

BETWEEN

DENIS ENGLISH

PLAINTIFF/RESPONDENT

AND

PROMONTORIA (ARAN) LIMITED (NO. 2)

DEFENDANT/APPLICANT

EX TEMPORE JUDGMENT of Ms. Justice Murphy delivered on the 17th day of May, 2017.

1. This is the defendant/applicant's application by way of notice of motion issued on 17th January, 2017 for an order vacating the stay on the appointment of a receiver to the plaintiff's lands at Knocklofty, County Tipperary. The circumstances in which the stay was granted and the circumstances in which this application comes before the Court are of significance.

Background

2. On 8th November, 2007, the plaintiff entered into a mortgage agreement with Ulster Bank Ireland Limited in respect of unregistered land at Knocklofty House, Knocklofty, Clonmel, County Tipperary.

3. Between the years 2008 to 2011 the plaintiff entered into a series of facility agreements with Ulster Bank Ireland Limited. By letter dated 5th January, 2015, Ulster Bank Ireland Limited wrote to the plaintiff to inform him that it had agreed to transfer his loans to an affiliate of Cerberus Global Investors pursuant to the terms of the facility letters. It further informed the plaintiff that it would contact him immediately after the date of transfer of legal ownership to provide him with contact details for the purchaser.

4. Prior to the date of the letter of notification of 5th January, 2015, Ulster Bank Ireland Limited had executed a mortgage sale deed in respect of the plaintiff's lands, inter alia, to Promontoria Holding 128 B.V. The deed is dated 16th December, 2014. This mortgage sale agreement was the subject of a deed of novation dated 12th February, 2015. On the same date, 12th February, 2015, a global deed of transfer and a deed of conveyance and assignment were executed by Ulster Bank Ireland Limited and three related entities, UB SIG (ROI) Limited, Ulster Bank Limited and UB SIG (NI) Limited, transferring all rights, title, interest and benefits in the plaintiff's facility letters and the plaintiff's mortgage to the defendant Promontoria (Aran) Limited.

5. On 22nd September, 2015 and on 16th October, 2015, the defendant issued letters of demand in accordance with the terms of the facility letters agreed by the plaintiff with Ulster Bank Ireland Limited. On 6th November, 2015, the defendant appointed Mr. Ken Fennell of Deloitte as fixed charge receiver pursuant to the mortgage of the plaintiff's lands by way of instrument of appointment. The basis of the defendant's entitlement to appoint a receiver is expressed in the instrument of appointment to be a transfer from Promontoria Holding 128 B.V. to Promontoria (Aran) Limited by way of deed of novation, global deed of transfer and deed of conveyance and assignment.

6. On 10th November, 2015, the plaintiff issued a plenary summons claiming declaratory and injunctive reliefs arising from his contention that Promontoria (Aran) Limited was neither validly nor legally entitled to hold itself out as being entitled to Ulster Bank Ireland Limited's interest in the facility letters nor the securities, being the mortgage referred to. In his plenary summons, the plaintiff sought various declaratory reliefs to this effect and further sought an injunction preventing the defendant appointing a receiver pursuant to the facilities and security underpinning them.

7. On 11th November, 2015, the plaintiff was given liberty to issue and serve short service of a notice of motion for an interlocutory injunction returnable to Tuesday, 17th November, 2015. The relief sought by the plaintiff in his notice of motion was:-

"1. An Order for an injunction preventing the Defendant herein appointing a Receiver in possession, or a Receiver of Rents or Income of the plaintiff pursuant to the Facilities and Security referred to herein.

2. An Order for an Injunction directing the Defendant to disclose all and any Instruments, Terms and Conditions, Deeds of Novation, Deeds of Assignment, Deeds of Conveyance and Assignment or any document or instrument on which they rely prior to the appointment of a Receiver over the properties herein."

8. On 16th November, 2015, the defendant provided the plaintiff with copies of the facility letters, the mortgage and a redacted copy of the global deed of transfer in which the recitals and clauses 4 and 5 were fully redacted, as were the signatories of all parties to the deed other than Promontoria (Aran) Limited. The deed of conveyance and assignment was also furnished. This deed had the background to the deed fully redacted and the signatories on behalf of all parties including Ulster Bank Ireland Limited were also fully redacted. Copies of the underlying mortgage sale deed of 16th December, 2014 and the deed of novation of 12th February, 2015 were not furnished to the plaintiff. This was despite the fact that the instrument of appointment of the receiver referred to his appointment being based on a transfer by Promontoria Holding 128 B.V. to Promontoria (Aran) Limited.

9. On 30th November, 2015, the transfer of the plaintiff's mortgage was registered in the Registry of Deeds. The grantor is specified to be Ulster Bank Ireland Limited, UB SIG (ROI) Limited, Ulster Bank Limited and UB SIG (NI) Limited and evidence of the registration was produced in the course of the hearing of the interlocutory injunction.

10. Throughout the interlocutory hearing the defendant maintained that it had provided sufficient evidence of the transfer. This was exemplified by the statement in para. 11 of a replying affidavit of Lisa Burns wherein she stated:-

"I am advised that the redacted documents provided to the Plaintiff are more than adequate to evidence the Defendant's entitlement to the facilities granted pursuant to the Facility Letters and the Mortgage."

