# UNAPPROVED

# THE COURT OF APPEAL

**Record Number: 2023/299**
**Neutral Citation Number [2024] IECA 285**

**Faherty J.**
**Pilkington J.**
**Butler J.**

**BETWEEN/**

**KIERAN MCKENNA**

**APPELLANT**

**- AND –**

**PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY AND KEN FENNELL**

**RESPONDENTS**

**Judgment of Ms. Justice Faherty delivered on the 29th day of November 2024**

**1.** This is an appeal against the judgment and order of the High Court (Cregan J., hereinafter "the Judge") dated 9 October 2023 refusing the appellant interlocutory injunctive relief in respect of farmlands at Killyshavin, Kilbrane, Co. Monaghan (hereinafter "the Lands").

**2.** Two questions arise for determination. The first is whether the one issue upon which the appellant now relies for the purposes of seeking interlocutory injunctive relief meets the threshold of a fair issue to be tried. The second is whether (assuming a fair issue to be tried is established) the balance of justice favours the granting of the injunctive relief sought.

**Background**

**3.** In or around 16 November 2004, the appellant borrowed €220,000 from Irish Nationwide Building Society ("INBS") which loan was secured on the Lands by way of a mortgage. The deed of mortgage was executed on 8 March 2005.

**4.** On 1 July 2011, the loan and mortgage were part of a transfer by INBS to Anglo Irish Bank Corporation Limited who later became Irish Bank Resolution Corporation Limited ("IBRC"). Some three years or so later, on 6 March 2014, the loan and mortgage were transferred by IBRC to Shoreline Residential Limited ("Shoreline") who later converted to a Designated Activity Company.

**5.** On or about 8 July 2015, the appellant defaulted on his loan and no payments of principal or interest have been made since that time.

**6.** On 17 September 2018, Shoreline appointed the second respondent, by deed of appointment, as receiver over the lands. The appellant was advised of the appointment on 24 September 2018.

**7.** On 18 April 2019, Shoreline transferred the loan and mortgage to the first respondent herein (hereinafter "Pepper").

**8.** On or about 8 August 2019, the appointment of the second respondent as receiver was novated from Shoreline to Pepper in an agreement ("the deed of novation") entered into between Shoreline, Pepper and the second respondent *qua* receiver.

**9.** Subsequently, attempts were made by the second respondent to sell the lands, namely in September 2019, November 2020 and December 2020, without success.

**10.** Around the same time, the appellant appointed a negotiator, Mr. Larry Shields, to act on his behalf in respect of the loan, and between February 2021 and July 2021, Mr. Shields made offers ranging from €80,000 to €120,000 in an attempt to discharge the appellant's indebtedness, all of which were rejected by the second respondent.

**11.** On or about 28 July 2021, the second respondent entered into a contract of sale to sell the Lands to a third party for the sum of €120,000.

**12.** The appellant's solicitors were informed of this on 7 September 2021 by telephone and on 29 September 2021 in writing.

**13.** On 18 November 2021, the appellant issued his plenary summons in these proceedings. In the general indorsement of claim, the appellant sought, *inter alia*, *"[a] declaration that the purported appointment of [the second respondent], and/or his servants or agents, as receiver over [the Lands] is null and void and/or of no legal effect"*; an order discharging or vacating the purported appointment of the second respondent as receiver, injunctive relief restraining the second respondent from seeking to take possession of the Lands, and/or marketing for sale and/or selling and/or completing any sale of the Lands. the Lands and damages.

**14.** However, no application for an interlocutory injunction was brought at that time. The notice of motion seeking injunctive relief issued on 26 January 2022. It was grounded on the appellant's affidavit sworn on 17 November 2021. On 6 April 2022, a Mr. Reardon, an auctioneer employed by the second respondent, swore an affidavit in response to certain averments in the appellant's grounding affidavit. On 7 April 2022, the second respondent swore an affidavit in reply to the appellant. This was followed by the appellant's supplemental affidavit sworn 19 May 2022 to which the second respondent replied in an

affidavit filed 1 July 2022. This in turn led to the appellant's second supplemental affidavit, filed on 29 July 2022. His third supplemental was filed on 2 June 2023 in response to an affidavit sworn by on 29 April by Mr. Seamus Dowling on behalf of Pepper. In a further affidavit filed on 15 June 2023, the second respondent gave updated particulars concerning the sale of the Lands.

