintain and improve the assets and to comply with local authorities requests and requirements.*
>
> *3. Failure to implement a management company and pay landlord bills which has already resulted in the disconnection of services and in turn resulted in damage to the property, temporary closure of businesses, loss of reputation to businesses, loss of income and financial damage.*
>
> *4. Failure to meet existing tenants in order to discuss long term plans of the development and resolve any issues.*
>
> *5. Failure to respond to immediate problems with the building in terms of leaks, servicing etc.*
>
> *6. Negligently running up unnecessarily professional costs which the borrowers will ultimately bear without any real benefit to the asset.*
>
> *7. Failure to update the borrowers of progress, costs and incomes.*
>
> *8. Acting in a manner in which serves only to accrue fees and to protect [his] own self interest as opposed to that of the borrower or the asset of which [he has] a duty of care to."*

Each of these complaints was the subject of submission and cross-examination at the trial.

19. The third ground of complaint was that the defendant was negligent in his treatment of tenants in that:-

> *"1. His failure to meet existing tenants upon their request to discuss the long term plans for the development, carry out essential works under the responsibility of the landlord, and agree to payment structure which reflects the terms of the leases, current market conditions and trading conditions given the state of the development.*
>
> *2. His constant threats of injunction to the legal operation of Greystones Theatre has resulted in the closure of the Theatre due to the inability to book acts, rent to theatre groups or plan ahead which is essential for the operation of the Theatre. In turn this has reduced the attractiveness of the Studios to renters and users as the performance space is no longer available for use.*
>
> *3. His complete lack of interest in the development and in maintaining and improving the good work of the existing businesses."*

There is a claim that the defendant should be removed from his position as receiver and a claim for damages and costs.

20. In addition, in notices for particulars dated 20th June, 2014, and 28th October, 2014, the plaintiffs advanced claims in defamation against the defendant as is more particularly discussed below.

21. In written submissions and at the hearing of the action the plaintiffs also argued that the defendant had a conflict of interest when he accepted the position of receiver in view of the fact that he had previously acted as an advisor to ACC in relation to the developments prior to his appointment as receiver. It was also claimed that he was manager of the business comprised in the secured

properties and that he owed the plaintiffs as the borrowers a duty of care to manage the properties having regard to their interests as well as that of ACC.

The plaintiffs' case in defamation

22. The plaintiffs have not pleaded their case in defamation in accordance with the requirements of the Defamation Act 2009. It is not set out in the plenary summons or the statement of claim. It is set out in replies to particulars dated 24th April, 2014, 20th June, 2014, and 28th October, 2014. It was accepted by senior counsel on behalf of the defendant that the affidavits sworn by the plaintiffs in the context of the application to admit the proceedings into the commercial list of the High Court were sufficient to satisfy the requirements of s. 8 of the Defamation Act, 2009, though these affidavits predated the particulars of defamation. No objection was taken to the bringing of a claim in defamation in these proceedings by the defendant. In the circumstances I accept that there has been sufficient compliance with s. 8 of the Act of 2009.

23. At the opening of the case the first named plaintiff on behalf of both plaintiffs identified three alleged claims of defamation against the defendant. Firstly, it was said that the defendant defamed the plaintiffs by continuing to hold himself out as a receiver and to call himself a receiver over the assets of the plaintiffs after they had objected to his appointment and indicated to him that they were challenging his appointment. It was argued that he ought not to have not called himself a receiver from that point onwards and that in so doing he acted wrongly and defamed the plaintiffs. Secondly, the plaintiffs relied on the contents of para. 3.3.1 of the ORS Report. This was a planning compliance review prepared by ORS Consulting Engineers for the defendant in respect of the properties over which he had been appointed receiver. Paragraph 3.3.1 read as follows:-

> *"Submission of a Fire Safety Certificate for the commercial or residential developments does not appear to be on record with Wicklow County Council Building Control Department or Fire Department. Also the commencement notice for any development should detail the relevant Fire Safety Certificate number if applicable. Copies of the relevant commencement notices on file show that this section has been filled out as "TBA" in all cases. ORS have carried out searches for the above fire safety certificate under the names of the architect and developer and have also searched for all previous Fire Safety Certificates within a 1km radius but there is no record of any certificate for the development. These search results have been verified by the Building Control Section of Wicklow County Council. Please note that we have not requested a meeting with the Building Control Authority or approached the previous architect at any stage and it may be a case that this certificate has been lost by the Local Authority."*

It was argued that this passage implied that the plaintiffs were reckless as developers in that they proceeded to carry out a development without a fire safety certificate and that it is further defamatory of the first named plaintiff as he is an architect and the alleged failure to obtain a certificate reflected negatively on his professional competence.