Counsel for the plaintiff at that hearing maintained that by reason of the absence of the original mortgage sale deed of 16th December, 2014 and the deed of novation of 12th February, 2015 and the redaction of the execution clauses in the global deed of transfer and the deed of conveyance and assignment, the chain of title from Ulster Bank Ireland Limited to Promontoria (Aran) Limited was not clear.

11. In its judgment given on 16th November, 2016, the Court noted that the plaintiff did not dispute the validity of the mortgage entered into by him with Ulster Bank Ireland Limited on 8th November, 2007, nor did he challenge the series of facility agreements with Ulster Bank Ireland Limited between the years 2008 and 2011, nor did he challenge the entitlement of Ulster Bank Ireland Limited to transfer, assign or dispose of his loans together with the benefit of the first legal mortgage over his property, without notice to him. His issue was that he had a right and entitlement to see proof of the transfer of ownership to a third party before he could be compelled to cede control of his property to that third party. The Court found that he had such a right, pointing out at para. 23 of its judgment as follows:-

"As a condition of granting the plaintiff loan facilities Ulster Bank Ireland Limited required the plaintiff to agree that Ulster Bank Ireland Limited could transfer his loans and the security provided in respect thereof, to whoever it wished, whenever it wished, without his consent and without notice to him. This is a significant power contractually granted by the plaintiff to UBIL. If, as in this case, it purports to exercise that right of transfer, then a complete stranger with whom the plaintiff has no connection can come knocking on his door claiming an entitlement to possession of his property. It appears to the Court that before ceding possession of his property, the plaintiff is entitled to insist that the stranger prove its entitlement to possession by showing that it duly acquired the interest of the bank in his loans and the security underpinning those loans, in particular, the mortgage on the property."

The issue the Court had to decide was whether on the basis of the documentation furnished at the date of the interlocutory hearing, the ownership of Promontoria (Aran) Limited of the plaintiff's mortgage was clearly established such as to entitle it to invoke the provisions of the mortgage for the purpose of appointing a receiver.

12. The Court was not satisfied on the basis of the documentation furnished that Promontoria (Aran) Limited had demonstrated that it had acquired the interest of Ulster Bank Ireland Limited in the mortgage of the plaintiff's lands. The Court considered that the factual position at the date of the interlocutory hearing was unclear. It noted that according to the evidence then available, that on 16th December, 2014, Ulster Bank Ireland Limited sold to Promontoria Holding 128 B.V. all its rights, title, interest and benefit in its mortgage over the plaintiff's lands. That sale was effected by way of a mortgage sale deed. On 12th February, 2015, Ulster Bank Ireland Limited together with the other named Ulster Bank entities, purported to sell the same mortgage to Promontoria (Aran) Limited which it had already apparently sold to Promontoria Holding 128 B.V. two months earlier. There was a reference in the evidence to a deed of novation also dated 12th February, 2015 between unnamed parties. Neither the mortgage sale deed nor the deed of novation had been disclosed to the plaintiff.

13. The Court considered that the mortgage sale deed and the deed of novation might explain how Ulster Bank Ireland Limited having sold its interest in the plaintiff's mortgage to Promontoria Holding 128 B.V. in December, 2014, was able to sell or transfer the same mortgage to Promontoria (Aran) Limited two months later. The Court found that without sight of the mortgage sale deed of 16th December, 2014 and the deed of novation of 12th February, 2015 it was not possible to assess the purported transfer by Ulster Bank Ireland Limited and associated entities to Promontoria (Aran) Limited on 12th February, 2015.

14. The Court noted at para. 28 of its judgment that a further element of confusion and uncertainty arose from the contents of the instrument of appointment of the receiver dated 6th November, 2015. The recital in that deed, detailing the basis of the entitlement of Promontoria (Aran) Limited to appoint a receiver, referred to a transfer by Promontoria Holding 128 B.V. of its interest to Promontoria (Aran) Limited.

15. At the time of the interlocutory hearing, it was not at all clear how that transfer arose, particularly when the only documents that had been produced to the Court and to the plaintiff suggested that Promontoria (Aran) Limited's rights (if any) derived from a direct transfer from Ulster Bank Ireland Limited and associated Ulster Bank entities to Promontoria (Aran) Limited.

16. In coming to its view, the Court noted that the registration of the transfer of the plaintiff's mortgage in the Registry of Deeds did not refer to a transfer between Promontoria Holding 128 B.V. and Promontoria (Aran) Limited as does the instrument of appointment of the receiver, but rather to a transfer between Ulster Bank Ireland Limited and the other Ulster Bank entities to Promontoria (Aran) Limited. The details of that transfer were registered on 30th November, 2015 some weeks following the execution of the instrument of appointment of the receiver. Adding to this uncertainty was the fact that the execution clauses of the deeds furnished were fully redacted.

17. In its judgment, the Court observed that there might well be a perfectly good explanation for the apparent uncertainty and potential confusion as to the manner in which Promontoria (Aran) Limited acquired its claimed entitlement to appoint a receiver to the plaintiff's property but further observed that if so, that explanation with appropriate supporting documents should be proffered to the plaintiff.