**The High Court judgment**

**15.** The arguments the appellant advanced in the court below in aid of his application for interlocutory injunctive relief may be summarised as follows:

- Pepper had no proper legal title to the loan and/or mortgage and the appellant also took issue with "the "chain of title" of Pepper and the second respondent.
- No notice was given in writing to the appellant of the assignment of the loan/mortgage from IRBC to Shoreline or Shoreline to Pepper.
- The alleged unlawfulness of the second respondent's appointment.
- The alleged invalid novation of the receivership.
- The alleged block on the equity of redemption.
- No corporate approval of the transfer of the debt.

**16.** The High Court found none of the issues raised by the appellant constituted a fair issue to be tried such as would justify the granting of interlocutory injunctive relief. As already referred to, the appellant appeals only one of those findings, namely the issue of the second respondent's novation. That is not to say, of course, that the other issues raised by the appellant in the court below will not be pursued at the trial of the action.

**17.** The specific argument advanced in the court below in regard to the novation issue was that the novation of the second respondent was invalid as a matter of law in circumstances where although Shoreline had appointed the second respondent as receiver on 17 September 2018 and the appellant's loan and mortgage had been transferred to

Pepper on 18 April 2019, the second respondent's appointment was only novated from Shoreline to Pepper on 8 August 2019 (although stated to be effective from 18 April 2019). At para. 18 of his grounding affidavit the appellant put it as follows:

> *"Whilst more properly a matter for legal submission, I also further am advised that there is a serious issue to be tried as regards the validity of [the] Second Named Defendant's appointment, whereby he is purporting to still act under an Instrument of Appointment dated 17 September 2018, but which was executed by Shoreline. Whereas, since then, there has been a further subsequent purported transfer or assignment of the Loan and Mortgage to the First Named Defendant herein. As such, I am advised that there is a serious issue to be tried as to whether the Second Named Defendant can act in relation to [the Lands] at all, let alone enter into any contract for the sale of [the Lands]."*

**18.** Insofar as the appellant challenged the second respondent's authority on the basis that his appointment was only novated from Shoreline to Pepper on 8 August 2019, the Judge found that the appellant's argument had been considered and rejected by this Court in *Healy v. McGreal* [2018] IECA 78 and so rejected the appellant's argument on the basis that he was bound by that decision.

**19.** *Healy v. McGreal* case concerned the sale of a portfolio of loans (including the plaintiffs' mortgages) by Irish Bank Resolution Corporation ("IBRC") to Kenmare Property Finance Limited ("Kenmare") on 28 March 2014. On 12 September 2013, prior to the sale, by three deeds of appointment bearing the date 12 September 2013, IBRC had appointed the defendant (Mr. McGreal) to be receiver and manager of the properties. In the High Court, the plaintiffs unsuccessfully challenged the receiver's appointment on a number of grounds. One of the bases for trial judge's rejection of the plaintiffs' claim was

that deeds of novation were in fact only material to IBRC and Kenmare and did not affect the relationship between the receiver and the plaintiffs.

**20.** The plaintiffs' appeal to this Court was unsuccessful. At para. 33 of her judgment, Irvine J., writing for the Court, distilled the plaintiffs' core argument as follows:

> *"33. The essential point the plaintiffs make therefore is that, following the Loan Sale of the 28th March 2014, IBRC (in special liquidation) ceased to have any right or interest in the assets which it had transferred to Kenmare. Thus, it had no ability to execute the three Deeds of Novation or the Deed of Confirmation and Acknowledgement."*

Addressing this argument, Irvine J. went on to state:

> *35. As was observed by the trial judge, Mr. McGreal had been appointed receiver prior to the Loan Sale to Kenmare. That receivership was valid and ongoing pursuant to the original deeds of Appointment. The fact that IBRC (in special liquidation) entered into the Loan Sale with Kenmare and was no longer a party to the loan did not affect the validity of the Receiver's appointment or the ongoing nature of the receivership. The only question arising as a result of the Loan Sale was to whom the Receiver would remit any sums recovered in the course of the receivership. However, that was a matter between the receiver, IBRC and Kenmare and had nothing to do with the plaintiffs. While the execution of the Deeds of Novation might have some potential bearing on when Kenmare succeeded to the position of IBRC in receivership they could have no bearing at all on the question of the continuing validity of the Receiver's appointment over the secured assets*
>
> *….*
>
> *37 Whilst strictly speaking unnecessary in light of my aforementioned findings, I feel I should nonetheless also state that I reject the plaintiffs' submission that the Deeds*

*of Novation are invalid because there is no provision in the Mortgage Deeds providing for novation. I agree with the High Court judge that in circumstances where the Mortgage Deed provides for the appointment of a receiver with the power of sale it is axiomatic that the lender would be entitled to enter into a novation agreement."*

**21.** As we see, the salient holdings in *Healy v. McGreal* were (a) a loan sale does not affect the validity of a receiver's appointment or the ongoing nature of the receivership and (b) the only question arising as a result of a loan sale is to whom the receiver should remit sums recovered in the receivership: these are matters between the receiver, the original lender and the transferee of the loan/security and have nothing to do with the borrower/chargor.