24. The third allegation of defamation related to three emails of the 23rd August, 2013, referred to as the Allsop correspondence. The defendant had intended to sell the properties at an auction to be conducted by Allsop in September, 2013. The plaintiffs intervened by writing to Ms. McParland a letter dated 19th August, 2014, as is set out above at para. 14. Ms. McParland passed the letter to her husband, Mr. Ross McParland, who in turn forwarded it to Lisney. Mr. Duncan Lyster of Lisney sent an email to Mr. Brendan O'Reilly and Mr. James Anderson of Kavanagh Fennell stating as follows:-

> *"Brendan/James*
>
> *See email below from Ross McParland and the letter sent to his wife yesterday by the borrowers. Hugh spoke to Ross this morning to clarify that his offer still stands as his email is a(sic) open to interpretation. The good news is the offer stands.*
>
> *The letter sent to Elaine McParland underlines that Kenny and Farrelly are on a crusade and an auction would play into their hands.*
>
> *Give me a call when you have time to discuss this.*
>
> *Regards,*
>
> *Duncan".*

25. The next email was from Mr. O'Reilly to Mr. Richard O'Neill of Allsop, which forwarded this email and stated:-

> *"Richard,*
>
> *I'll call you on below,*
>
> *Regards*
>
> *Brendan"*

26. Mr. O'Neill of Allsop emailed Mr. O'Reilly of Kavanagh Fennell later that afternoon as follows:-

> *"Brendan,*
>
> *Further to our earlier conversation, given the events of the July auction we have to be extremely careful about the properties we offer in the forthcoming auction, we are particularly concerned about sales that involve disgruntled borrowers in conflict with the receiver. We expect that such parties are likely to approached by the activists in an attempt to halt the sale.*
>
> *Due to the above it is with regret that we are unable to include the property in upcoming auction.*
>
> *If you have any further queries please do not hesitate to contact me.*
>
> *Kind regards*
>
> *Richard".*

27. The question for consideration by the court is whether any or all of the above amount to the defamation of the plaintiffs or either of them. Firstly, the defendant is not the author of the emails referred to as the Allsop correspondence. Neither did the defendant publish the Allsop correspondence. The email from Mr. Lyster of Lisney was forwarded by Mr. O'Reilly of Kavanagh Fennell to Mr. O'Neill of Allsop. However, Mr. O'Reilly was not called to give evidence and there was no evidence before the court upon which it could conclude that the defendant had published the emails. That being so it is not necessary to consider whether or not the content of the emails could form the basis of a claim in defamation. If I be incorrect in that conclusion, I nonetheless do not accept the argument that the contents of the Allsop correspondence is defamatory of the plaintiffs. I reject this claim.

28. The ORS Report likewise was not published by the defendant. It was published by Lisney in a very limited fashion. The entire report was made available along with other relevant material on its Click to Purchase platform. Only parties who had registered with Lisney in respect of the particular property had access to the documents on the platform. Thus it was possible to identify each and every person who had access to this document. In fact only Mr. McParland registered an interest in the purchase of the property and thus only Mr. McParland had access to the ORS report (other than the relevant staff of Lisney and Kavanagh Fennell who must have had possession of the ORS Report). Mr. McParland was not called to give evidence. There was no evidence whatsoever that Mr. McParland read or considered para. 3.3.1 of the report or that he formed a negative view of the plaintiffs or either of them as a result. None of the witnesses from Lisney or Kavanagh Fennell were asked if they considered this paragraph of the ORS Report and, if so, what was their opinion of the plantiffs. Therefore there was likewise no evidence that any of these witnesses formed a negative view of the plaintiffs or either of them as a result of reading this section of the ORS Report. This was not a publication to the world at large. It follows that there simply was no evidence before the court upon which the court could conclude that the material, even if defamatory, was in fact published to someone who read the matter complained of and who formed a negative view of the plaintiffs as a result.