18. Having noted that the plaintiff mortgagor retained few rights under the terms of the facility letters and the mortgage, the Court held that it was for Promontoria (Aran) Limited to establish that it has duly acquired Ulster Bank's rights, title and interest in the plaintiff's loans, facility letters and mortgage before requiring him to cede possession of his property and that to date it had not done so.

19. In its judgment, the Court did not order Promontoria (Aran) Limited to furnish any documents to the plaintiff but pointed out that a failure to do so could well result in its entitlement to appoint a receiver remaining unestablished.

20. During the course of this application, counsel for the defendant/applicant repeatedly adverted to the Court's "refusal to order Promontoria (Aran) Limited to disclose its documentation" as somehow suggesting that the plaintiff had been unsuccessful in his interlocutory application. The Court considers that the plaintiff was successful in his interlocutory application in that the appointment of the receiver was stayed or restrained because, on the basis of the documentation furnished at that time, it was not clear that Promontoria (Aran) Limited had an entitlement to appoint the receiver.

Post judgment

21. Following delivery of the Court's judgment on the interlocutory application on 16th November, 2016, the case was put in for mention on 22nd November, 2016 to allow the parties consider the judgment. On that date, counsel for the defendant sought leave to adduce further evidence to address, what she described, as the lacuna identified by the Court in its judgment, before the order staying the receivership was made. Counsel for the defendant relied on the decision of Clarke J. in *In Re McInerney Homes Limited & Ors.* [2011] IEHC 25 as authorising the introduction of additional evidence in the circumstances of this case. The plaintiff/respondent objected to the defendant/applicant's application to adduce new evidence, submitting that the situation which arose in *McInerney Homes* was not at all analogous to the situation arising in this case, pointing to the quotation of Clarke J. in *McInerney Homes* at para. 3.12, that any such new evidence should:-

"...not ordinarily be permitted to be relied on if the relevant evidence could, with reasonable diligence, have been put before the court at the trial."

This seems to the Court to be a restatement in effect of the rule in *Henderson v. Henderson* (1843) 3 Hare 100. Having considered the decision of Clarke J. in *McInerney Homes* in which the learned judge set out in some detail the circumstances in which a Court might revisit its judgment before its order was perfected, the Court was quite satisfied that this case did not meet the criteria set out in *McInerney Homes*. In that case, the judgment of the court on an examinership issue was potentially rendered nugatory by events not disclosed to the court when considering its judgment. In this case, by contrast, the defendant adopted a position at the interlocutory hearing that it had done enough and deliberately chose not to proffer the mortgage sale deed of 16th December, 2014 and the deed of novation of 12th February, 2015 to the plaintiff and in addition, maintained an entitlement to redact the execution clauses and other materials in those deeds which it did in fact produce. The Court refused therefore to allow the defendant to adduce additional evidence in relation to the interlocutory application.

22. In the normal course, an interlocutory order will subsist pending the plenary hearing. However, in the course of exchanges between the Court and counsel, it became clear that no real proceedings had been advanced or taken by the plaintiff in respect of his plenary action. At one point, counsel for the plaintiff indicated that he was not clear as to his instructions in relation to the plenary hearing. In that context it was suggested to counsel for the defendant that she would now submit to the plaintiff, rather than the Court, additional documentation which she maintained would disclose the chain of title from Ulster Bank Ireland Limited to Promontoria (Aran) Limited. In the event that the defendant's entitlement to appoint a receiver was not accepted by the plaintiff on consideration of the additional documentation, the Court gave the defendant liberty to issue a motion to vacate the stay on the receivership ordered by the Court. Counsel for the plaintiff welcomed the opportunity to review documentation that had been sought for over a year so that they could determine whether the chain of title disclosed was adequate.

23. Additional documentation was then furnished by solicitors for the defendant as follows:-

- (1) the mortgage sale deed dated 16th December, 2014;
- (2) the deed of novation dated 12th February, 2015;
- (3) the global deed of transfer dated 12th February, 2015, with some material unredacted and in particular the execution clauses;
- (4) the deed of conveyance and assignment dated 12th February, 2015 which was entirely unredacted save for details of other properties;
- (5) the deed of power of attorney dated 20th June, 2014 by Ulster Bank Ireland Limited authorising, inter alia, Declan Murray and Alistair Aiken as attorney for and on behalf of Ulster Bank Ireland Limited to execute documentation including the mortgage sale deed, the global deed of transfer and the deed of conveyance;
- (6) the deed of power of attorney dated 16th January, 2015 by Promontoria (Aran) Limited authorising, inter alia, Karen McCrave as director of Promontoria (Aran) Limited as attorney for and on behalf of Promontoria (Aran) Limited to execute documentation including the deed of novation;
- (7) the deed of power of attorney dated 6th February, 2015 by Promontoria (Aran) Limited authorising, inter alia, Jonathan Hanly as attorney for and on behalf of Promontoria (Aran) Limited to execute documentation including the global deed of transfer and the deed of conveyance and assignment.