**22.** The Judge found that the decision of Irvine J. *"covers precisely the argument which [the appellant] is making in this case".* He rejected the appellant's argument and agreed with the respondents' contention that he was bound by the decision, stating, *"any contention that Healy v. McGreal was wrongly decided by the Court of Appeal is bound to fail before the High Court".* In those circumstances he concluded that *"the issue about the novation of the receivership and thereby the legality of the appointment of [the second respondent] is not a serious question to be tried for the purposes of the injunction".*

**23.** The Judge also found that the balance of justice favoured the refusal of injunctive relief. He considered that if the appellant were successful at trial, damages would be an adequate remedy. He was also of the view that a key feature in the application was the fact that the appellant had waited until after the second respondent had entered into a contract of sale to sell the Lands *"to an innocent third party"* to bring the application for injunctive relief.

**24.** The Judge opined that had the appellant moved earlier *i.e*. before the second respondent had entered into a contract for sale then the application for an injunction "*might have been regarded more favourably by this court"*. That being said, the appellant would still have faced difficulties in establishing a fair issue to be tried "*and also difficulties in satisfying the court in relation to his undertaking as to damages"*. Moreover, the appellant had failed to bring his application in time, and only brought it some six months after the second respondent had entered in a contract for sale. In the view of the Judge, in those circumstances it would be difficult, if not impossible, for the appellant to argue that a court should grant an injunction to restrain the completion of the sale because damages would not be an adequate remedy. This was in circumstances where there was no evidence of fraud, or sale at an obvious undervalue or patent illegality on the face of a contract such that a court might be minded to set aside the contract. For those reasons, the Judge considered that the appellant had not established that damages would not be an adequate remedy.

**25.** The Judge went on to consider other factors in the balance of justice. He reiterated that the first issue to which weight should be attributed was the fact that the second respondent had entered into a contract for sale with a third party purchaser. He considered that were an injunction granted, this *"would be interfering with the lawful contract entered into between the receiver and a purchaser"* and could enable the purchaser to resile from the contract and result in the second respondent being unable to sell the lands for a considerable period of time or forced to sell at a lesser price. Moreover, the second respondent would also suffer reputational damage if he were unable to complete the contract for sale as he had contacted to do. The Judge noted that the appellant had not alleged that the Lands had been sold at an undervalue, which might have been a ground to restrain the completion of the sale. He further found that arguments raised by the

appellant's counsel regarding the alleged unconstitutionality of s.12 of the Irish Banking Resolution Corporation Act 2013 did not tilt the balance of justice in favour of the appellant, the Judge having earlier in the judgment opined that he did not believe that the appellant had raised a serious issue to be tried *"of such a nature as to displace the presumption of constitutionality"* which the provision enjoyed.

**26.** The Judge found the appellant's undertakings as to damages *"illusory"* and of *"no substance".* This was in circumstances where, as of June 2023, the balance outstanding on the loan was €276,000 approximately, with interest continuing to accrue at approximately €33 per day. The appellant was in default on the loan since in or about 2015, which was not disputed by the appellant. Albeit the appellant had offered to make a payment of €750 per month towards the outstanding debt, the Judge considered that the said offered *"merely amounts to an offer to resume repayments on his contractual obligations to repay the debt"* and did not come anywhere near providing proof to the court that the appellant was in a position to meet an undertaking as to damages if he obtained the injunction and did not succeed at the full trial of the action. Hence, the Judge concluded that the appellant was not in a position to satisfy his undertaking as to damages. On that basis alone he would refuse the application for an injunction.

**27.** The Judge also considered the delay on the part of the appellant in moving his application for an interlocutory injunction. He found that the appellant, at any stage from September 2019, and again in November/December 2020 and before 28 July 2021, could have brought an application for an injunction to restrain the sale of the lands. He did not do so. As was his right, the second respondent then entered into a contract for sale on 28 July 2021. As to the question of delay after the signing of the contract, the appellant's solicitors were aware on 7 September 2021 that the second respondent had entered into a contract. This was confirmed to them in writing on 29 September 2021. Yet no steps were taken in

October or November or December 2021 to apply for an injunction. In the Judge's view, this four-month delay, coupled with the delays before the second respondent entered into a contract for sale, were all matters to be considered in the balance of justice. Having done so, he considered that it would be unjust to the respondents, and to the third-party purchaser, to grant an injunction in circumstances where the appellant had delayed for such a long period of time.