29. Furthermore there was no evidence adduced or argument advanced that when Lisney published the material on the Click to Purchase site, it did so as the agent of the defendant. It follows, therefore, that insofar as the placing of the ORS Report on the Click to Purchase site could amount to a publication, it was not one in respect of which the court could conclude that the defendant was legally responsible.

30. Finally, it was argued on behalf of the defendant that at the date the ORS Report was prepared the report was in fact factually correct and that this afforded the defendant a defence pursuant to s.16(1) of the Act of 2009 which provides:-

> *"It shall be a defence (to be known and in this Act referred to as the "defence of truth") to a defamation action for the defendant to prove that the statement in respect of which the action was brought is true in all material respects."*

31. Mr. Bolger of ORS, the author of the report, gave evidence that ORS carried out searches for the Fire Safety Certificate. He confirmed that the searches in respect of the Fire Safety Certificate were carried out in the names of the development, Cleevaun, Mr. Farrelly and Mr. Kenny. Mr. Farrelly was both the architect and the developer with Mr. Kenny. He confirmed that ORS requested the Building Control Section of Wicklow County Council try to see if there were any other developments in and around the area that would match the property and the employee in the Building Control Section said they could not find anything in their system. He also confirmed that subsequent to the completion of the report in about the middle of August, 2013 ORS received a copy of the Fire Certificate. Thus the evidence before the court was that the report was correct at the time it was written and that subsequently the Fire Safety Certificate was in fact produced. As the evidence of Mr. Markey of Lisney was that all the material relevant to the sale of the property was made available on the Click to Purchase platform, I infer that the Fire Safety Certificate was in fact made available to Mr. McParland when he also had access to the ORS Report. It of course was also available to staff in Lisney and Kavanagh Fennell. For these reasons I reject the plaintiffs' claims in defamation based on either the Allsop correspondence or the ORS Report.

32. The balance of the claim was that the defendant continued to describe himself and to act as a receiver in respect of the properties notwithstanding the fact that the plaintiffs had challenged the validity of his appointment and had called upon him to cease acting as a receiver. The basis for their contention that his appointment was invalid related to the circumstances in which they executed the third deed of mortgage dated the 30th November, 2009. The plaintiffs argued that their signatures on this third deed of mortgage were procured by undue influence of their solicitor. It was argued that the receiver ought to have been suspicious that the mortgage had not been validly created and that he should have accepted their objections to his appointment and ceased to act when he became aware of their objections.

33. The plaintiffs have not impugned the mortgage in proceedings against the mortgagee and the deed has not been set aside. According it remains a valid enforceable deed on its face. The plaintiffs did not sue the bank and did not seek an order that the bank remove the defendant as receiver over the property. The plaintiffs adduced no evidence that the bank, never mind the defendant, was aware of the alleged undue influence of the plaintiffs' own solicitor. In these circumstances there can have been no obligation on the defendant to act upon the mere allegations of the plaintiffs. From his perspective there were three valid mortgages and he had been validly appointed under a deed of appointment pursuant to those mortgages. He owed a duty to the bank which had appointed him to realise the assets. Unless or until that deed of appointment had been set aside either by the bank or by an order of the court he acted perfectly correctly in describing himself as a receiver and in continuing to act as a receiver over the properties. Indeed, he had a duty so to do. It follows therefore that there can be no question of a case in defamation arising based on the fact that he described himself as the receiver of the plaintiffs' properties or that he continued to act as a receiver of those properties. This claim in defamation also must be rejected.

Mr. Kenny's Claim

34. The first named plaintiff was an undischarged bankrupt when the proceedings issued, he having been adjudicated bankrupt on 10th October, 2011. By order dated 6th February, 2014, Kelly J. struck out all claims made by the first named plaintiff in the proceedings save those that concerned the "damaged reputation, stress" referred to at p. 3 of the statement of claim on the grounds that he was an undischarged bankrupt. This has been dealt with as a claim in defamation. Thus the balance of the case is maintained solely by the second named plaintiff.