There are extensive redactions in the mortgage sale deed and the deed of novation. There are also redactions in relation to some of the deeds of power of attorney. A global explanation was given for the redactions at para. 18 of the grounding affidavit of Jonathan Hanly of the defendant company. Essentially, he asserts commercial sensitivity, bank and/or client confidentiality, and a general assertion of irrelevance. The Court observes that relevance is normally an issue for the Court to decide. It has been asserted that the redactions did not in any way prevent the plaintiff/respondent from satisfying himself as to Promontoria (Aran) Limited's ownership of the facilities and the mortgage which the defendant/applicant asserts is clearly established from the documentation actually furnished.

The application

24. The defendant's application is grounded on the affidavit of Jonathan Hanly, director of the defendant company, together with the exhibits therein and a supplemental affidavit of Karen McCrave, also a director of the defendant company and the exhibits referred to therein. The plaintiff/respondent has chosen not to file any replying affidavit and has relied exclusively on legal submissions as to what he alleges is the continuing insufficiency of the documentation supplied to establish the transfer of his facilities, loans and mortgage by Ulster Bank Ireland Limited to Promontoria (Aran) Limited.

Standard of proof

25. The first issue which arose on this application is the requisite standard of proof. The defendant/applicant maintained that the required standard of proof is that required in an interlocutory application, namely *prima facie* evidence of the matters sought to be established. The plaintiff/respondent on the other hand, submits that in the circumstances of this case, the requisite standard of proof is balance of probabilities. The Court is satisfied that the plaintiff/respondent is correct that in the circumstances of this particular case, the appropriate and requisite standard of proof is balance of probabilities.

26. The interlocutory hearing in this case concluded with the decision of the Court on 16th November, 2016. Throughout the interlocutory hearing, the defendant insisted that the documentation it had already supplied to the plaintiff was sufficient to establish its entitlement to appoint a receiver over the plaintiff's property.

27. Having been unsuccessful in that argument in the interlocutory hearing, the defendant then unsuccessfully applied to adduce further evidence relying on the case of *In Re McInerney Homes Limited & Ors.* [2011] IEHC 25. Counsel for the defendant sought to adduce further evidence in the form of additional documentation between judgment and the order of the Court. The Court refused that application. The Court repeatedly pointed out in its judgment, and post judgment, that it was the plaintiff to whom proof of Promontoria (Aran) Limited's entitlement to appoint a receiver had to be shown in the first instance. In the course of the interlocutory hearing, the Court declined to inspect unredacted documents on the basis that the Court's role is not to act as some kind of filter between the plaintiff and the defendant, in a process in which the Court would inspect documents for the purpose of assuring the plaintiff that his mortgage was legally transferred to the defendant, but without disclosing to him the means whereby that had been

achieved. The Court remarked in its judgment that the Court performs its functions in public and that that is the greatest guarantee of the integrity of the process.

28. The Court's refusal to allow the defendant to adduce further evidence in the interlocutory hearing concluded that hearing. It was of course open to the defendant to appeal that order, which has not occurred. In the normal course, the order of the Court staying the receivership would have subsisted until plenary hearing of the matter or until the order was successfully appealed. However because as already mentioned, there was initially some doubt as to counsel's instructions in relation to a plenary hearing, the Court suggested that the defendant might take the course of producing the appropriate documentation to the plaintiff's lawyers and that in the event that the plaintiff's lawyers were not persuaded of the defendant's entitlement to appoint a receiver based on the additional documentation, then the defendant would have liberty to bring a motion to vacate the Court's interlocutory order. This proposed course of action was not objected to by the plaintiff's lawyers and as already remarked, then counsel for the plaintiff expressed the view that he welcomed the opportunity to review the documentation that had been sought for more than a year.

29. It appears to the Court that having taken the opportunity to bring a motion to vacate the Court's interlocutory order, the defendant/applicant has taken upon itself the burden of showing that Promontoria (Aran) Limited has acquired Ulster Bank Ireland Limited's interest in the plaintiff's loans and security on the balance of probabilities and the Court considers that that is the standard of proof required on this application.

The evidence

30. The Court has the uncontroverted affidavit evidence of Jonathan Hanly, director of Promontoria (Aran) Limited and Karen McCrave also a director of Promontoria (Aran) Limited that the defendant has acquired Ulster Bank Ireland Limited's interest in the plaintiff's facilities and security. Mr. Hanly sets out in his affidavit the manner of acquisition. In para. 9 of his affidavit, he states that by mortgage sale deed dated 16th December, 2014 and made between Ulster Bank Ireland Limited and other bank related entities (the sellers) and Promontoria Holding 128 B.V. (the initial buyer) the sellers agreed to sell and Promontoria Holding 128 B.V. agreed to buy as the initial buyer, all rights to, under or in connection with the mortgage assets referred to therein, together with the underlying loans and certain contractual rights of the sellers and other ancillary rights and claims.

31. He exhibits a copy of the mortgage sale deed. The mortgage sale deed contains extensive redactions of which more later. Mr. Hanly identified that the mortgage sale deed lists both the obligors and the properties to be transferred, among which are the facilities being the loans of the plaintiff Denis English and identifying Knocklofty House as the property in respect of which Ulster Bank Ireland Limited held a mortgage.

