



APPROVED

**THE COURT OF APPEAL
CIVIL**

Neutral Citation Number [2022] IECA 130

Court of Appeal Record Number: 2020/97

High Court Record Number: 2019/4606P

Whelan J.

Donnelly J.

Ní Raifeartaigh J.

BETWEEN/

JANE GLEESON

SECOND DEFENDANT/APPELLANT

- AND -

EVERYDAY FINANCE DAC, STEPHEN TENNANT AND NICHOLAS O'DWYER

PLAINTIFFS/RESPONDENTS

-AND-

PAUL WHITE

FIRST DEFENDANT/NOTICE PARTY

-AND-

AND PERSONS OCCUPYING 96 AVOCA PARK CO. DUBLIN

NOTICE PARTIES

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 8th day of June 2022

Introduction

1. This is an appeal in respect of an Order of the High Court (Sanfey J.) dated the 27 February 2020 by which he ordered that the first and second defendants, their servants and agents and all other persons having notice of the Order, including individuals in occupation of the premises, surrender to the plaintiffs vacant possession of a property, pending the determination of the proceedings. The property in question is 96 Avoca Park, Blackrock, Co. Dublin (hereafter “**the Avoca Park property**”). He ordered that those parties deliver to the plaintiffs all keys, alarm codes and other security and access devices pertaining to the property, pending the determination of the proceedings. He also ordered a stay on the sale, pending such determination. The issues raised in the case were dealt with in his judgment, which was delivered on the 20 February 2020.

2. It may be noted that the appeal has been brought by Ms. Gleeson and not by Mr. White, although both were defendants to the High Court proceedings. The defendants are a married couple, although estranged and living apart. Objection has been taken by the respondents to the fact that the appeal has been “reconstituted”, as they see it, and I will return to this point later. For clarity, I will retain the nomenclature of the High Court and refer to Mr. White and Ms. Gleeson as the first and second defendants, and the respondents as the plaintiffs.

Background

The plaintiffs’ plenary proceedings and notice of motion

3. The plaintiffs issued a plenary summons on the 11 June 2019 in respect of both defendants. Among the reliefs sought were:

1. A declaration that the first plaintiff acquired loan facilities and mortgage securities which were originally agreed with the defendants and AIB to include

the mortgage security executed by the defendants in favour of AIB Plc on the 12 August 1998 in respect of the Avoca property.

2. A declaration that the second and third plaintiffs were lawfully appointed as receivers over the property on the 13 October 2017 by instrument of appointment of that date and on foot of a receiver novation deed dated the 2 August 2018.
3. A declaration that a purported letting of the property by the defendants was in breach of the covenants under the mortgage dated 12 August 1998 and in particular Clause 5(j) thereof.
4. An order to surrender vacant possession of the property and various related orders.

4. By notice of motion issued on the 12 June 2019, the plaintiffs sought an interlocutory injunction to obtain vacant possession of the property together with orders prohibiting the defendants from impeding or obstructing the plaintiffs (and related orders) pending the determination of the proceedings.

5. The motion was grounded on the affidavit of Stephen Tennant, Chartered Accountant, of one of the receivers, who is the second plaintiff. The affidavit was sworn on the 6 June 2019. He exhibited a number of key documents. The first document is a Deed of Mortgage from 1998 between AIB and both defendants. The second is a letter of loan offer from 2008 from AIB to the first defendant. I will return in further detail to these documents later as some of the legal argument turns on an interpretation of their provisions.

6. The second plaintiff averred that the first plaintiff acquired the rights, interests and benefits of AIB in the loan facilities and mortgage security which the defendants had with

AIB under a Global Deed of Transfer dated the 2 August 2018, which was subsequently amended by an Amendment and Restatement Deed dated the 22 October 2018. He exhibited both of those documents. Again, I will return in further detail to these documents later, as complaints are made by the second defendant about errors within them.

7. In his first affidavit, the second plaintiff averred that the defendants were husband and wife and that they resided at 32 Willow Terrace, Blackrock, Co. Dublin, i.e. an address other than the Avoca property. He says that prior to the first plaintiff acquiring the defendants' loan facilities and mortgage from AIB, the defendants had already defaulted in complying with the terms and conditions of their loan facility. He exhibited formal letters of demand issued from AIB in this regard, dated the 15 December 2016 and the 3 April 2017. The letter of the 15 December 2016 refers to a "credit agreement" and says that the balance due in connection with the credit agreement is €32,436.17. There is a further letter in this regard on the 3 April 2017, as well as a letter of the same date referring to a "housing loan agreement", which says that the total balance due at that stage was €2,908,121.52.

8. The second plaintiff said that the letters of demand were not replied to by the defendants and following their appointment as receivers, the second and third plaintiffs wrote to the occupiers of the premises and requested that any rental payments being discharged in respect of the property would now be paid into a new account. He said that they received no cooperation whatsoever from the occupants of the premises or from the defendants at that time or at any time thereafter.

9. The second plaintiff also averred that the plaintiffs solicited the advice of the HSE and Dun Laoghaire/Rathdown County Council because there were a large number of

individuals occupying the property and they had genuine concerns in that regard. They hoped that this would facilitate a positive outcome with the occupants deciding to vacate the property but this did not prove to be the case.

10. The second plaintiff said that in seeking interlocutory injunctive relief against the defendants and those in occupation of the premises, the plaintiffs were relying on Clause 5(j) of the mortgage in which the defendants covenanted “*not to convey, transfer, assign, demise or let or part of the possession of the Mortgaged Property or any part thereof or any Interest therein without the express prior consent in writing of the Bank*”. He averred that no such written consent was ever requested by the defendants and no consent in writing was ever given by AIB to the defendants. Therefore, he says any purported letting of the premises was clearly invalid and of no legal force and effect.

11. He averred that as the defendants had failed to discharge their indebtedness to the first named plaintiff and their default had resulted in the appointment of the second and third named plaintiffs as receivers, it was evident that the defendants had no defence to the within proceedings.

12. He said that separate letters were sent to the defendants and to the occupants of the premises prior to the commencement of the proceedings requesting that they cooperate and take steps to ensure the premises were vacated. These letters were issued on the 27 March 2019. He said that subsequent to these letters having been written, it was discovered that the first and second named defendants had separated, with the first defendant having relocated to an address in County Wexford. Further letters in identical terms were sent separately to each of the defendants. This did not elicit any response from either defendant.

13. The second plaintiff averred that they were being wrongfully denied access to and possession of both the premises and the receipt of income being derived from the premises, in circumstances where the defendants had not made any attempt to discharge their indebtedness to the first plaintiff which was in excess of €3m and where they “continue to derive a substantial income from the premises”. He averred that damages would not be an adequate remedy for the plaintiffs and also that they were prepared to give an undertaking as to damages. He submitted that the balance of convenience clearly favoured the court granting interlocutory injunctive relief.

The defendants’ position in the High Court

14. By letter dated the 19 June 2019, John P. O’Donoghue Solicitors wrote to solicitors on behalf of the plaintiffs saying that the letter was “... *to put you on formal notice that our client has a legal interest in the properties at 96 Avoca Park and 14 Roney Beach. Although estranged, our client has a beneficial interest in all and any property owned by Mr. Paul White. Any attempt to undermine our client’s legal and equitable rights will be vigorously defended*”. An appearance was entered to the proceedings by the same solicitors on behalf of both respondents on the 28 June 2019.