**The appeal**

**28.** The appellant's notice of appeal advances the following grounds:

- Ground 1: The Judge erred in determining that there was not a serious issue to be tried as regards the appointment of the second respondent, in particular, the alleged novation of the receivership. Without prejudice to this, the Judge failed to consider, whether adequately or at all, whether there were substantial reasons to depart from the reasoning of this Court in *Healy v. McGreal* and follow the albeit *obiter dicta* of Butler J. in *Tyrrell and Anor v. Mulligan* [2022] IEHC 311. The Judge also failed to consider, whether adequately or at all, the appellant's supplemental written submissions that a receiver cannot owe contractual duties and obligations to two separate counterparties or "appointees" at the same time. Further, the Judge failed to consider, whether adequately or at all, the appellant's argument that a novation is, as a matter of law, a separate and distinct contract and, therefore, a "fresh" appointment, and, thus, it was not permissible to retrospectively appoint or "novate" the purported appointment of the second respondent. In the premises, the Judge erred in considering that there was not a serious issue to be tried on this point at trial.
- Ground 2: The Judge erred in determining that the balance of justice favoured the refusal of the relief. In particular, he erred in determining that damages would be

an adequate remedy for the appellant and failed to consider, whether adequately or at all, the nature of the lands in question. Furthermore, the Judge gave undue weight to the fact that a purported contract for sale had been entered into by the second respondent and/or the strength of the appellant's undertaking as to damages, particularly where the underlying loan was secured on an additional property, as well as the Lands which are the subject matter of the proceedings.

- Ground 3: The judge erred in holding that the appellant unduly delayed in moving for injunctive relief. Without prejudice to that, the Judge failed to consider, whether adequately or at all, the explanations proffered by the appellant for the delay. Moreover, by dint of his failure to give due weight to the appellant's contention that the *"greater risk of injustice"* was to refuse to grant the injunction, the Judge erred in concluding that it would be unjust to the respondents and the third party purchaser to grant interlocutory injunctive relief.

**29.** By their respondent's notice, the respondents oppose the appeal in its entirety.

**Discussion and Decision**

***A fair issue to be tried on the novation?***

**30.** The appellant advances his application for an interlocutory injunction on the basis, essentially, that the second respondent had no lawful basis to enter into any contract for the sale of the Lands in the absence of a valid novation of the second respondent's appointment as receiver. As we see, the Judge rejected the appellant's argument. In his submissions to this Court, the appellant fairly acknowledged that the Judge was correct to hold that he was bound by the decision in *Healy v. McGreal*. However, with reference to *Hughes v. Worldport* [2005] IEHC 189, the argument the appellant advances on appeal is that it is open to this Court to consider whether there are *"substantial reasons"* on foot of which a judge hearing the trial of the within action might be persuaded to depart from the

rationale in *Healy v. McGreal.* The appellant contends that such reasons exist. Counsel asserts that the decision in *Healy v. McGreal* was based on what is described as *"an erroneous premise that the issue of a purported novation of a receivership does not concern the substantive borrower".* As such, it was incorrect, it is said, for Irvine J. to have held (at para. 34) that the issue of any purported novation of a receivership does not affect the *"relationship between the receiver and the plaintiffs"* It is said that Irvine J. was also incorrect in holding that the issue of *"the remittal of any sums received in the course of the receivership"* had *"nothing to do with the plaintiffs"* (para. 35).

**31.** Citing the *dictum* of Clarke J, in *Hughes v. Worldport* [2005] IEHC 189 that "*[a]mongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period"* (emphasis added), the appellant urges this Court not to abide the decision in *Healy v. McGreal* at this juncture and to find that the appellant has established a fair issue to be tried at the hearing of the action on the issue of the novation of the second respondent.

**32.** The crux of the appellant's argument is that as a matter of law, there is a requirement for a contemporaneous novation of the second respondent's receivership with the transfer of the loan/security by Shoreline to Pepper, which did not occur in this case.