32. The execution page for the mortgage sale deed shows that it was signed and delivered as a deed by Mr. Declan Murray as the attorney for and on behalf of Ulster Bank Ireland Limited. It is witnessed by Eoghan Hannigan and his address and occupation are given. The mortgage sale deed is signed and delivered as a deed by attorneys on behalf of the other Ulster Bank entities and also by Promontoria Holding 128 B.V. acting through its managing directors G.J. Schipper and R.R. Holland.

33. Given that Promontoria Holding 128 B.V. is described as "initial buyer", it appears clear that it was always the intention that an Irish company would be formed to take Promontoria Holding 128 B.V.'s interests in the mortgage sale deed. This was accomplished by deed of novation dated 12th February, 2015. That deed made between six parties, being Promontoria Holding 128 B.V. again described as the "initial buyer", the four Ulster Bank entities described as "sellers and each a seller", and Promontoria (Aran) Limited described as the "novated buyer". The copy novation deed exhibited is signed as a deed by Promontoria Holding 128 B.V. acting by a managing director J.C.A. Van Beek and another managing director G.W.A. Wardenier. It is signed and delivered for on behalf of Promontoria (Aran) Limited acting by its duly appointed attorney Karen McCrave and is witnessed by Lydia Burke. The deed is given under the common seal of Ulster Bank Ireland Limited and delivered as a deed by two authorised sealing officers, Rachel Curran and Sarah Anderson, and is witnessed by Claire Johns.

34. On the same date, 12th February, 2015, a global deed of transfer was executed between the various Ulster Bank entities as the sellers and each a seller, and Promontoria (Aran) Limited as the buyer. It recites the fact of the mortgage sale deed dated 16th December, 2014 as novated on an unstated date in February, 2015 (the Court notes that the deed itself is dated 12th February, 2015). The sellers agree to sell and the buyer agreed to purchase the security interests and contractual rights of the sellers under the finance documents including without limitation those documents as more particularly described in schedule 1 and 2. Included in the schedule are the plaintiff's loans and the mortgage of 8th November, 2007. That deed of transfer is signed and delivered as a deed by Alistair Aiken as the attorney for and on behalf of Ulster Bank Ireland Limited.

35. On the same date a deed was executed, called an Irish Law Deed of Conveyance and Assignment (unregistered property). The recitals refer to the mortgage sale deed dated 16th December as novated on 12th February and recites that the sellers agreed to sell and the buyer agreed to buy, inter alia, all right, title, interest, benefit and obligations (both present and future) of the sellers in and under the mortgages for the consideration therein mentioned at C (of the mortgage sale deed). It provides that in consideration of the rights and obligations of the parties pursuant to the mortgage sale deed, the parties have agreed to enter into the deed pursuant to the terms and the condition of the mortgage sale deed. There are no redactions in the body of this deed. Details relating to other mortgages and properties have been redacted. The deed of conveyance and assignment is signed and delivered as a deed by Alistair Aiken who is described as the attorney for and on behalf of Ulster Bank Ireland Limited. It is witnessed by Lisa Doyle, solicitor.

36. In addition to the mortgage sale deed, the deed of novation, the global deed of transfer, and the deed of conveyance and assignment of unregistered property, Mr. Hanly exhibits the power of attorney authorising Declan Murray and Alistair Aiken as attorney for and on behalf of Ulster Bank Ireland Limited to execute documentation including all of the foregoing deeds. Mr. Hanly also exhibits the deed of attorney authorising Karen McCrave as attorney for and on behalf of Promontoria (Aran) Limited to execute documentation including the deed of novation. Finally he exhibits the deed of power of attorney dated 6th February, 2015 whereby he the deponent was authorised as attorney for and on behalf of Promontoria (Aran) Limited to execute documentation including the global deed of transfer and the deed of conveyance and assignment.

37. In his affidavit at para. 18, Mr. Hanly sets out the basis for the redaction of certain portions of the deeds, though again the Court notes that the deed of conveyance and assignment is not redacted. Mr. Hanly cites commercial sensitivity and states that:-

"Disclosure of the pricing, mechanism of loan sale process, and the terms on which PAL was prepared to transact with the Bank (including any representations and warranties which may have given or received), as recorded in the redacted portions of the documents, could significantly undermine the legitimate commercial interest of PAL in inter alia (i) realising the loans and assets which it currently controls, (ii) in its dealings with borrowers under the acquired loans, and (iii) in its future dealings with prospective vendors of other loan portfolios."

Mr. Hanly cites bank and/or client confidentiality and states that:-

"PAL is under certain contractual and statutory obligations to unrelated third parties including other borrowers to maintain in strict confidence all of its dealings with such third parties."

He avers that:-

"Confidential information relating to unrelated third parties and a number of other provisions contained in the Suite of Documents are not relevant or necessary in order to establish PAL's ownership of the Facilities and Mortgage."

At para. 19 of his affidavit, Mr. Hanly avers that:-

"I say and am advised that the Suite of Documents exhibited hereto clearly establishes PAL's ownership of the Facilities and Mortgage and that the redaction made thereto do not in any way interfere with the Plaintiff's ability to satisfy himself of such acquisition. For the above and other reasons it is important that certain passages of the relevant sale documentation be redacted."

