**THE COURT OF APPEAL**

**Neutral Citation Number: [2019] IECA 184**

**Record No. 2017/576**

**Peart J.**
**McGovern J.**
**Baker J.**

**BETWEEN/**

**VITGESON LIMITED AND WILLIAM FARRELLY**

**PLAINTIFFS/APPELLANTS**

**- AND–**

**TOM O'BRIEN AND PROMONTORIA (ARROW) LIMITED**

**DEFENDANTS/RESPONDENTS**

**JUDGMENT of Mr. Justice McGovern delivered on the 4th day of July 2019**

1. This is an appeal against a judgment of Haughton J. delivered on 9th November, 2017 in which he dismissed the plaintiffs' claims.

2. In the proceedings the appellants sought the following reliefs:

> (a) a declaration that the appointment of the first respondent, ("the receiver") was *ultra vires*, null and void and of no effect;
>
> (b) a declaration that certain of the facilities granted to the appellants were not actionable at the suit of the second named respondent ("PARL");
>
> (c) a declaration that PARL was estopped/precluded from relying upon certain mortgages by reason of the fact that the appellants were volunteers in respect of same;
>
> (d) a declaration that PARL was estopped/precluded from relying upon certain mortgages by reason of representations and agreements as between the appellants and NAMA.

3. At the trial of the action the appellant confined its submissions to the following issues:

> (i) an allegation that the appointment of the receiver was invalid as PARL has not been registered as the owner of the relevant mortgages at the time of his appointment;
>
> (ii) whether the receiver had a power of sale; and
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> (iii) whether the respondents had breached an undertaking given to the High Court on foot of an interlocutory injunction application brought by the appellants concerning the failure on the part of an estate agent to remove a "For Sale" sign from a parcel of agricultural land for a period of time.

4. In the High Court the respondents defended the proceedings and counter-claimed for the sum of €11,383,442.86 as against the first named appellant and €15,335,201.88 against the second named appellant. The respondents also sought possession of various secured properties.

5. Apart from dismissing the appellants' claim the trial judge granted the respondents' judgment on their counter-claim including orders for possession of the property set out in Schedule 2 of the order made on 14th November, 2017 and perfected on 23rd November, 2017. Although the notice of appeal states that the entire order is being appealed no argument was advanced against the judgment in the counter-claim.

6. The appeal focused on three issues namely:

> (a) proof of acquisition of the facilities by PARL from NALM;
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> (b) the appointment of the receiver and whether he had a power of sale; and
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> (c) the marketing of the properties by the receiver.
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> The issue referred to at para. 3(iii) above was not pursued.

**Proof of acquisition of the facilities by PARL from NALM**

7. By means of a loan sale deed dated 27th October, 2015 and made between NALM and Promontoria Holding 176 BV ("Holding") NALM agreed to sell and Holding agreed to buy, inter alia, all the right, title and interest both present and future in the mortgages and charges which had been granted by the appellants as security for certain loan facilities to the appellants. These facilities, collectively referred to as "the loan agreements", comprised a letter of sanction dated 24th April, 2008 from AIB offering certain loan facilities to Vitgeson and a letter of sanction dated 22nd April, 2008 whereby AIB offered certain facilities to William Farrelly.

8. By Deed of Novation dated 20th November, 2015 and made, *inter alia*, between Holding and PARL, Holding assigned absolutely all of its right, title and interest under the loan sale deed to PARL and subsequently on 11th December, 2015 NALM executed a deed of transfer in writing whereby NALM as assignor conveyed, assigned, transferred and delivered to PARL the right, title and interest in, *inter alia*, the security offered by each of the appellants.

9. Both a "goodbye" letter and a "hello" letter were sent to the appellants. It is not in dispute that by letter dated 11th December, 2015 NALM notified the appellants of the assignment of the loan agreements and the securities to PARL. (See para. 12 statement of claim). On 16th December, 2015 Capita Asset Services (Ireland) Limited ("Capita") sent, on behalf of PARL, letters to the appellants notifying them that certain loan facilities and security had been acquired by PARL.

10. The appellants challenged the admissibility of the global deed of transfer which effected the transfer of the interests of NALM to PARL, relying on the best evidence rule as set in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. At p. 518 O'Flaherty J. stated:-

> *"It should be emphasised that documentary evidence needs to be proved in a court like every other evidence. While the general rules of evidence with regard to admissibility, i.e. relevance, hearsay, opinion etc. apply to documentary evidence, additional requirements include proof of contents and proof of due execution: Fennell, The Law of Evidence in Ireland, page 296.*
>
> *The best evidence rule operates in this sphere to the extent that the party seeking to rely on the contents of a document must adduce primary evidence of those contents, i.e. the original document in question. The contents of a document may be proved by secondary evidence if the original has been destroyed or cannot be found after due search. Similarly, such contents may be proved by secondary evidence if production of the original is physically or legally impossible. …"*

11. The High Court judge admitted into evidence a copy of the Deed of Transfer which was redacted so as to exclude reference to other loans which were not relevant to these proceedings. The judge took the view that while production of the original document was physically possible it was legally impossible in the sense that it would give rise to unnecessary publication of the details of third party loans and security in these schedules. He held that to admit such evidence would be an entirely unwarranted incursion into the privacy of persons not involved in the proceedings.