**33.** In aid of his submissions, counsel relies on the *dicta* – albeit *obiter* – of Butler J. in *Tyrrell and Anor v. Mulligan* [2022] IEHC 311 (*"Tyrrell"*). There, the plaintiffs were, respectively, the receiver appointed by the original lender Allied Irish Bank ("AIB") and the transferee ("Everyday") of the loans sold to Everyday pursuant to a global deed of

transfer between AIB and Everyday. The plaintiffs issued proceedings seeking permanent injunctive relief against the defendant seeking to restrain him from trespassing on property or otherwise interfering with the receivership, together with damages. They then duly sought interlocutory injunctive relief on an identical basis to the injunctive relief sought in the proceedings.

**34.** One of the arguments raised by the defendant in response to the injunction application concerned the validity of the receiver's appointment. The second of two issues raised in this regard was that the receiver had been appointed by AIB prior to the transfer of the defendant's mortgages to Everyday. As observed by Butler J. at para. 39 of her judgment, in some instances where this situation arose, i.e. where a mortgage in respect of which a receiver has already been appointed has been transferred, the appointment of the receiver by the original mortgagee is discharged and a fresh appointment is made by the transferee. In other cases, the prior appointment of the receiver is expressly approved or adopted by the transferee after the transfer has concluded. Neither of those approaches were chosen in *Tyrrell*. Instead, AIB, Everyday and the receiver entered into a deed of novation on the same date (14 June 2019) as the global deed of transfer under which the receiver consented to the substitution of Everyday for the transferors (AIB) in what were termed the receiver agreements. The receiver agreements were defined in the deed of novation by reference to all deeds of appointment entered into between AIB and the receiver. The deed of novation here has many of the hallmarks of the approach adopted by the contracting parties in *Tyrrell* save as to its timing.

**35.** The difficulty that arose in respect of the deed of novation in *Tyrrell* was that in the schedule to the deed, in the case of the defendant's properties, the date upon which the receiver was appointed was identified in each case as being 18 November 2016. That was not, however, the relevant date of appointment in respect of any of the properties. After

setting out (at para. 40) that that date was not the correct date and that the correct dates in respect of the four mortgages were otherwise than 18 November 2016, at para. 41, Butler J. asked *"What then is the legal effect of a deed of novation which purports to novate receiverships which either never existed or were no longer in existence at the date of the novation and which does not purport to novate the receiverships which were actually in existence at the material time?"*

**36.** The defendant's contention in response to Butler J.'s query was that if a transfer takes place, the receivership automatically expires and, on the particular facts, the receiver's appointment terminated as the deed of novation was invalid and ineffective.

**37.** On the other hand, the argument advanced by the plaintiffs was that *"the deed of novation…is of no real concern to the defendant who is not a party to it".* They argued that the deed of novation *"affects the charge holder and the receiver".* They acknowledged, however, that it was common to novate a receivership "*as one contract needed to end and another to come into being".* They contended that once appointed, the receiver was the agent of the mortgagor (the defendant) and that the receiver's responsibility was to realise the defendant's assets in order to disperse them to meet the defendant's liability to the mortgagee or charge holder. The argument advanced was that *"the receivership did not end with the transfer of the charge as otherwise it would require novation at the same precise moment as that transfer".* In other words, the plaintiffs' position was that the receivership inured irrespective of the loan transfer.

**38.** It was considered by Butler J. that the plaintiffs' argument *"might carry more weight if, in fact, the purported novation of the receivership had not taken place on the same date as the global deed of transfer which suggests that it was clearly considered by the parties to the novation to be part of the same suite of documents and, thus, inextricably linked to the transfer itself".* (para. 41)

**39.** Butler J. then went on to address the plaintiffs' argument that the contractual relationship between the receiver and the charge holder has no material effect on the receivership, stating:

> *"42. I struggle to see how it can be said, certainly to the extent required to establish a strong case, that the contractual relationship between the receiver and the charge holder has no material effect on the receivership. Put simply, in the context of the facts of this case if the deed of novation was ineffective to transfer the receivership from AIB to the second plaintiff, it means that AIB continues to have a receiver appointed over property in respect of which it no longer holds a mortgage or security and that the second plaintiff holds the mortgage and security over property in respect of which it has not appointed a receiver. I note, for example, that in accepting the original deed of appointment in respect of Abercorn Road in 2016, and again in accepting his reappointment in 2019 the first plaintiff undertook, inter alia, to regularly account to the bank (i.e. AIB) for the monies received by him as a receiver. If the receivership has not been validly novated, then the first plaintiff remains under an obligation to account to AIB in respect of monies received from the receivership and, technically, the defendant will not benefit from those monies being applied towards his outstanding indebtedness to the second plaintiff. Whilst this may not be what the plaintiffs intend will happen in practice, it is what is legally required on foot of the exhibited documents. Therefore, I do not think that the issues raised concerning the deed of novation can be treated in the same manner as those concerning the inter-lender agreement. Were I not to have already taken the view that the plaintiffs have failed to establish their interest in the loans underlying the mortgages the subject of the proceedings, I would be inclined to take the view that*