38. Mr. Hanly avers at paras. 20 to 23 of his affidavit as to the engagement between the parties' lawyers following the Court's judgment on 16th November, 2016. All of the documents which are exhibited in his affidavit were furnished by email to the plaintiff's lawyers late on 16th December, 2016. Having done so the defendant's lawyers wrote to the plaintiff's lawyers on 3rd January, 2017 calling on the plaintiff to confirm by 11 am on 19th January, 2017 that having satisfied himself as to the defendant's ownership of the facilities and the mortgage, he would undertake to deliver up to the receiver all of the properties secured by the mortgage being the lands and premises of Knocklofty, Clonmel, Co. Tipperary. Mr. Hanly avers that no response had been received to that letter by 13th January, 2017, the date of swearing of his affidavit.

39. The story is taken up in the supplemental affidavit of Karen McCrave who confirms that she is a director of Promontoria (Aran) Limited. She deals in her affidavit primarily with the engagement between the defendant's solicitors and the plaintiff's solicitors after 13th January, 2017. On 25th January, 2017, Casey solicitors, then solicitors for the plaintiff, raised six queries in relation to the additional documentation supplied by the lawyers for Promontoria (Aran) Limited. Each of the queries was answered and in addition, a further portion of the mortgage sale deed, being clause 26.5 was unredacted. That clause provides:-

"The Parties agree that the Initial Buyer may novate, at any time, all of its rights and obligations under the Transaction Documents to the Novated Buyer (or any other wholly owned subsidiary of the Initial Buyer) (provided that each Seller has confirmed that all of its 'know your customer' requirements in respect of such person have been satisfied and each Seller is permitted, pursuant to applicable laws and regulations, to transact with that person) pursuant to a novation agreement to be agreed between the Buyers and the Sellers (each acting reasonably)."

Ms. McCrave sets out in detail in her affidavit the response made to the queries raised by the plaintiff's then solicitors.

The plaintiff/respondent's case

40. The plaintiff did not file a replying affidavit to the affidavits of Mr. Hanly or Ms. McCrave. He changed solicitors for what appears to be the third time in the days shortly before the due date for the hearing of the motion and the case was adjourned for a few days to allow the new solicitor and counsel to familiarise themselves with the papers. A replying affidavit was not filed but during the course of the hearing a short affidavit exhibiting the result of a search in the Registry of Deeds was produced.

41. The essence of the plaintiff's response to the application is a legal one, asserting that the documentation now furnished does not discharge the defendant's burden of proof on the balance of probabilities, that Promontoria (Aran) Limited has acquired the loans and security of the plaintiff. The plaintiff's submissions are made under a number of headings:-

1. *insufficient evidence of due execution of deeds;*
2. *unexplained and unjustified redactions;*
3. *insufficient evidence of the transfer of underlying loan obligations;*
4. *failure to stamp the deeds or alternatively show that they were not chargeable with duty and accordingly were not admissible in evidence; and*
5. *miscellaneous.*

While the Court does not propose to give an exhaustive list of the issues raised, the main issues raised under each of these headings appear to be as follows:-

1. Alleged deficiencies in execution

42. In relation to execution of deeds, it is submitted:-

- i. Insofar as deeds have been executed by Promontoria Holding 128 B.V. the plaintiff contends that there is no evidence before the Court that the deed was executed in accordance with Dutch law as required by s.64(2)(b)(iv) of the Land and Conveyancing Reform Act 2009.
- ii. Equally the plaintiff submits that there is no evidence that the deed was executed in accordance with laws of Ireland as there is no seal affixed and no power of attorney exhibited.
- iii. The plaintiff makes the same submissions in relation to the deed of novation dated 12th February, 2015. He submits that there is no evidence that the executors on behalf of Promontoria Holding 128 B.V. had the capacity or authority to execute the deed of novation. He submits that should it transpire that there is a want of authority to execute the deed of novation then the underlying loans never passed to the defendant.
- iv. In relation to the execution of the deed of novation by Promontoria (Aran) Limited, the plaintiff submits that the articles of association of that company are not before the Court so there is no evidence that the defendant has the constitutional power to convey powers of attorney. The Court again notes, as pointed out in the course of the hearing,

that the articles of association are undoubtedly available in the Companies Registration Office.

v. The plaintiff raises an issue in relation to the existence of two powers of attorney in respect of the deponent Jonathan Hanly. The Court notes that the first power of attorney of 16th January, 2015 appoints him as an attorney in his capacity as a director of Promontoria (Aran) Limited while the second power of attorney dated 6th February, 2015 is not dependent on his status as director.

vi. The plaintiff submits that no evidence has been given in relation to the authority and capacity of Lydia Burke to act as a witness to the execution of the deed of novation.

vii. The plaintiff submits that in relation to the execution of the deed of the novation by the defendant that no evidence has been given that the named authorised sealing officers for Ulster Bank Ireland Limited, Ms. Sheryl Anderson and Ms. Rachel Curran, are in fact authorised sealing officers nor indeed that Ms. Claire Johns had authority to act as a witness to the sealing to the deed.

viii. The plaintiff points out that the articles of association for Ulster Bank Ireland Limited are not before the Court so that there is no evidence before the Court that the executors and the witnesses to the execution comply with the constitutional documentation of Ulster Bank Ireland Limited. The Court again notes however that they are readily available in the Companies Registration Office.