15. A replying affidavit dated the 23 July 2019 was sworn by the first defendant. He said that he was making the affidavit on his own behalf and that of the second named defendant with her knowledge and authority. The second defendant did not herself swear any affidavit at any stage.

16. The first defendant reserved his position in relation to the validity of the transfer to the first named plaintiff and the appointment of the receivers. He said that the exhibits

showed that no debt was due by the second named defendant to the plaintiffs or any of their predecessors in title. He denied that there had been any obstruction of the receivers and that they were entitled to possession. He said that insofar as the second plaintiff had averred that the premises were let out to approximately sixteen people, this was denied “in part”. He said that the defendants had let the property with the knowledge and consent of AIB since 2002. For most of the letting period, the rents were paid from the tenant accounts to AIB. In order to facilitate their letting affairs, AIB extended a credit card facility for controlling property management expenses. He exhibited a letter from a manager at AIB to this effect dated the 9 July 2009. He said that in or around December 2018 the current tenant refused to pay rent because of the contact from the receivers. He said that the property was let to one individual only but that it was accepted that this person had caused approximately 15 people to occupy the premises. The first defendant said he was a stranger to the circumstances in which this happened. He said that he was aware that the HSE and the County Council had inspected the premises and that no enforcement action was being taken in respect of occupation.

17. He denied that the second named defendant had any loan facility with AIB or Everyday Finance. He pointed out that the loan offer of 2008 was offered to and accepted by himself only. There being no facility to her, he said, there cannot have been any default by the second named defendant. He pointed out that the property to be mortgaged in 2008 was one known as 19 Beacon Court, Sandyford, Dublin 18 (hereafter “**the Beacon Court property**”), and insofar as AIB relied on a legal charge over the Avoca Park property, this was by way of additional security. He pointed out that in its letter of loan offer, AIB required the outstanding balance on the existing home loan to be cleared on drawdown of the 2008 loan. He also pointed out that, by the same letter, the second defendant was required to give a letter of guarantee as a condition precedent to drawdown. He said there was no provision

in the mortgage of 1998 suggesting that the mortgage was a continuing security for any future guarantee by any of the parties.

18. He made reference to the Global Deed of Transfer and pointed to errors within certain documents. He pointed out that letters for demand for payment were addressed to the first named defendant only.

19. In response to the averment that no defence exists to the claim, he made clear that the main points of the intended defence were to be follows:

- a) There is no debt due to the plaintiffs by the second named defendant.
- b) The plaintiffs do not enjoy the benefit of any security over any property of the second named defendant.
- c) The second named defendant is not bound by any negative pledge clause limiting her entitlement to alienate her interests, including by way of lease to the current occupants or any other party.
- d) The receivers were not validly appointed over the assets/interests of the second named defendant and it is impossible for them to purport to possess and/or manage the property jointly, without the consent and agreement of the second named defendant.
- e) The second named defendant is entitled to the benefit of rent or any other form of payment in respect of her interests in the property.
- f) The mortgage of the 12 August 1998, insofar as it concerns the second named defendant, has been discharged and the second named defendant is entitled to redemption by way of counterclaim.
- g) Also, by way of counterclaim, the defendants are entitled to damages for trespass and/or interference in their economic interests.

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

20. The second named defendant averred that the plaintiffs' case was fundamentally misconceived and that an injustice would be caused to the defendants if orders facilitating the sale of the property were granted.

Folio exhibited showing charge on the property

21. In a second affidavit sworn by the second plaintiff on the 10 October 2019, he exhibited a printout from the Property Registration Authority relating to Folio 122784F, being the Folio relating to the Avoca property. Under "Part 2 – Ownership", the defendants are described as full owners. Under "Part 3, Burdens and Notices of Burdens", the entry for the 29 September 1998 is "*charge for present and future advances stamped to cover £340,000 pounds repayable with interest. Allied Irish Bank Plc is owner of this charge. Note: Certificate of Charge issued rule 156. Note: The ownership of this Charge has been transferred. See entry No. 5.*" Item 5 is dated the 13 December 2018 and says "*Everyday Finance Designated Activity Company is the owner of the Charge registered at Entry No. 4.*" Thus, the first plaintiff is the registered owner of the charge over the property, as was AIB before it.

22. Among other matters addressed in this second affidavit, the second plaintiff averred: "It is the Plaintiff's belief that Mr. White and/or Mr. White and the Second named Defendant are receiving rental income from the unknown occupants and are retaining rental income for their own benefit".

Key Documents

The 1998 Deed of Mortgage

23. The second defendant relies heavily upon the interpretation of the 1998 Mortgage Deed in advancing the proposition that she was released from that mortgage. Certain provisions thereof should therefore be set out in detail.

24. The mortgage deed of 1998 includes the following within a section entitled “B. Definitions”.

“(4) “The Mortgagor” means the person or persons so named in part 1 of the Mortgage Particulars and the personal representative or the personal representatives of the Mortgagor and the person or persons deriving title under the Mortgagor to the Mortgaged Property”.

...

“(6) “present loan” means the Loan of the principal sum which is set out in Part 3 of the Mortgage Particulars offered by the Bank to the Mortgagor and accepted by the Mortgagor and any reference herein to the said “present loan” shall also include any refinancings or reschedulings thereof or any amendments thereto whether in whole or in part which may be agreed in writing at any time or from time to time between the Mortgagor and the Bank.”

“(7)”future loan” means any Loan or Loans of a specific principal sum or sums offered at any future time or times on the Security of this Mortgage by the Bank to the

Mortgagor and agreed and accepted in writing by the Mortgagor in any relevant letter of offer (as hereinafter defined) and shall also mean any refinancings or reschedulings thereof or any amendments or variations thereto whether in whole or in part which may be agreed in writing at any future time or times between the Mortgagor or the Bank.”

“(8)”relevant letter of offer” means the letter of offer the date of which is set out in Part 3 of the Mortgage Particulars wherein the Bank offered the present loan to the Mortgagor... and shall ... in addition mean and include for the purposes of this Mortgage any letter or letters of offer of a future loan... agreed and accepting in writing between the Mortgagor and the Bank at any future time or times.”

25. Another section within the mortgage deed entitled “C. Interpretation” provides *inter alia* that:

“Where two or more persons together constitute the Mortgagor the covenants and agreements on the part of the Mortgagor herein expressed or implied by law in this Mortgage shall be deemed to have entered into jointly and severally by the said persons”.

The 2008 letter of loan offer

26. The letter of loan dated the 10 March 2008 is addressed solely to the first defendant at an address other than the Avoca property. The amount of the loan was €2,750,000.00. The letter states as follows:

“I am pleased to offer you a mortgage loan of the principal sum specified in Part 1 attached, subject to the mortgage loan being secured by a first legal

mortgage/charge for present and future advances in favour of the Bank over the property described in Part 1, and acceptance of and compliance with the Special Conditions, the Pre-Drawdown requirements and the General Terms and Conditions detailed in Parts 2, 3, and 4 respectively.”

27. Part 1 contains the particulars of the offer of mortgage loan and sets out the “customer name” as that of the first defendant (only). It also describes “the property to be mortgaged” as the Beacon Court property. The acceptance and consent of the loan offer is signed by the first defendant only.

28. Part 2 contains the special conditions and says that the Bank will rely on a number of listed properties as “additional security for this borrowing”. This list includes the Avoca Park property.