*the plaintiffs had not established the continuing validity of the receivership subsequent to the transfer of those loans to the second plaintiff."*

**40.** The appellant contends that the *dicta* of Butler J. in *Tyrrell* support his argument as to the need for a valid novation in order to confer validity on the second respondent's receivership post the loan sale. Counsel asserts that the position is even more acute here than that which pertained in *Tyrrell* in circumstances where pursuant to the deed of mortgage, the second respondent has a substantive power of sale and, in fact, has sought to enter a contract for the sale of the Lands dated 28 July 2021. The appellant contends that without a valid novation of his appointment as receiver, as a matter of law the second respondent is required to remit any sale proceeds arising from the contract for sale to Shoreline rather than Pepper. This, it is argued, would have adverse consequences for the appellant *qua* borrower. It is in those circumstances, it is said, that the *dicta* of Irvine J. in *Healy v. McGreal* that the remittal of any such sums received has *"nothing to do"* with the borrower cannot be correct.

**41.** As appears from his affidavit sworn 30 June 2022, since the time of the transfer by Shoreline to Pepper of the underlying loan and mortgage, the second respondent has held himself out as acting for Pepper rather than Shoreline, evidenced by his averment at para. 9 that *"... as with any loan sale I have regarded myself in this case as reporting to the charge holder for the time being and from time to time..."*, which, essentially, echoes the averment in his earlier affidavit sworn 7 April 2022: "*Moreover, I have at all times since 18 April 2019 acted with the knowledge and approval of the First Defendant [Pepper]"*. The appellant argues that those averments cannot be correct in the absence of a valid deed of novation given that the second respondent's *"contractual obligations"* are owed to Shoreline, not Pepper.

**42.** Albeit the second respondent's position would appear to be that he can owe fiduciary and contractual duties and obligations to both Pepper and Shoreline, the appellant's overarching argument is that the second respondent's position is in fact a binary one: either he acts for Shoreline or Pepper, but not both. The appellant queries how the second respondent can be validly appointed by Pepper in circumstances where absent a contemporaneous novation of the receivership, he continues to have a contractual relationship with Shoreline, a relationship which, it is said, is evidenced by the provisions of Clauses 2.1. 2.2 and 2.3 of the purported deed of novation. The appellant argues that that the second respondent cannot lawfully *"serve two masters".*

**43.** The appellant also asserts that absent a valid novation of the second respondent's appointment occurring simultaneously with the transfer of the loan and security, the second respondent became a trespasser over the Lands in question. This, it is said, is supported by the *dicta* of Butler J. in *Tyrrell* where she states, at para. 42, that if the deed of novation was *"ineffective"* to transfer the receivership from AIB to the second plaintiff, it meant that *"…AIB continues to have a receiver appointed over property in respect of which it no longer holds a mortgage or security and that the second plaintiff holds the mortgage and security over property in respect of which it has not appointed a receiver".*

**44.** Whatever the impact on the second respondent's standing because of the alleged invalidity of the deed of novation, I am not persuaded that the appellant can assert, *willy-nilly*, that the second respondent has become a trespasser over the Lands in circumstances where the appellant himself remains in actual possession of the Lands and where it is the second respondent who is attempting, *via* the amended defence and counterclaim, to obtain possession of the Lands. When this was pointed out by the Court at the hearing of the appeal, albeit accepting that the second respondent was not a trespasser, counsel for the appellant nevertheless maintained that it was arguable that absent a valid deed of novation,

the second respondent's actions *vis a vis* the sale of the Lands amounted to a slander of the appellant's title. For the purposes of determining whether the appellant has established a fair issue to be tried, I am inclined to the view that this latter proposition is arguable.

**45.** The respondents refute the appellant's contention that there is a requirement for contemporaneity between the loan sale and the novation to the incoming lender of the receiver's contractual relationship with the outgoing lender. More fundamentally, they submit that the novation of the receivership is solely a matter for the outgoing and incoming lenders and the receiver to arrange and does not involve the borrower/chargor.