2. Redaction

43. The plaintiff argues that the level of the redaction is unwarranted and unjustified. Among the many submissions made by the plaintiff in respect of redactions of the documents, were the following in respect of the mortgage sale deed and deed of novation:-

(a) The plaintiff argues that clause 26 of the mortgage sale deed which deals with assignment and change of parties should be disclosed in full and not merely that section which relates to the power to novate.

(b) The plaintiff argues that there is no reason why clause 29 of the mortgage sale deed dealing with counterparts should not be disclosed.

(c) The plaintiff points to the fact that pp. 87 to 135 of the mortgage sale deed are redacted which he maintains, inter alia, would include the solvency certificates for the buyers and sellers.

(d) He submits that pp. 161 to 202 are also redacted and these would include, inter alia, schedule 10 (form of sub-participation agreement).

(e) In relation to execution of the mortgage sale deed, the plaintiff contends that there is insufficient evidence before the Court to be satisfied that the mortgage sale deed was properly executed.

(f) The plaintiff makes similar submissions in relation to the deed of novation. He submits that no reasons have been given for the redaction of clauses 4 and 5 and the redaction of the subject matter of those clauses from the table of contents. Equally the plaintiff argues that there does not appear to be any legitimate reason why matters such as "invalidity" in clause 9 and "counterparts" in clause 10 require redaction.

3. Insufficient evidence of the transfer of underlying loan obligations

44. The plaintiff takes issue with the identification of his loans in the mortgage sale deed and suggests that one facility does not appear to have been encompassed at all in the mortgage sale deed.

45. The plaintiff submits that the mortgage sale deed of 16th December, 2014 is defective in that there is not sufficient evidence of the transfer of all the underlying loan obligations. In her submissions, Ms. Smith B.L. for the defendant/applicant has traced one loan through from start to finish and the Court is again reminded that from the outset of the case the plaintiff made it clear that he was not challenging the fact of the facilities or the fact of the mortgage underlying them.

4. Stamp duty

46. The plaintiff also raised the issue of the Stamp Duties Consolidation Act 1999 and submitted that as none of the deeds presented to the Court had been stamped, and as the defendant had not shown that it was not chargeable with duty, the Court was not entitled to treat the deeds as evidence.

47. The plaintiff withdrew this submission when relevant statutory authority that the deeds were not chargeable with duty was produced to the Court by the defendant/applicant.

5. Miscellaneous

48. During the course of the hearing, the plaintiff adduced evidence of a search from the Registry of Deeds and suggested that it indicated that Ulster Bank Ireland Limited still held the plaintiff's mortgage. Unfortunately this evidence was potentially misleading by reason of the overly narrow search conducted. In fact, as the Court had seen in the earlier proceedings, a transfer from Ulster Bank entities to Promontoria (Aran) Limited was registered in the Registry of Deeds on 30th November, 2015. Evidence of that registration was produced to the Court in the course of the interlocutory hearing, with the result that the Court was in fact not misled.

49. The plaintiff complains that compliance with s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1887 had not been proved; that he was not given express notice of assignment as required by the Judicature Act, on the basis that the purported assignments to the defendant did not take place until 12th February, 2015 and the "goodbye letter" sent by Ulster Bank Ireland Limited to him on 27th February, 2015 made no reference to the deed of novation dated 12th February, 2015.

50. The Court rejects this submission. The plaintiff was told by Ulster Bank Ireland Limited by letter dated 5th January, 2015 that it had agreed to transfer its loans with the plaintiff to an affiliate of Cerberus Global Investors. That is a clear reference to the mortgage sale deed. The letter went on to state:-

"UB will write to you again after the date on which the legal ownership of the Facility/ies has transferred to the Purchaser (the "Transfer Date"). Following the Transfer, all of the rights of UB under your Facility/ies and your facility letter(s), guarantee(s), security and all rights relating to your Facility/ies (the "Facility Documents" will transfer to the Purchaser."

Having been informed of their intention, he was in due course notified by letter dated 27th February, 2015 of the fact of the transfer having occurred on 12th February, 2015. In the circumstances, the Court considers there is no want of compliance with s. 28(6) of the Act of 1887.

51. The plaintiff challenged the power of Jonathan Hanly to appoint a receiver. The instrument of appointment states that the appointment was made by Jonathan Hanly as a director of the defendant company. The plaintiff queried the sufficiency of the evidence that Mr. Hanly's appointment was valid having regard to s. 142 of the Companies Act 2014 which limits the number of directorships which a person may hold to 25.

52. The plaintiff submitted but produced no evidence that the number of directorships held by Mr. Hanly far exceeds that number. The Court does have evidence on the other hand that Mr. Hanly enjoys an exemption in this regard which has been certified and is available in the Companies Registration Office.

53. The plaintiff made a general submission that there is some sort of wider context here and that there may be other parties involved and that if any of the deeds fail the plaintiff will be prejudiced.