Breach of duty of care

35. It was argued that the defendant breached the duty of care which he owed to the second named plaintiff in selling the properties as he failed to achieve the best price available. It was argued that he ought to have improved or finished out the property in order to maximise the price and that by selling the properties in their existing condition without completing various matters which could be dealt with at relatively small cost he thereby failed to achieve the best price for the properties.

36. In reply the defendant relied upon *Silven Properties Ltd. v. Royal Bank of Scotland plc* [2004] 1 WLR 997 which was a decision of the English Court of Appeal. Lightman J. delivered the judgment of the court. At para. 16 he held:-

> *"The mortgagee is entitled to sell the mortgaged property as it is. He is under no obligation to improve it or increase its value. There is no obligation to take any such pre-marketing steps to increase the value of the property as is suggested by the claimants."*

At para. 20 he continued:-

> *"In our judgment there can accordingly be no duty on the part of a mortgagee, as suggested by the claimants, to postpone exercising the power of sale until after the further pursuit (let alone the outcome) of an application for planning permission or the grant of a lease of the mortgaged property, though the outcome of the application and the effect of the grant of the lease may be to increase the market value of the mortgaged property and price obtained on sale. A mortgagee is entitled to sell the property in the condition in which it stands without investing money or time in increasing its likely sale value. He is entitled to discontinue efforts already undertaken to increase their likely sale value in favour of such a sale. A mortgagee is under a duty to take reasonable care to obtain a sale price which reflects the added value available on the grant of planning permission and the grant of the lease of a vacant property and (as a means of achieving this end) to ensure that the potential is brought to the notice of prospective purchasers and accordingly taken into account in their offers: see Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949. But that is the limit of his duty."*

The court then turned to the question of the duties regarding mortgaged properties of receivers and, in particular, of receivers who under the terms of the mortgage under which they are appointed are designated as agents of the mortgagor (as is the case here). At para. 28 the judgment continued as follows:-

> *"The mortgage confers upon the mortgagee a direct and indirect means of securing a sale in order to achieve repayment of his secured debt. The mortgagee can sell as mortgagee and the mortgagee can appoint a receiver who likewise can sell in the name of the mortgagor. Having regard to the fact that the receiver's primary duty is to bring about a situation where the secured debt is repaid, as a matter of principle the receiver must be entitled (like the mortgagee) to sell the property in the condition in which it is in the same way as the mortgagee can and in particular without awaiting or effecting any increase in value or improvement in the property. This accords with the repeated statements in the authorities that the duties in respect of the exercise of the power of sale by mortgagees and receivers are the same and with the holding in a series of decisions at first instance that receivers are not obliged before sale to spend money on repairs…"*

37. I accept that this is a correct statement of the law and in particular of the duties of receivers in relation to the sale of secured properties. There was thus no obligation on the defendant to carry out any of the works which the second named plaintiff alleges could have enhanced the purchase price achieved upon the sale of the properties. Furthermore, as the defendant pointed out in evidence, he did not have the money to carry out the works identified, which he was advised would cost €355,000.00 exclusive of VAT. He simply was not in a position to carry out such extensive works. That being so, the fact that he did not carry out works which the second named plaintiff argues were desirable or advisable cannot ground a claim in damages against him. In this case there was clear evidence that the defendant had endeavoured to realise the security for a period of in excess of three years. The property was placed on the market with Lisney for more than two years. There were numerous difficulties in relation to a sale at that time as set out above and evidenced by Mr. Markey and Mr. Anderson. Ultimately Lisney advised that the properties be withdrawn and that an alternative strategy be followed. The defendant was advised to include the properties in an Allsop sale in September, 2013. As discussed above, Allsop declined to accept the properties in the auction because of a fear that the plaintiffs might seek to disrupt the sale. Ultimately, the defendant was left with very few options for realising the security. He took advice from Lisney and followed their advice which was to sell the properties on its Click to Purchase platform.