**46.** In effect, the respondents' position is that the relationship in issue here is a tripartite contractual relationship involving first, the transferring lender (Shoreline), secondly, the transferee of the loan/security (Pepper) and thirdly, the second respondent. A novation may, depending on the case, transfer from the outgoing lender to the incoming lender both contractual rights and contractual obligations owed by and to the receiver. Thus, it is said, a novation is concerned only with the contractual relationship between the receiver and the charge-holder (including the charge holder for the time being) and not with the receiver's continued appointment as agent of the borrower/chargor or the receiver's fiduciary relationship with the charge-holder (including the charge holder for the time being) which, it is said, arises by operation of law and, so, is not dependent on any contractual relationship that may exist between the receiver and his or her appointor. The respondents also say that expressions such as *"transfer of receivership"* or *"novation of receivership"* are not sufficiently particular or precise to describe the contractual relationship that may be novated, and, so, lead to confusion.

**47.** More generally, the respondents say that it is not clear how it is asserted the novation changes matters in circumstances where the novation does not involve the borrower/appellant and involves only the charge holder (outgoing and incoming) and the

second respondent receiver by which the relationship between the receiver and the incoming charge-holder is being reconstituted. Thus, the respondents argue, even if the deed of novation was invalid, it cannot be problematic for the borrower/chargor. They also argue that in *Tyrrell*, the receiver was under a contractual obligation to account to the lender and so, arguably, remained under that duty notwithstanding the transfer of the loan and charge unless and until the receivership was validly novated. The evidence did not establish an equivalent contractual obligation in this case.

**48.** The respondents further contend, even assuming that contemporaneity of the novation with the transfer of the loan and security was required, that contemporaneity was in fact achieved by means of the clear language in the deed of novation which provided for retrospectivity. Counsel contends that there was nothing to stop the relevant parties from agreeing that their respective obligations were governed by or arose from a date earlier than the date upon which the deed of novation was executed. In this case, the original charge holder (Shoreline) treated the incoming charge holder's (Pepper) rights and obligations to have taken effect from18 April 2019 being the date of the deed of transfer. By this, one is not saying that the contract was executed at an earlier date, rather, one is certifying that the relationship between the relevant parties has been governed by the deed of novation since 18 April 2019. There is an express term in the deed of novation to that effect. Hence, the respondents say, there is no conceptual difficulty with retrospection once the parties agree to it. In aid of their argument, the respondents rely on *Flynn v NALM* [2014] IEHC 408 and *Trollope & Holland v. Atomic Power Constructions Ltd.* [1963] 1 W.L.R. 333.

**49.** Before further addressing the parties' respective arguments on the novation issue, it is perhaps apposite to refer to the factors in the case which appear not to be in dispute.

**50.** In the first instance, the office which the second respondent occupies was provided for by the deed of mortgage dated 8 March 2005. Secondly, it is not in dispute (at least for the purposes of the within appeal) that on 17 September 2018 there was an actual appointment of the second respondent as receiver, which the second respondent accepted. The deed of appointment appointed the second respondent to be receiver *"of all the rights, property and assets … comprised in, and mortgaged and charged by the Relevant Mortgage…"*.

**51.** It also broadly accepted by both sides that a receivership involves a series of relationships. First, there is the relationship of principal and agent between the borrower/chargor and the receiver. As can be seen, the respondent's overarching argument in this appeal is that that relationship did not change upon the transfer of the loan and security from the original lender (Shoreline) to a new lender (Pepper) and that there is a straightforward continuity in the second respondent's appointment and, consequently, the receivership, notwithstanding the loan/mortgage sale. The respondents also say that whilst the deed of novation may be described as a contractual document as between Shoreline, Pepper and the second respondent, it remains the position that upon the second respondent's appointment as receiver, by operation of law a fiduciary relationship was created between the receiver and the charge holder and that fiduciary relationship inures post the loan/mortgage transfer to Pepper.

**52.** It is perhaps appropriate at this juncture, to interrogate the respondents' argument as to the consequences of this fiduciary relationship, by reference to the relevant case law.

**53.** A fiduciary duty arises from a relationship in which a fiduciary person has undertaken to act for or in the interest of another (*McMullen v Clancy (No. 2)* [2005] IESC 10 citing *Bristol and West Building Society v Mothew* [1998] Ch.1). Fiduciary duties are imposed by law on persons who assume relevant relationships of trust and confidence.