29. Three particular features of the special conditions in Part 2 should be noted:

- (1) They state that the existing home loan must be cleared in full on drawdown of the facility now offered.
- (2) They state that it is a condition of sanction that a letter of guarantee for €2,750,000.00 is provided by the second defendant prior to the drawdown of the loan facility.
- (3) The letter of offer is stated to supersede all previous home plan offers made to “the above borrowers”.

30. Part 6 contains a spousal consent to the letter of offer of mortgage loan under the Family Home Protection Act and is signed by the second defendant and dated the 25 April

2008. It says that “the property to be mortgaged to the Lenders described in Part 1 of the Particulars of this Offer is my Family Home....”. As we have seen, the property referred to in Part 1 was the Beacon Court property, not the Avoca Park property.

The Global Deed of Transfer of the 2 August 2018, and the Amendment and Restatement Deed of the 22 October 2018

31. There are heavy redactions within the Global Deed of Transfer dated the 2 August 2018 as between AIB Plc, AIB Mortgage Bank, EBS Designated Activity Company (i.e. the sellers) and Everyday Finance D.A.C. (i.e. the buyer). What is visible between large portions of the document which are redacted are the following items.

32. First (under the Schedule of Loan Assets, Security Documents and Guarantees, sub-heading ‘Property Security’), there is reference to a mortgage dated the 12 August 1996 between the two defendants and Allied Irish Bank Plc. There are various reference numbers in the columns in the row beside this entry, and one of them refers to the first defendant (only).

33. Under the Schedule of ‘Loan Assets, Security Documents and Guarantees’, sub-heading ‘Guarantees’, there is a reference to an undated guarantee from the second defendant. Under the Schedule of ‘Loan Assets: Security Documents and Guarantees’, sub-heading ‘Guarantor Datatape’, the first and second defendant are referred to with some apparent identification codes. Under the Schedule of ‘Loan Assets: Underlying Loan Agreements’, sub-heading ‘Facility Letters’, there is a reference to a facility letter between AIB and the first defendant as borrower dated the 10 March 2008. There are three further references to the first defendant only under sub-headings of ‘Loans Datatape’ or ‘Revolving Facility Datatape’.

34. The Amendment and Restatement Deed, dated the 22 October 2018, attached a revised schedule 2. There is a reference to the Avoca property alongside references to the first defendant (only).

The Instrument of Appointment and the Novation

35. The Instrument of Appointment is dated the 13 October 2017. The recitals thereto include the following recital in particular, which, it may be noted, correctly describes the date of the mortgage:-

“WHEREAS A. By Deed of Mortgage/Charge dated **12th August 1998** between (1) **Paul White and Jane Gleeson** together (the “**Borrower**”) and (2) and **Allied Irish Banks p.l.c.** (the “**Charge**”), the Borrowers charged in favour of the Bank by way of Fixed Mortgage/Charge the property described in the Schedule of the Charge and as specified in the schedule hereto (the ‘Mortgaged Property’) as security for payment in discharge of the monies and liabilities therein specified... “. (Emphasis added)

36. The Instrument of Appointment goes on to state:

“NOW the Bank in pursuance of the power given to it under and or pursuant to the Charge and of every other power conferred upon it by State or otherwise HEREBY APPOINTS the Receiver to be the Receiver of and over the Mortgaged Property and to exercise all the powers of a Receiver given by the Charge and by law....” (Emphasis added)

37. The schedule then describes the property in question as “*ALL THAT AND THOSE the mortgagees interest under a Deed of Mortgage/Charge dated 12th August 1988* between (1) Paul White and Jane Gleeson; and (2) Allied Irish Banks p.l.c.”. (Emphasis added). Thus,

the date of the mortgage is misdescribed in the schedule. However, the address of the Avoca property is correctly described and the correct folio reference is given in this schedule.

38. The acceptance to the instrument of appointment is signed by the second and third plaintiffs on the 2 November 2017.

39. The Receiver Novation Deed dated the 2 August 2018 has a schedule containing a reference to the property address. It describes the date of the Deed of Appointment as being dated the 2 November 2017.

The Registration of Title Act 1964

40. S.31(1) of the 1964 Act provides:

‘The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just.’”

Outline of submissions by the parties

41. The defendants made a number of submissions in the High Court, which were repeated on appeal on behalf of the second defendant/appellant. These included the following:

1. That the applicable standard on this interlocutory injunction was for the plaintiffs to show at least a strong case that they are likely to succeed at the hearing of the action; in other words, the *Maha Lingam* standard (*Maha Lingam v. Health Service Executive* [2005] IESC 89, as discussed further in *Charleton & Anor. v. Scriven* [2019 IESC 28.]) It was submitted that the decision of the Supreme Court in the latter case was authority for the proposition that where the reliefs sought by the receiver are mandatory in nature and would in effect bring the proceedings to an end, the receivers would have to establish that they had a strong arguable case and not the lower standard that normally applied to an interlocutory injunction.
2. That the receivers were not validly appointed by reason of a number of errors in the Global Deed of Transfer and the Instrument of Appointment.
3. That in order for the mortgage to be binding upon the second defendant, she would have had to have consented to the terms of the loan in writing and there was no evidence that she had agreed to provide continued security in respect of the 2008 loan to the first named defendant by way of mortgage. The loan was clearly to the first defendant only.

42. The submissions on behalf of the respondents included the following:

1. That such errors as there were in the documentation did not render invalid the appointment of the second and third plaintiffs as receivers;
2. That even though the 2008 loan was advanced to the first named defendant only, the 1998 mortgage continued to act as security for the 2008 loan and bound both of the defendants. In this regard they relied upon the specific wording of certain parts of the 1998 mortgage, to which I will return;

3. That the evidence of the registration of charge on the folio was, pursuant to the provisions of the Registration of Title Act 1964, conclusive evidence of the title of the party registered, in the absence of fraud or mistake. Reliance was placed on *Tanager D.A.C. v. Kane* [2018] IECA 352. They pointed out that it was clear from the execution of a letter of guarantee by the second defendant that she was aware of the terms of the 2008 loan;
4. Counsel also emphasised that the defendants had not denied that a sum of more than €3m was due and owing or that repayments had not been made for some time. Emphasis was also laid upon the fact that the defendants had not cooperated at all with the receivers.

The High Court judgment

43. The High Court judge accepted that the reliefs sought by the plaintiffs in their notice of motion were mandatory in nature and, having regard to *Charleton v. Scriven*, that the test to be applied was whether the respondents had a strong case which was likely to succeed at the hearing of the action.

44. He turned then to the errors within some of the documentation. Regarding the Instrument of Appointment of the 13 October 2017, he noted that the schedule erroneously referred to the year 1988 but went on to say that the recital at the outset of the document correctly recorded the Deed of Mortgage/Charge as the 12 August 1998. He also noted that the mortgage particulars referred to the two defendants by name and recorded the correct address for the property. He said:

“54. The recital in the instrument of appointment makes it clear that the only purpose of the schedule to that document is to identify the property – not the deed of mortgage/charge, which is correctly identified in the recital to which I have referred at

paragraph 51 above. In those circumstances, the erroneous reference to ‘1988’ is irrelevant to the description of the property in the schedule, which is correct. I am therefore of the view that this error, while unfortunate, does not invalidate the appointment of the receiver.”

45. Regarding the Novation Deed, the reference to the 2 November 2017 was, he said, clearly a reference to the date of the receivers’ acceptance of the appointments. He was of the view that the schedule correctly recorded the date of their appointment because it recorded the date of the acceptance of their appointment and therefore the date in the schedule was not incorrect.