12. It has to be said that the best evidence rule has, in more recent times, been significantly relaxed. In *Ulster Bank v. O'Brien* [2015] IESC 96 at para. 13 Charleton J. stated:-

> *"The best evidence rule has, since that time (the 1870s), weakened and ultimately, it has ceased to exist in favour of a test as to whether the evidence offered is admissible or inadmissible. Whether there might be better evidence of an event or transaction, merely goes to the weight that might be given particular testimony…"*

13. The views of Charleton J. have been adopted by the Court of Appeal in *Healy and Spillane v. McGreal* [2018] IECA 78. In that case Irvine J. at para. 55 stated:-

> *"I am satisfied that there is no rule of law that required the trial judge to direct the production of the un-redacted Loan Sale agreement in the present case. There was, it would appear, very good reasons for its redaction. Clearly there would be a commercial sensitivity to the information contained in it. Indeed, I would have taken a different view than that of the trial judge as to the entitlement of the receiver to rely upon the redacted document once satisfied that the matters redacted were not relevant to the matters at issue and that they had been redacted to protect issues of confidentiality. However, the Deed of Confirmation and Acknowledgment of the 14th July 2015, which was introduced into evidence…was more than sufficient admissible evidence to prove that the plaintiffs' loans had been transferred to Kenmare."*

14. In this case Ms. Siobhan Hallissey gave evidence of due execution stating that at all material times she was employed by SFM, a corporate service provider for the second named respondent. She said she was familiar with the global deed of transfer and had received a soft copy of it in advance of its execution. She was present in a room at the premises of A&L Goodbody Solicitors when her colleague, Jonathan Hanley, signed a number of documents including the global deed of transfer. She confirmed that the copy provided to the court was a copy of the original document with certain borrower information redacted. This evidence was not challenged in cross-examination and it established that the global deed of transfer had been duly executed and that the appellants' loans and security had been transferred from NALM to PARL. While the schedule to the deed also contained redactions, the facility letters relevant to the appellants were clearly identified therein.

15. Furthermore Mr. John Burke, a director of PARL gave evidence that whilst he had not witnessed the execution of the global deed of transfer, the appellants' loans and securities had indeed been assigned by NALM and were now owned by PARL. His evidence of PARL's ownership of the loans and security was not disputed or challenged in cross-examination.

16. But in any event it is, perhaps, worth pointing out that a chose in action is freely assignable under s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 and does not require the mortgagor's consent nor does it require to be approved in writing. In my view the trial judge was correct in reaching his conclusions on the basis of the deed of transfer. But it was not necessary for him to do so and he could have reached the same conclusion on the basis of the oral evidence given by Ms. Hallissey and Mr. Burke and proof of the receipt by the appellants of the "goodbye" letter and "hello" letter. In short there is ample evidence of the sale of the loan. At para. 12 of the statement of claim the appellants admitted to having received a written notice of the assignment from NALM (the "goodbye" letter). Ms. Catherine Mangan, a director of Vitgeson Limited and the partner of the second named appellant gave evidence in which she confirmed not only the receipt of the "goodbye" letter but also the receipt of the "hello" letter from PARL.

**The appointment of the receiver and power of sale**

17. The trial judge concluded that the power to appoint a receiver, as modified, was a contractual right which could be availed of notwithstanding that the registration of the transfer of the registered properties had not been concluded prior to his appointment on

21st and 24th October, 2016. The appellants complained that the High Court judge failed to have adequate regard to the law as set down in *The Merrow Limited v. Bank of Scotland plc & Anor.* [2013] IEHC 130 wherein Gilligan J. held that the power of appointment and the powers of receivers generally are strictly rooted in the contractual document underpinning the relationship between the mortgagor and mortgagee.

18. The appellants also rely on *Kavanagh v. McLaughlin* [2015] 3 I.R. 555. Therein, Laffoy J. distinguished between the contractual rights of a charge which was deemed to be vested in the party seeking to appoint a receiver (BOS) by operation of law and the relevant statutory rights of a charge which would only be exercisable once BOS was registered as transferee of the charge. In that case Laffoy J. held that BOS unquestionably held power to appoint a receiver independent of the powers conferred by the Registration of Title Act 1964. She said at p. 595:-

> *"There is nothing in the Act of 1964 which limits or restricts the contractual power to appoint a receiver once it is exercisable. Accordingly, I am satisfied that the fact that BOS is not registered on the relevant folio as the owner of the 2006 Charge did not affect it appointing the receiver over the registered property secured by that charge."*

19. Later in that judgment Laffoy J. expressed the opinion that s. 62(2) of the 1964 Act provides that a charge shall not confer on the owner of the charge any interest in the land until the owner is registered as such. She said at p. 596:-

> *"Similarly, in the case of the transfer of a charge, sub section (2) of section 64 provides that the instrument of transfer "shall not confer" on the transferee any interest in the charge until the transferee is registered as the owner of the charge."*

20. *Kavanagh v. McLoughlin* is now the leading authority on this question and has been applied again and again to issues such as those being raised in this appeal.