38. The evidence is clear that the defendant at all times sought to realise the security. His duty, once the decision to sell had been taken, was to sell at the best price reasonably obtainable. This he endeavoured to do within the constraints outlined above. At each step he took advices from Lisney. They were highly experienced in the business of selling commercial developments including mixed developments of this type. They were appropriate agents to instruct and it was perfectly proper to follow their advice in relation to both the method of selling and any offers received for the properties. The second named plaintiff's complaint is that the properties were sold at an under value. In fact the evidence from Mr. Markey of Lisney was that the price achieved for the Cleevaun Development was a very strong one and that "we got lucky" as the purchaser, Mr. McParland had a particular interest in the property. The second named plaintiff adduced no evidence whatsoever as to the values of the properties and the sale prices which the second named plaintiff alleges ought to have been achieved. Thus there was no evidence to contradict that of Mr. Markey. Accordingly, I find as a fact the properties were not sold at an under value and that the defendant did not act negligently or breach any duty of care which he may have owed to the second named plaintiff in or about the conduct of the sales of the properties.

39. Secondly, the second named plaintiff alleged that the defendant should not have accepted the appointment as receiver and that in accepting the appointment and then continuing to act he breached the duty of care he owed to the second named plaintiff as the mortgagor of the properties. Firstly it should be pointed out that no challenge was advanced against the first two mortgages. The claim was that the third mortgage entered into between the plaintiffs and ACC on 30th November, 2009, was procured by the undue influence of the plaintiff's solicitor. There was no evidence that ACC was aware of the alleged undue influence and there was certainly no evidence that the defendant was aware of the claimed undue influence at the time he accepted his appointment. On its face there was a valid deed of mortgage and ACC was entitled to appoint a receiver pursuant to the three deeds of mortgage. The defendant gave evidence that he took legal advice before he accepted the appointment in accordance with his normal practice. There was no evidence adduced upon which the court could conclude that he acted negligently or in any way breached any duty of care which he may have owed to the plaintiffs or either of them in accepting the appointment as receiver. As I have already stated, unless and until the deed of mortgage is set aside in proceedings in which the bank is a party, I must proceed on the basis that the deed of mortgage and the appointment pursuant to the deed are what they appear on their face: valid enforceable deeds.

40. A number of the second named plaintiffs complaints related to the dealings, or the lack of them, had between the defendant and various tenants of the properties. The second named plaintiff cannot advance a cause of action against the defendant based upon an alleged cause of action of a third party. Insofar as there is a claim therefore based on alleged mistreatment of any of the tenants or of damage occasioned to them, none of whom were the second named plaintiff, this part of the claim must fail.

41. It was claimed that the defendant acted in a negligent manner in his management of the assets over which he had been appointed receiver. It is important therefore to consider what was the duty of care owed by the defendant as a receiver to the plaintiffs as borrowers. His first duty of care is owed to the mortgagee who appointed him. No particular duty of care is owed to the borrower. The duty is owed equally to any person who has an interest in the equity of redemption. The duty owed by the defendant to the plaintiffs is the same as that owed to a charge holder ranking in priority after ACC if there had been one in this case. In *Silven*

Properties Ltd. v. Royal Bank of Scotland plc, quoted above, at para. 17 of his judgment Lightman J. stated as follows:-

> *"The mortgagee is free (in his own interest as well as that of the mortgagor) to investigate whether and how he can "unlock" the potential for an increase in value of the property mortgaged (e g by an application for planning permission or the grant of a lease) and indeed (going further) he can proceed with such an application or grant. But he is likewise free at any time to halt his efforts and proceed instead immediately with a sale. By commencing on this path the mortgagee does not in any way preclude himself from calling a halt at will: he does not assume any such obligation of care to the mortgagor in respect of its continuance as the claimants contend."*

42. At para. 29 of his judgment Lightmann J. confirmed that receivers and mortgagees bore the same responsibility. That being so, it follows that while the defendant may well have been free to explore various possibilities in relation to the management of the secured assets with a view to maximising the realisation from a sale of the assets, he was under no obligation to the plaintiffs to do so. It follows therefore that his failure to do so cannot form the basis of a claim against him. This principle alone is enough to justify the rejection of the second named plaintiff's claim based on the defendant's alleged breach of his duty of care owed to him in respect of the management of the assets.