46. As regards the Global Deed of Transfer, he said that the schedule correctly identified the parties to the mortgage and the date and month; the only error was the reference to 1996 rather than 1998. He said that the Amendment Deed of the 22 October 2018 correctly identified the property. He also noted that the folio shows that the mortgage/charge was registered by AIB in September 1998 and that the first plaintiff was registered on the 13 December 2018. He then referred to ss. 31(1) and s.64 of the Register of Title Act 1964 and discussed *Tanager D.A.C. v. Kane*. He went on to say the following:

“[64.] In my view, the provisions of s.31 and s.62 of the Registration of Title Act 1964 as quoted above, and the effect of those sections as confirmed by the Court of Appeal in *Tanager*, make it clear that the first named plaintiff is entitled to rely on the registration of it as the owner of the mortgage. This Court must, and does, accept that the registration of the first named plaintiff as owner of the mortgage of 12th August, 1998 is correct. It was not at any stage suggested to me that the defendants intend to

apply to court for rectification of the Register, such that the court should consider adjournment of the present application to allow such an application to take place.

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

47. The trial judge then turned to the second issue, arising from the fact that the second defendant was not party to the 2008 loan. He said that the court was obliged to regard the first named plaintiff’s ownership of the mortgage as unassailable for the reasons set out above. He said that it appeared that the second named defendant was aware of the terms of the 2008 loan because of her letter of guarantee, but added:

“[68.] ... Even if she was not, the terms of the mortgage which provide that it is security for any future loans to either the first or second named defendants may render the question of her consent or otherwise academic.”

48. He noted that counsel for the respondents had submitted that it was significant that at no stage prior to the present application had the second named defendant ever argued that

the mortgage did not cover the 2008 loan or that she was entitled to reliefs from the terms of the mortgage. He said that he did not have to resolve the issues on the application, but that the question was whether the onus of showing a strong case likely to succeed a trial had been met. He was satisfied that it had been met.

49. The trial judge then considered precisely what order should be made. He said that the current situation was completely unsatisfactory in that there might be as many as fifteen occupiers then in the premises. None of the parties appeared to be aware of the situation regarding rent, although the second plaintiff suspected that the defendants continued to derive a substantial income from the premises. Neither of the defendants resided in the property. It was not in dispute that the first named defendant was in very substantial arrears in respect of the 2008 loan. Taking all of that into account, he thought it would be appropriate to make orders which would enable the plaintiff to take possession of the property. He did, however, take into account a suggestion by counsel for the plaintiff that a stay might be placed on the sale of any property pending the determination of the proceedings or agreement of the parties. He said that this would allow the receivers to secure the property and perhaps to regularise the position of the occupiers in terms of tenure, payment of rent and so on. Any rent collected could be held in escrow pending the determination of the proceedings. In those circumstances he granted the order for possession but placed a stay on it pending the determination of the proceedings.

50. According to the written submissions of the plaintiffs, vacant possession of the property was obtained by them on the 20 March 2020. They gave an undertaking not to proceed with the sale of the property pending the determination of the proceedings.

51. No stay on the High Court order was sought by either defendant. According to the plaintiffs' submissions, a timetable for pleadings was agreed between the plaintiffs and the defendants was handed into the High Court on the 27 February 2020.

The appeal

52. The appeal was brought by the second defendant only. This is a matter to which the respondents objected in the opening paragraphs of their ground of opposition to the appeal. They plead that the appeal is procedurally invalid and improperly constituted in circumstances where the second defendant purports to reconstitute the proceedings on the basis that the first named defendant and the persons formerly in occupation of the property are now to be treated as notice parties to the appeal, in circumstances where the only affidavit on behalf of the defendants was sworn by the first named defendant, who has not appealed against the High Court Order. They also say that her appeal is unsustainable in circumstances where the second named defendant did not adduce any affidavit evidence independently of the replying affidavit sworn by the first named defendant who has not appealed. They do not accept that the appeal is divisible in this manner. I do not think that anything turns on the manner in which the appeal was constituted. The second defendant was a party to the High Court proceedings and is entitled to appeal and rely on such affidavit evidence as was adduced in the High Court. I do not think anything of substance flows from the fact that she now describes her husband and the occupants of the property as notice parties.

53. The grounds of appeal filed on behalf of the second named defendant are relatively lengthy and I would summarise them as follows. It is contended that the trial judge erred:

1. In holding that the respondents had a strong case that the appointment of the receiver was invalid, and that he incorrectly applied the *Maha Lingam* test.

2. In his conclusions concerning the documentation and in holding that there was no issue of substance concerning the validity of the appointment in the power of the receiver on the basis of invalid appointment. In this context, particular complaint is made that the trial judge relied on the recital contained within the instrument of appointment of the receiver which was not an operative part of the instrument. I pause to observe that the respondents contend that this, *inter alia*, is a new point made on appeal.
3. In finding that the errors in the documents were *de minimis* and could be remedied by way of rectification in circumstances where the plaintiff had failed to plead rectification nor was there any indication that it would be sought before the hearing of the matter; and there was a more fundamental flaw than “appreciable deviation” from the terms of the mortgage in that it was not properly identified by the operative terms of the instrument appointing the receiver.
4. In holding that the 1998 mortgage was capable of operating as a continuing security against the interests of the second named defendant in circumstances where she was not a party to the 2008 loan, where that loan had discharged the previous 1998 loan, and where there was no evidence before the trial judge that the liability on foot of the guarantee had been called in.
5. In determining that the 1998 mortgage was a continuing security notwithstanding that he had no evidence that the 2008 loan was made on the security of the second defendant’s interests in the property secured by the 1998 mortgage, and where, on the contrary, a letter of guarantee was required from her as security for that loan. That letter was not in evidence at the hearing in the High Court nor was the letter of demand. It was also pleaded that he erred in

finding that the joint liability aspect of the definition of mortgagor in the 1998 mortgage created a joint liability for the 2008 loan, because the terms of the 1998 mortgage made it clear that the covenants and agreements were entered into jointly and severally. It is pleaded that the second defendant is entitled to redeem the 1998 mortgage insofar as it affects her obligations and interests thereunder, because of the repayment of the monies secured by the 1998 mortgage, and that she is entitled to make this claim by way of counterclaim at the hearing of the proceedings in the High Court.

6. That there was no evidence before the trial judge that any liability had been called in on foot of the guarantee and that in fact it was called in by letter of demand dated the 1 April 2014; any liability is statute-barred because no proceedings were issued thereafter.
7. That he incorrectly concluded that having regard to the decision in *Tanager D.A.C. v. Kane* and Section 64 of Registration of Title Act 1964, the second named defendant was not entitled to challenge the registration of the first plaintiff as owner of the charge. The relevant legislation related only to the title of the owner of the charge but not the issue of whether the owner of the charge had satisfied the necessary proofs, which it had not done in this case.

54. The plaintiffs oppose the appeal in full and rely upon the trial judge's judgment which they contend is correct. They plead that the errors in the documents did not impact on the validity of the appointment of the second and third plaintiffs and/or were matters to be corrected/rectified at the hearing of the proceedings. They also contend that the second named defendant continues to be bound by the 1998 mortgage and they rely heavily upon the conclusiveness of the Register as discussed in *Tanager D.A.C. v. Kane*. They also

contend that the Court could apply the “fair issue to be tried” standard to the case because there is no question of the property being sold prior to trial and the only issue is maintaining the property in the meantime.