54. Counsel for the plaintiff referred to the nature of special purpose vehicles, in particular their transience, and suggested that if an element of the elaborate structure failed, the plaintiff would be prejudiced.

Decision of the Court

55. The approach taken by the plaintiff to this application has been to raise a multiplicity of issues concerning execution and redaction as set out above. Counsel has raised many hares relating to these issues. He has invited the Court to speculate that the redacted portions of the mortgage sale deed and the deed of novation may reveal that there is some wider context to these transactions; that there might be other parties involved; that without sight of the redacted portions of those deeds one cannot be sure that the underlying agreements between Promontoria Holding 128 B.V. and the various Ulster Bank entities are valid. All of the issues raised by counsel for the plaintiff would be properly and validly raised if the plaintiff were a party to the deeds with an entitlement to challenge their efficacy, but he is not a party to the deeds. He is a third party whose only entitlement is to be shown that the stranger knocking on his door claiming possession has in fact acquired the interests of Ulster Bank Ireland Limited.

56. In this application, what the plaintiff has singularly failed to do is to engage properly with the evidence that is actually before the Court. The Court has sworn uncontroverted evidence that Promontoria (Aran) Limited has acquired Ulster Bank Ireland Limited's interest in the plaintiff's loans and the security underpinning them. The evidence shows the mechanism by which they were acquired. The defendant has underpinned its uncontroverted evidence by exhibiting the relevant portions of each deed and the entirety of the deed of conveyance and assignment of the plaintiff's mortgage. It has revealed the identities of all of those who executed the deeds or where relevant, affixed the seal of the company thereto. In addition, it has exhibited all relevant deeds of powers of attorney.

57. Deeds are not hearsay. They constitute real evidence of transactions between parties. On their face, all of the deeds exhibited are valid and show the transfer of the plaintiff's loan facilities and security from Ulster Bank Ireland Limited via a mortgage sale deed between it and Promontoria Holding 128 B.V. which was subsequently novated to Promontoria (Aran) Limited, which was followed by a transfer by Ulster Bank Ireland Limited to Promontoria (Aran) Limited, and the conveyance and assignment of the plaintiff's mortgage to Promontoria (Aran) Limited.

58. The evidence furnished to the plaintiff by the defendant is prima facie proof of transfer. The evidence furnished permits the plaintiff, should he choose, to challenge the validity of the deeds. He could do so by the simple means of checking in the Companies Registration Office that these deeds which are valid on their face have in fact been executed in accordance with the constitution and rules of each corporate entity involved. He has either not done so or having done so, has found no irregularity with which to challenge the validity of the various deeds. The plaintiff's failure to challenge deeds which are valid on their face amounts in the Court's view, to an acceptance of their validity if only by inference.

59. It is important to remember what is at issue in this case. This case concerns the chain of title showing the transfer of the plaintiff's loans and security from Ulster Bank Ireland Limited to Promontoria (Aran) Limited. The Court in its judgment of 16th November, 2016 was not satisfied for the reasons set out, that Promontoria (Aran) Limited had established that chain of title. In this application, Jonathan Hanly and Karen McCrave, both directors of Promontoria (Aran) Limited have averred ownership by Promontoria (Aran) Limited of the plaintiff's loans and security and have substantiated their evidence by exhibiting all relevant deeds such that the chain of title is now clear.

60. There may well be frailties, defects or deficiencies in the arrangements between Promontoria in its various guises and the various Ulster Bank entities but that is not a matter of concern to the plaintiff. If any such issues exist, they lie between the parties to the deeds. The Court wishes to make it clear that it is not suggesting that such frailties exist. As submitted by the plaintiff, there may well be other parties involved in the wider transaction but again, that is not a matter of concern to the plaintiff. His only entitlement, as stated in the Court's earlier judgment, is to have it established that Promontoria (Aran) Limited have acquired Ulster Bank Ireland Limited's interest in his loans and mortgage and it appears to the Court that that has been established on the balance of probabilities by the uncontroverted evidence of Jonathan Hanly and Karen McCrave and the deeds exhibited which the Court repeats are all valid on their face.

61. Counsel for Mr. English repeatedly suggested that the failure to reveal the redacted portions of the mortgage sale deed and the deed of novation could be prejudicial to Mr. English. The Court can see no prejudice. After all, Mr. English has accepted throughout that he was granted the loan facilities; that they remain unpaid; that he mortgaged his Knocklofty property to Ulster Bank Ireland Limited; and that Ulster Bank Ireland Limited had the right to transfer or assign his loans and security. That has now been shown to have occurred. The Court fails to see how he can be prejudiced in those circumstances, by ceding possession of his mortgaged property to a lawfully appointed receiver.

62. The Court is therefore satisfied that the defendant/applicant has discharged the burden on the balance of probabilities of showing that Promontoria (Aran) Limited has duly acquired Ulster Bank Ireland Limited's interests in the plaintiff's loans, facilities and mortgage.

63. The Court therefore proposes to lift the stay previously imposed on the receivership on the grounds that the defendant has now

shown to the plaintiff that it has duly acquired Ulster Bank Ireland Limited's interests in his loans, facilities and mortgage.