43. For the sake of completeness, I should point that there was evidence to show that the defendant took such steps as lay within his power to comply with the requests and requirements of the fire safety authorities of Wicklow County Council. Though under no obligation so to do, he ensured that a management company for the Cleevaun Development was incorporated so that the sale of units four and six to Mr. McParland ultimately could proceed. He employed professional advisors to advise him on various matters which arose during the receivership. Lisney acted as his property management agents. ORS Consulting Engineers prepared a review of the Cleevaun Development with a view to preparing a certificate of compliance with planning permission and building regulations which would be required to enable a sale to take place. The Building Consultancy was employed to prepare and submit a pre acquisition survey report and to advise in respect of compliance with statutory regulations. Various works were carried out to the Cleevaun Development of a maintenance nature and landscape gardeners were employed to spray the weeds and maintain the grounds in an acceptable condition. There was no evidence that the defendant's agents failed to deal with minor maintenance issues as they arose Complaint was made that the contractors were excessively expensive. However the defendant gave evidence that this was not the case, their rates were competitive and that all expenses incurred by him during the receivership had to be approved by ACC. There was no expert evidence to suggest that the fees charged were improperly incurred or inflated.

44. It was implied that the defendant had unnecessarily generated significant fees for his own benefit to the detriment of the plaintiffs and in particular the second named plaintiff. I reject this suggestion and I wish to record that it is without any foundation in fact. It was apparent from the evidence at trial that the receivership was a difficult one. It took nearly three years to sell the principal development, the Cleevaun Development. It had been necessary to institute three sets of proceedings in the Circuit Court seeking vacant possession against tenants who were not paying rent and who were refusing to surrender vacant possession of their respective units. At least two of these tenants were closely associated with the first named plaintiff. A possible sale of the Cleevaun Development through the Allsop auction process in July, 2013 was frustrated by the intervention of the plaintiffs as has been set out above.

45. In summary, the defendant gave evidence that he did not incur unnecessary, excessive fees in the conduct of the receivership, that it was a difficult receivership and that there were a considerable number of issues which required to be resolved. There was no evidence adduced to rebut the evidence of the witnesses called on behalf of the defendant that they had acted properly and other than in a professional manner. Accordingly I must reject this claim of the second named plaintiff.

46. Much of the case concerned the failure of the defendant to pay the landlord's ESB bill following his appointment in May, 2010 resulting in power being temporarily cut off. This lead the Fire Officer to hold that there was a breach of the Fire Safety Certificate. The Fire Officer directed the closure inter alia of the theatre. Also, the loss of power contributed to flooding of the Cleevaun Development and particular damage was sustained in the theatre. The evidence on behalf of the defendant was that the account had not been transferred into his name. The account did not distinguish between the apartments and the commercial portion of the development. The defendant was not receiver of the entire development and therefore he could not discharge liabilities for which he and ACC had no responsibility. He sought an apportionment of the account but this was never resolved. He cannot be held liable for the ESB cutting off supply in the circumstances. It follows that he likewise cannot be liable for the Fire Officer closing down the theatre as the development did not temporarily comply with the Fire Safety Certificate, or the flooding that resulted when the pumps could not function in the absence of power.

47. The final complaint related to an alleged conflict of interest. It was said that the defendant advised ACC to appoint him as receiver as the most suitable way to realise a return of the monies owed by the plaintiffs to ACC. It was said that he had a conflict of interest in so advising as he would be paid large fees as a receiver to the three properties. No conflict of interest arises in these circumstances. The defendant never acted for the plaintiffs or either of them. He acted as an advisor to ACC early in 2010. He advised ACC to place the properties in receivership. There was no guarantee that he would be the practitioner whom ACC would appoint to act as receiver. There was no evidence that he advised on that basis. Even had he done so, it would still not give the plaintiffs any cause of action against him. He did not act for them so they cannot say that he acted on the basis of a conflict of interest.

48. In summary, I dismiss all of the claims advanced by the second named plaintiff against the defendant and I dismiss the claims of both plaintiffs based on defamation.