Discussion

55. It is important to note at the outset that this is not a case where the plaintiffs sought an order for possession in summary proceedings pursuant to Section 62(7) of the Registration of Title Act 1964, but rather a case where the plaintiffs had issued plenary proceedings seeking a panoply of equitable reliefs (i.e. declarations and injunctions) and then sought an interlocutory injunction within those proceedings. The plaintiffs have therefore chosen to invoke the equitable jurisdiction of the courts rather than the statutory procedure for obtaining possession.

56. The appeal raises a number of issues which may be enumerated as follows:

- (1) Whether the appropriate threshold to be met by the plaintiffs in this case is a “strong case” or a “fair issue to be tried”;
- (2) Whether errors in some of the documentation raise questions about the appointment of the receivers sufficient to prevent the plaintiffs from establishing that their appointment was valid (according to whichever test is appropriate: see issue (1));
- (3) Whether, having regard to the questions raised as to the second defendant’s position in relation to loan in 2008 which was made to the first defendant only, and whether that loan was secured against the second defendant’s interest in the property, the plaintiffs have sufficiently made out a proprietary interest which

they can assert as against the second defendant (again according to whichever test is appropriate: see issue (1)), and further, whether *Tanager D.A.C. v. Kane* is relevant to this analysis;

- (4) The balance of convenience/justice, if that stage of the analysis is reached.

Issue 1: The Standard of Proof and the application of it to the present case

57. The High Court judge applied the “strong case” (i.e. *Maha Lingam*) standard and found the plaintiffs to have satisfied it. The second named defendant supports the “strong test” threshold but submits that he misapplied the test. The plaintiffs submit that they have a strong case; but also submit in the alternative that if the Court has any concerns regarding satisfaction of the higher test, it could approach the matter on the basis of the lower test of “fair issue to be tried”, given that the property will not be sold pending trial and the position is merely (according to the plaintiffs) the preservation of the status quo. The plaintiffs ask the court to characterise the order in this case, on the analysis in *Charleton v. Scriven*, as one primarily directed at preserving the integrity and management of the property pending trial, rather than one which effectively determines the final issues in the case.

58. In *AIB plc v. Diamond* [2012] 3 IR 549, Clarke J. (as he then was) said (at page 571):

“It is now well settled that in cases involving a mandatory injunction the court will normally require a higher level of likelihood that the plaintiff has a good case before granting an interlocutory injunction (see for example *Lingam v. Health Service Executive* [2005] IESC 89, [2006] 17 ELR 137. It may well be that the logic behind that departure from the normal rule can be found in the added risk of injustice that may

arise where the court is asked not just to keep things as they were by means of a prohibitory injunction but to require someone to actively take a step which may, with the benefit of hindsight after a trial, turn out not to have been justified. The risk of injustice in the court taking such a step is obviously higher. In order to minimise the overall risk of injustice the court requires a higher level of likelihood about the strength of the plaintiff's case before being prepared to make such an order.”

59. In *Charleton & Anor. v. Scriven*, Clarke C.J. said that it was important to note that the assessment of whether the relief sought was mandatory should focus on the substance rather than the form of the relief sought:

“ 4.6 However, there is also clear authority for the proposition that the assessment of whether an injunction can properly be said to be mandatory for those purposes is a matter of substance rather than one of form

...

4.7 This substance over form approach can also be seen in, for example, my judgment in *Bergin v. Galway Clinic Doughiska Ltd.* [2007] IEHC 386, [2008] 2 I.R. 205 and the judgment of Irvine J. in *Stoskus v. Goode Concrete Limited* [2007] IEHC 432.

4.8 The reason why a higher standard is applied is not because of some technicality but because of the greater risk of injustice which I have sought to identify. But that greater risk is a function of the substance of the order sought and the consequences which it might have for an individual who became bound to obey the interlocutory injunction but ultimately succeeded. It is clear that, at least in general terms, requiring someone to do something which, it may ultimately transpire, they were not required to do may give rise to a greater risk of injustice than simply requiring someone to refrain from doing something which they may ultimately be found to be

entitled to do. But that question is dependent on an analysis of the substance of the effect of the injunction if granted, rather than the language used in its terms...”

60. That case involved a receiver injunction also. Mr. Scriven had entered into loan facility agreements with a bank on foot of which the bank had advanced €3.6m, with loans secured over eight residential properties. Mr. Scriven had been in default since 2009 and had not made any repayment since 2013. Following a demand duly made, receivers were appointed on foot of the deeds of charge. The validity of their appointment was in issue on the basis that the deed referred to the appointment of “receiver and manager or receivers and managers” whereas the actual instrument of appointment referred to “the receivers only” (i.e. not “managers”).

61. At paragraph 5.2 of his judgment, Clarke C.J. said that it was important to keep in mind that at the time the injunction was granted and until the appeal, the relevant properties were let. He said that in those circumstances it was clear that the principal substance of what lay behind the injunction sought was that the receivers would be entitled to collect the rent without any interference. He accepted that some of the reliefs sought, such as that requiring Mr. Scriven to hand over possession of the properties, might be characterised as more mandatory than prohibitory in character. However, he thought that for the purposes of the assessment of whether it was appropriate to grant or refuse interlocutory relief in the case, it was appropriate to characterise much of the relief sought as essentially prohibitory in nature. Having analysed the position of the parties in relation to the validity of the receivers’ appointment, he concluded (at paragraph 6.10) that it would be difficult to suggest that a sufficiently strong case could be made to warrant the grant of an injunction which was essentially mandatory in character. He therefore distinguished between the relief which

sought to retain the position that the receivers were entitled to collect the rent, on the one hand, and any relief which would allow the receivers to move on to selling the property, on the other. As regards the collection of rent, the balance of convenience favoured those sums being paid to the receiver and retained by them because in the event that the receivers ultimately lost the case, the monies could be paid over to Mr. Scriven.

62. He continued:

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

63. Similar comments were made by Irvine J. in *Taite & Anor. v. Beades* [2019] IESC 92 at paragraphs 22-29 of her judgment. In *Taite & Anor. v. Beades*, the essential difference appears to have been that the receivers sought to exercise the power of sale, which necessitated the application of the higher standard. At paragraph 36, she said:

“Whilst the receivers did not pursue an order for possession, relief which is claimed in the plenary summons, the purpose of the injunction was clearly to wrest control of the premises from Mr. Beades in order that they might exercise all of the powers provided for in Clause 11.4 of the deed of mortgage, including their right, not only to receive any rents payable in respect of the said premises, but also to sell or dispose of the assets. Thus, the relief sought, whilst couched in prohibitory terms, went a long way to giving the receivers the substantive relief claimed in the plenary summons, i.e. possession. For these reasons the interests of justice would demand that this court would review the evidence advanced by the receivers in the High Court under the higher threshold.”

64. In *Bank of Ireland v. O'Donnell* [2016] 2 IR 185, this Court upheld an interlocutory injunction requiring the occupants to vacate a property known as “Gorse Hill” in Killiney, County Dublin. This relief was characterised as mandatory in nature (see paragraph 97 of judgment therein) and the “strong case” test was held to be the correct one to be applied. The Court specifically distinguished this situation from that which arose in *Kavanagh and Lowe v. Lynch and St. Angela's Student Residences Ltd.* [2011] IEHC 348, where the defendants were not residing in the subject property (see paragraph 104 of the judgment).