21. The respondents take no issue with the appellants' argument that *The Merrow Limited* is authority for the proposition that an appointment of a receiver is not valid unless it is made in accordance with the terms of the instrument appointing him.

22. In this case the respondents argue that the power of appointment is not purely statutory but also contractual. The evidence of Mr. Paul Halley of Mason, Hayes and Curran Solicitors was to the effect that applications for registration of the security over all of the appellants registered land had been submitted prior to the commencement of the proceedings and that by the time of the trial there was only one agricultural property in Meath, comprising folios 34231F and 49301F ("the Whitehall property") where the charge had not yet been registered.

23. The High Court judge reviewed the security documents at some length in his judgment and concluded that the 2015 mortgages contained contractual powers for the mortgagee to appoint a receiver in addition to any statutory rights arising under the Land and Convayencing Reform Act 2009. Two of the secured properties namely 9, Grosvenor Road, Rathgar, Dublin 6 and Apartment 31, The Willow, Rockfield, Dundrum, Dublin were on unregistered land and were subject to a mortgage of 2nd July, 2010. There was ample evidence to support the judge's conclusion that the mortgage deeds expressly provided for modification of the provisions of the Convayencing Act 1881 (as amended by the Conveyancing Act 1911) and that there was a contractual power to appoint a receiver. In the course of his judgment the High Court judge extensively analysed the contractual power to appoint a receiver (pp. 20-27). In the course of that analysis he referred to relevant case law, legislation and the relevant clauses in the mortgage deed. From this analysis he concluded that the deed expressly provided for modification of the Convayencing Act 1881 and that it follows that the power to appoint a receiver, as modified, is a contractual right that can be availed of by the mortgagee notwithstanding that the transfer of the mortgage had yet to be registered. The High Court judgment makes it clear that what the mortgagee or assignee cannot exercise the power of sale or transfer prior to the registration of the assignment. There is nothing remarkable about these findings having regard to *Kavanagh v. McLoughlin*.

24. He found that the receiver enjoyed the right and power to receive income and rentals from the property and had power to enter into possession to exercise such rights. He also held that the appointment of the receiver was valid and lawful. He did not find it necessary to decide the issue of whether or not the completion of registration of the assignment of the charges in respect of the registered land had the effect under a land registry rule 60 of relating back to the date of appointment so as to validate them retrospectively as made under the statutory powers. I find no error in these findings made by the High Court judge.

**The marketing of the properties by the receiver**

25. The appellants argued in the High Court that the receiver acted unlawfully in undertaking tasks related to bringing the properties to market as he was only a rent receiver. The trial judge referred to the receiver's evidence that he nominated CBRE, Sherry Fitzgerald, Raymond Potterton and others as people who were instructed by him or his office and he set out various dates on which he gave instructions to CBRE or its solicitors in relation to the advertisements and publication of advertisements for the sale of secured properties. He also asked CBRE to provide a draft marketing brochure which was approved for release. The trial judge was satisfied that these tasks were undertaken by the receiver not qua receiver but rather as agent for the charge holder and he notes in his judgment that the receiver was not challenged on this issue. Accordingly, the work fell outside the receivership.

26. In the course of the trial in the High Court the receiver gave evidence that it was always intended that PARL would use their contractual power of sale and sell as mortgagee in possession. He said that he was engaged as an agent by PARL in circumstances where the charge holder wished to dispose of certain assets. The receiver's firm (Mazars) was to act as the charge holder's agent for the purpose of preparatory work as part of any sales process.

27. In relation to one property at Black Castle, Navan, County Meath Mr. Cormac Smith of the receiver's office signed a property services agreement retaining CBRE in respect of the proposed sale of the lands and erroneously signed the agreement "Tom O'Brien Receiver". The receiver explained in evidence that the document had incorrectly been signed by Mr. Smith under the designation of "receiver". The trial judge accepted that explanation. The evidence established that Mazars had been appointed to assist with the sales process, not in their role as receiver, and were billed and paid separately for this work outside the receivership. There was sufficient evidence to entitle the judge to find that the first named respondent could and did act in a capacity other than that of receiver in arranging for the marketing of the lands for sale. In doing so the receiver was acting within his powers.

**Conclusion**

28. I am satisfied that the redacted copy deed of transfer was properly admitted into evidence by the trial judge and that it was sufficient evidence that the global deed of transfer had been properly executed and that the appellants' loans and security had been transferred from NALM to PARL.

29. The loan facilities, indebtedness and security now owned by PARL is a chose in action freely assignable under s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 without the mortgagor's consent and the "goodbye" and "hello" letters sent to and received by the appellants, individually and together, satisfy the requirements of s. 28(6) as to notification.

30. The first named respondent was entitled to act as agent for the purpose of marketing the properties for sale.

31. For the reasons set out in this judgment I find no error in the findings reached by the trial judge and I would dismiss the appeal.