65. In the present case, it is true to say that neither of the defendants resided in the property and that tenants were *in situ* at the time of the application for the injunction, without any of the rental income being applied to discharge the debt. However, the plaintiffs did not seek merely to divert any rental income coming from the tenants in the property to the receivers, although they could have limited the relief sought to that end. Instead, they also sought

vacant possession of the property and certain related reliefs. In those circumstances, it seems to me that the correct characterisation of the relief sought is that it was mandatory in nature and that the trial judge was correct in this regard. This is the position, in my view, notwithstanding that the trial judge placed a stay on the order for sale and that the plaintiffs had given an undertaking not to sell the property pending the determination of the proceedings. If and when the stay is removed, the order grants possession; the fact that its operation is stayed does not deprive it of its mandatory character. If the plaintiffs had confined themselves merely to diverting the rents to the receivers or requiring them to be paid into an escrow account, the “fair issue to be tried” test might have been the appropriate standard, but the overall substance of the reliefs sought, which included vacant possession, were mandatory in nature and accordingly the plaintiffs must satisfy the higher threshold of a “strong case”.

Issue 2: Errors in documents

66. The second named defendant submits that the errors described above (see section entitled “Key Documents”) raise significant questions as to the validity of the transfer of the security to the first plaintiff and the validity of the appointment of the receivers. She points to the requirement that an appointment of a receiver must be strictly in accordance with the original document authorising the appointment, as discussed in cases such as *The Merrow Ltd v. Bank of Ireland Plc & Anor.* [2013] IEHC 130 and *Moroney v. McCarthy & Anor.* [2018] IEHC 379. She also submits that the High Court judge was in error insofar as he relied upon a recital, because it is a basic tenet of conveyancing law that recitals must yield to the operative part of an instrument. The second defendant also submits that *Tanager D.A.C. v. Kane* has nothing to do with the issue of whether the receivers were validly appointed.

67. The plaintiffs submit that, as regards the Global Deed of Transfer, the registration of the first plaintiff on the Folio as owner of the charge is a complete answer to the suggestion that the first plaintiff did not validly acquire the charge from AIB. They rely on paragraph 64 of the trial judge's judgment in which he reached this conclusion. They submit that the trial judge's reference at paragraph 65 of his judgment to potential rectification of the date of the mortgage was clearly intended to be a reference to the parties to the Deed of Transfer and to the rectification of the Schedule thereto, but that this was *obiter* and did not detract from his core determination that the first plaintiff had made out a strong case that it was owner of the mortgage of the 12 August 1998 by virtue of its registration as owner of same on the Register.

68. In my view, the plaintiffs do appear to have a strong case that the first plaintiff is the owner of the charge, having regard to the fact that it is registered on the Folio as such, and having regard to the conclusiveness of the folio as provided for by s.31(1) of the Act and discussed in such cases as *Tanager D.A.C. v. Kane* and *Bank of Ireland v. Cody* [2021] IESC 26. Insofar as the High Court judge spoke about rectification, I agree with the plaintiffs that this was at best *obiter* and that his core conclusion on this point was the conclusiveness of the Register on the question of the first plaintiff's title to the charge, and I agree with him that the plaintiffs had made out a strong case on this specific issue.

69. The question of the validity of the receivers' appointment is a separate matter; I am of the view that the conclusiveness of the Register has no application to that issue. I turn now to what is therefore a separate issue; the documents in question here are the Instrument of Appointment and the Deed of Novation.

70. In the first instance, I am not persuaded that there is any error in relation to the description of the date of the receivers' appointment in the Deed of Novation as the 2 November 2017, in circumstances where the 2 November 2017 was the date of their *acceptance* of the appointment, even though the date of the Instrument itself was the 13 October 2017. In this regard I also agree with the High Court judge.

71. There is, however, a clear error in the Schedule to the Instrument of Appointment regarding the date of the mortgage, albeit that the property address itself is correctly described, as is the Folio reference.

72. The plaintiffs submit that authorities such as *The Merrow v. Bank of Ireland* and *McCarthy v. Moroney* are distinguishable because they concern compliance with the formalities of appointment (such as whether the appointment should be under seal) and not the issue which arises here, namely the correct identification of the mortgage on foot of which they were appointed. Referring to the recital, which correctly identifies the mortgage date as the 12 August 1998 and what they say is the "appointment" part of the instrument, they contend that the "operative appointment" part clearly references the "charge" in question as that defined in the recital, namely the mortgage of the 12 August 1998. The purpose of the Schedule was merely to specify the property over which they were being appointed and the property is correctly identified there. Therefore, they contend, the fact that the Schedule provides an incorrect date for the mortgage is immaterial to the legal effect of the instrument.

73. In *The Merrow Limited v. Bank of Scotland Plc*, the High Court (Gilligan J.) accepted an argument that the appointment of a receiver was not valid because it was not under seal in accordance with a particular clause of a debenture which required that it be under seal. In

the course of his judgment, Gilligan J. considered a number of authorities on the question of appointing receivers in accordance with debentures. He considered it well established that 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.

74. The analysis of Gilligan J. in *The Merrow* was followed in *Moroney v. Property Registration Authority and Ennis Property Finance*. One of the arguments made there was that the deed of appointment of the receiver was defective because it appointed him as receiver only, and not as “receiver and manager”, which was the language used in the deed of mortgage. The High Court judge (McDonald J.) noted in his judgment that he was referred to the decision in *The Merrow* and no others, but that he was aware that it had been applied in a number of subsequent authorities including *McCleary v. McPhillips* [2015] IEHC 591.

75. McDonald J. referred to the various arguments made but ultimately came to the conclusion that the receiver would have an “uphill struggle” in persuading the court at trial that he had been validly appointed. He said it was clear from the decision in *The Merrow* that one looks to see whether there has been strict compliance with the terms of the relevant instrument under which a receiver is appointed. On the basis of the submissions made on behalf of the receiver, it was not established that there was a strong case that this was so.

76. I accept the plaintiffs' point that the authorities referred to concern compliance with the formalities of the instrument of appointment rather than identification of the property, but in circumstances where receivers derive their powers solely from the mortgage, it is troubling that the Schedule misstates the date of the very mortgage which is said to confer authority upon them. Whether this error is cured or negated by the insertion of the correct date in the recital seems to me to be a matter which is debateable. The presence of the correct

date in the recital enables me to say that the plaintiffs have shown that there is a fair issue to be tried but given the presence of the error in the Schedule, I have reservations about characterising the plaintiffs' case in this regard as a strong one.

Issue 3: The second defendant's alleged release from the 1998 Mortgage

77. The second named defendant submits that there is no evidence that she had agreed to provide continued security by way of mortgage on the property in respect of the 2008 loan to her husband, and that in fact she had been released from the mortgage at that time. On the contrary, she submits, the evidence (i.e. the wording of the letter of loan offer) is that it was a condition of drawdown that the existing home loan would be cleared. Further, she was to provide a letter of guarantee for the new loan, guaranteeing the full amount borrowed by her husband. She submits that in the circumstances, her liability in respect of the first loan was discharged and she was entitled to redemption of the 1998 mortgage. A fresh situation had been created, whereby the relevance of the 1998 mortgage was limited to providing additional security for the loan to the first defendant but only in respect of *his* interest in the property.

78. Counsel on her behalf submits that the 1998 mortgage was not a continuing security nor an "all sums" security, and that its availability as security for subsequent lending was regulated by reference to the definition within the Mortgage Deed of "relevant letter of offer" and the satisfaction of a cumulative test for "future loan". Counsel criticises the High Court judge's analysis of the interaction between the terms "mortgagor", "future loan", and "joint/several liability". His argument runs upon the following lines.

79. Counsel submits that the High Court judge relied upon the reference to joint and several liability within the mortgage deed but failed to recognise that joint and several

liability was limited to covenants/agreements on the part of the mortgagors and did not apply to future loans. In this regard, he points to Clause C(1) of the mortgage which provides:

“Where two or more persons together constitute the Mortgagor the covenants and agreements on the part of the mortgagor herein expressed or implied by law in this Mortgage shall be deemed to have been entered into jointly and severally by the said persons.”

80. He contends that this is a liability clause and therefore calls for restrictive interpretation, but that it does not define the term “mortgagor”, which instead is defined at Clause B(4) of the mortgage as:

“The person or persons so named in part 1 of the Mortgage Particulars and the personal representative or the personal representatives of the Mortgagor and the person or persons deriving title under the Mortgagor to the Mortgaged Property”.

81. Counsel submits that this clause identifies who the mortgagors are and does not create any basis for liability by and/or between them on foot of the mortgage. He submits that in giving these words their plain and ordinary meaning, “mortgagor” does not mean *either* of the mortgagors; rather, it means *both* of the mortgagors in a situation where there is more than one.

82. Counsel submits that the basis of a liability for future loans was regulated by the meaning of the term “relevant letter of offer” in the “Definitions” section in the Deed of Mortgage as it applied to future loans (i.e. “... “relevant letter of offer” shall in addition

mean and include for the purpose of this Mortgage any letter or letters of offer of a future loan... *agreed and accepted in writing between the Mortgagor and the Bank* at any future time or times.”(Emphasis added)). No such writing existed as between the second defendant and the bank. It is contended that, as a matter of fact, there was no future loan within the meaning of the definition required by the 1998 mortgage, but instead there was a new loan to Mr. White secured by the charge on *his interest* in the property, together with the guarantee from the appellant. It is submitted that in circumstances where any cause of action arising from the guarantee is statute-barred, and where the guarantee is not exhibited or pleaded, the first plaintiff is asserting a security over her interest in the absence of any liability to support it. Security is contingent on liability and the security enjoyed by the lender is limited to the interests of the first defendant, i.e. the only debtor under the 2008 loan.

83. The second defendant also argues that *Tanager D.A.C. v. Kane* has nothing to do with the issue arising in the present case. It is pointed out that *Tanager D.A.C. v. Kane* involved a Circuit Court ejectment bill seeking summary possession pursuant to Section 62(7) of the 1964 Act, whereas the present proceedings seek equitable relief, namely declaratory and injunctive relief. Counsel submits that *Tanager* in fact contemplates that other proceedings may be brought to challenge the validity of the charge, and he indicates that the second defendant intends to do so. He points out that no issue of the kind raised by the second defendant arose in *Tanager D.A.C. v. Kane*.

84. The plaintiffs’ position is that when the loan was refinanced in March 2008, the second defendant remained with obligations in respect of the full debt as guarantor, though she was not a joint borrower, and *also* remained a party to the 1998 mortgage which clearly covered any refinancing of the original purchase loan. They say it is significant that she signed a

Family Home Declaration which made clear that she was accepting the Bank's entitlement to recover the property as security in the event of default on the loan.

85. The plaintiffs lay emphasis on the fact that the second defendant never swore any affidavit containing evidence which even on a *prima facie* basis substantiated the contention that it was agreed that she would be released from the mortgage at the time of the 2008 loan, or that any interest she had in the property did not remain secured to the Bank thereafter. They point out that at no time during the twelve years between the refinancing and the application for the injunction did she make the argument that she was not bound by the 1998 mortgage. No attempt was made to reflect any such arrangement on the Register. There is therefore, they say, a complete absence of any evidential foundation for her contention. What is advanced instead, they say, is a theoretical argument based on the documents to the effect that she must be taken to have been released from the 1998 mortgage by reason of the interpretation of the 1998 mortgage deed and the 2008 letter of offer, unsupported by any affidavit evidence stating as a matter of fact that the original home loan was discharged in full from the funds drawn down in 2008, and that she was released from the 1998 mortgage in 2008.

86. In relation to the precise wording of the mortgage ("present loan", "future loan" and "secured monies" in Section B of the 1998 Mortgage), the plaintiffs submit that the mortgage over the property was intended to cover any refinancing or rescheduling of the original loan or any amendments or variations thereto whether in whole or in part. "Present loan" is clearly defined to include refinancing. "Secured monies" was defined to include future loans as well as "all other monies which the mortgagor covenants to pay to the Bank or discharge or is liable for under this mortgage". The term "mortgagor" includes the first defendant, and the

mortgage clearly covers the 2008 loan. They contend that it is clear that what happened in March 2008 was a refinancing of a whole series of other loans. They contend that the fact that the second named defendant signed a letter of guarantee does not, contrary to her submissions, suggest that she ceased to have obligations under the 1998 mortgage, as financial institutions frequently take multiple securities. It does show, however, that she was aware of what was being done in 2008.

87. The plaintiffs also rely on *Tanager D.A.C. v. Kane* in respect of the conclusiveness of details on the Folio, submitting that the entirety of the property is affected by the 1998 mortgage. The Register does not record anything which would indicate her release from the mortgage and instead records the burden of the entire mortgage running against both of them. They say that insofar as the second defendant maintains that she is entitled to redemption of the mortgage, *Tanager D.A.C. v. Kane* makes it clear that any rectification of the Register is not permitted in these proceedings.

88. As regards *Tanager D.A.C. v. Kane*, it will be recalled that this was a judgment delivered by this Court in a case stated from the High Court. The judgment of Baker J. discussed in some detail the history of the registration of land in Ireland, including the legislative history prior to and including the 1964 Act, and the effect in law of the registration of a charge. She pointed out that the conclusiveness of the Register had been a cornerstone of the system of registration since its inception. Regarding the relationship between an application for possession and a challenge to the correctness of the register, she said:

“[60.] The principles of conclusiveness do not prevent rectification..., but such rectification is not engaged in the action for possession. The first observation to be made with regard to the power of rectification is that the jurisdiction is limited to

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

[61.] The nature of this equitable jurisdiction to rectify was considered by Holmes L.J. in the old Irish Court of Appeal in *In re Patrick Leonard's Estate* [1912] 1 IR 212, at p. 226, where he described the intention of the broadly similar provisions in the 1891 Act as “[...] to preserve the jurisdiction of the Chancery Courts to set aside or reform an instrument upon the grounds that it was entered into by what is known as fraud or mistake in equity.” The jurisdiction to rectify is exercisable in an *inter partes* action grounded on alleged mistake or fraud, and not in a summary action on affidavit.

[62.] Tanager argues that, as Mr Kane is a third party to the transfer from BOSI to BOS, he has no standing to challenge the Register, as the challenge would be confined to a challenge of either Tanager or BOS on account of a fraud or mistake in the transaction or instrument on foot of which Tanager became registered, and I agree. The argument could not be raised in the action between Tanager and Mr. Kane.”

89. Baker J. accepted that a court hearing proceedings for possession had an inherent jurisdiction, in a suitable case, to adjourn the proceedings or stay the enforcement or implementation of an order for possession, or to postpone the date of delivery of possession,

pending the determination of rectification proceedings, if it considered that those proceedings were “reasonably likely” to offer a defence to the claim for possession. This condition was not satisfied, in her view, in *Tanager D.A.C. v. Kane* itself.

90. The plaintiffs maintain that *Tanager D.A.C. v. Kane* makes it clear that they are entitled to rely on the charge as described on the Folio in the present case, and that the courts are not in these proceedings entitled to go behind the Folio. The second defendant maintains that the factual context is very different and that *Tanager D.A.C. v. Kane* does not apply. It is true that the factual context in which Baker J. made her comments was different. The proceedings were of a summary nature for recovery of possession of land and the specific point raised was whether Tanager had a valid title in circumstances where its predecessor in title (i.e. Bank of Scotland) had failed to register the charge on the folio, although its predecessor in title (Bank of Scotland Ireland Limited or ‘BOSI’) had. The Court of Appeal held that the Bank of Scotland had become entitled by defeasance under an enactment, within the meaning of Section 90 of the 1964 Act, to the interest of BOSI in the registered charge, and that therefore Bank of Scotland was entitled to deal with the charge without being registered. It is apparent therefore that the form of the proceedings was different (summary proceedings in *Tanager D.A.C. v. Kane*; application for injunction here) and the issue arising there did not arise in the present case (both AIB and the first plaintiff are registered owners of the charge on the Folio).

91. There was a recapitulation of many of the points made in *Tanager D.A.C. v. Kane* in a Supreme Court decision handed down in or about the time of the hearing of this appeal, in *Bank of Ireland Mortgage Bank v. Cody*, where the facts - although not the form of procedure - were somewhat closer to those in the present case. The second named defendant, the wife

of the first named defendant, had sworn an affidavit that she was not present when her signature was purported to have been witnessed by Bank of Ireland personnel on a mortgage protection declaration form. She suggested that the mortgage was part of a fraud and that the loans were created in her name without her knowledge or consent. This arose in the context of a summary claim for possession and where the issue was whether the matter should be sent to plenary hearing. In the course of her judgment, Baker J. dealt with the conclusiveness of the Register in similar terms to her decision in *Tanager D.A.C. v. Kane*. Ultimately the Supreme Court upheld the trial judge's decision that the second named defendant had made out a stateable defence to the claim and remitted the case to plenary hearing (thus overturning the trial judge on the remittal point).

Decision

92. Insofar as the plaintiffs rely upon the conclusivity of title and the decision in *Tanager D.A.C. v. Kane*, it seems to me that the issue raised by the second defendant is very different from that raised in the latter case. The conclusivity of title shows that the charge exists and that the plaintiffs own the charge but I do not think it necessarily follows (or that *Tanager D.A.C. v. Kane* is authority for the proposition) that it conclusively decides that the second named defendant's interest in the mortgage is the subject of the charge.

93. Although the Deed of Mortgage anticipates the mortgage potentially operating as security for future loans and refinancing, as the plaintiffs point out, it is also the case that certain conditions must be satisfied before that can happen, including that any such future loan is accepted in writing by "the mortgagor". The question of whether "the mortgagor" in this particular context means only one of the defendants or both of them becomes acutely important, therefore, because the loan offer was made to and accepted by the first defendant

only. If the second defendant is correct that the consent of both mortgagors is required, then her lack of written consent to the loan may be an indication that the intention was to release her from the mortgage insofar as it affected her interest in the property because the original family home loan had been discharged upon drawdown of the 2008 loan. I find the plaintiffs' argument that the signing of the Family Home Declaration is significant to be rather unpersuasive, at least at first sight, on the ground that it appears to relate to the Beacon Court rather than the Avoca Park property, as noted in my earlier section "Key Documents".

94. It may also be that Section 30(1) of the Land and Conveyancing Law Reform Act 2009 is of relevance in this context. It provides that any conveyance of land held in a joint tenancy by a joint tenant without the prior written consent of the other joint tenant is void both in law and equity.

95. The second named defendant also argued that the original loan had been discharged in 2008 and that she is entitled to redemption of the mortgage. In this regard, she points to the wording of the 2008 facility letter in which it is a requirement that the original family home loan be discharged out of the monies drawn down. It seems to me to be rather peculiar that the second named defendant has failed to swear any affidavit supporting the narrative that the original family home loan was in fact paid off and that she was released from the 1998 mortgage. One might also expect some kind of paper trail with regard to such a significant step, if it occurred. Further, no steps appear to have been taken to date, or at least at the time of the appeal hearing, either to file a counterclaim seeking redemption of the mortgage or to rectify the Register.

96. It must be borne in mind that these are plenary proceedings, and that these issues arise in the context of an interlocutory injunction. To what extent has the second defendant raised questions which undermine the plaintiffs' claim that the 1998 mortgage continues to bind both defendants? A much fuller picture may arise in the future, but as matters stand, I would be of the view that the plaintiffs have certainly demonstrated that there is a fair issue to be tried. I am not convinced, however, that they have a strong case that the second named defendant is bound by the mortgage. The decision in *Tanager D.A.C. v. Kane* deals with a different matter (i.e. ownership of the charge), and there are certainly arguments on both sides having regard to the wording of the Mortgage Deed (1998) and the Facility Letter (2008). There is no document which clearly contains the second defendant's consent, and I do not consider the Family Home Declaration (at least at first sight) to relate to the property in question at all.

Conclusion on whether the plaintiffs have made out a strong case

97. I am of the view that having regard to the matters discussed above, taken on a cumulative basis, the plaintiffs have not met the required threshold of a "strong case" in relation to their case as a whole. In those circumstances, I believe the appeal should be allowed and it is not strictly necessary to consider the balance of convenience. Nonetheless some remarks in that regard may be apposite.

98. The judgment of O'Donnell J. *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65 (see paragraph 52) emphasised the equitable nature of the relief in case of an interlocutory injunction as well as the flexibility of the remedy. He stressed the need to take all of the circumstances into account in striving to achieve a pre-trial position which would work the least injustice. In the present case, while the plaintiffs submit that the situation at the time of the application in the High Court was entirely

unsatisfactory, with some sixteen people living in the property, and a complete lack of co-operation from the defendant, it is also true to note that despite their calling in of the public authorities, no hazard was identified or enforcement action taken. Secondly, it is of considerable importance that at the hearing of the appeal it was indicated by counsel on behalf of the plaintiffs that the property had been secured by the receivers and was now vacant. No tenants had been secured for the property since the High Court order was made. Counsel said that this was because it was difficult to let the premises by reason of the pending court proceedings. However, there was no affidavit evidence to this effect, and it is difficult not to be somewhat sceptical about this explanation having regard to the current Dublin rental climate. What has therefore happened is that, by obtaining the interlocutory injunction, the plaintiffs have created a situation where the existing tenants were evicted and no new tenants have been secured. Nor was the Court informed of any significant efforts to bring the substantive matter to trial; merely that a timetable had been agreed. Meanwhile the property lies vacant and is generating no rent for anybody. Were it necessary to decide the matter on the balance of convenience, these would be significant factors in the balance in favour of a discharge of the interlocutory injunction. However, it is not necessary to proceed to this issue because of my earlier conclusion regarding the failure of the plaintiffs to meet the “strong case” threshold having regard to the various issues raised on behalf of the second defendant.

99. As this judgment is being delivered electronically, I wish to record that my colleagues Whelan and Donnelly J.J. have read the judgment and are in agreement with it.

100. As the appellant has been successful in this appeal, my provisional view is that the appellant is entitled to the costs of the appeal. If the plaintiffs wish to contend for a different order, they have liberty to apply to the Court of Appeal Office within 14 days for a brief

hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, he may be liable for the additional costs of that hearing. In default of receipt of such application within 14 days, an order in the proposed terms will be made.