The definition of fiduciary duty was given by Millet J. in *Bristol and West Building Society v. Mothew* at p.16:

> *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work fiduciary obligations (1977), p.2 is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."*

**54.** The obligations of a fiduciary include a duty to account, both for the way in which he or she exercises his or her powers and for the property with which he or she deals (*Re. Red Sail Frozen Foods Limited (in Receivership)* [2007] IR 361). Hence, the respondents argue, a receiver's duty is first and always a fiduciary duty and this fiduciary duty is to account to the charge-holder (including the charge holder for the time being), and latterly to those interested in the equity of redemption including the borrower/chargor. Thus, the essence of a receiver's office is the fiduciary duty that inheres in the office upon the receiver's appointment, a duty which transfers automatically when a change of charge-holder is brought about by a loan/mortgage sale.

**55.** The respondents submit that upon the loan/mortgage sale here there was no change to the central principal/agent relationship between the borrower (the appellant) and the

second respondent *qua* receiver. Moreover, once Pepper (as the transferee of the deed of transfer of the mortgage and thus the charge holder for the time being) took ownership of the loan/security, the second respondent owed Pepper a fiduciary duty to account. This fiduciary duty, the respondents reiterate, is not based on a novation of the receivership: rather it is imposed by operation of law.

**56.** It follows, the respondents say, that once the identity of the charge holder changed (as it did here), the object of the second respondent's fiduciary duty changed with it automatically, bringing with it the second respondent's duty to account to Pepper for any monies he may receive on foot of the sale of the Lands. On this basis, the respondents argue that the appellant's (*qua* borrower) position is protected.

**57.** The appellant, however, disputes the proposition that the second respondent has fiduciary obligation to Pepper absent a valid deed of novation, a matter to which I shall return.

**58.** Aside from the imposition of a fiduciary duty on a receiver by operation of law, there is of course also the possibility of a contractual relationship arising between the receiver and charge holder upon the receiver's appointment, under which, depending on the contractual terms agreed in a given case, the receiver may undertake to the charge holder contractually in similar terms to his fiduciary duty to account, and may also get from the charge holder a right to be remunerated (if the charged property proves inadequate for this purpose) and perhaps also an indemnity against risks in a particular case. In essence, what the respondents say was being novated to the incoming charge-holder here by the novation deed was not the receivership but rather the contractual relationship between the outgoing charge-holder and the receiver. Hence, both the second respondent's standing as agent of the borrower/chargor and his fiduciary duty to account remains unaffected and untouched by the novation.

**59.** I note that in the deed of appointment under which the second respondent was appointed receiver, there is no reference to any specific contractual provisions between Shoreline and the second respondent– what occurred is that Shoreline simply appointed the second respondent to the office created by the deed of mortgage. It that regard the second respondent's appointment differs from the position in *Tyrrell* (where the deed of appointment there contained a specific obligation on the part of the receiver to pay the rents to the original mortgagee). There is no such parallel contractual duty in the deed of appointment in this case.

**60.** The respondents say that this difference is critical to the argument the appellant advances. They highlight the absence of any contractual obligation on the second respondent to remit monies to the outgoing lender (Shoreline). They further say that in the event that Shoreline were to receive such monies from the second respondent in repayment of that loan, Shoreline must hold same in trust for the transferee (Pepper) because the monies are the transferee's property.

**61.** The respondents also point to the obligations on the second respondent as provided for in the deed of mortgage itself. Clause 22(C)(iii) of the mortgage deed provides for *"all moneys received by a Receiver appointed under this Mortgage shall be applied as follows… (g) in or towards the discharge of any other moneys due by the Mortgagor to the Society"*. Whilst that may be styled a contractual relationship which arises upon the second respondent's appointment pursuant to the provisions contained in the deed of mortgage, the respondents contend that by virtue of Clause 2 of the mortgage deed which defines *"The Society"* as including its *"Successors and Assigns"*, and the provisions of Clause 16.1(a)(i), which provide that in the event of a transfer or assignment of the mortgage by the original lender *"all powers, rights and discretion of the Society shall be exercisable by the transferee or assignee to the extent that they are so assigned*

*and/transferred",* the obligations on the second respondent arise pursuant to his *office* as well as arising under his fiduciary duties.

**62.** The respondents' contention is that Clause 22(C)(iii) directs the application by the second respondent *qua* receiver of money received not to a person but for a purpose, namely in payment of the interest, and thereafter the principal, outstanding on the loan which is due to the owner of the loan for the time being (here, Pepper) after deduction of rents, taxes and other outgoings affecting the property, amounts due to mortgagees, and the receiver's remuneration. It is argued that a similar approach is taken in s. 24(8)(iv) of the Conveyancing Act 1881 ("the 1881 Act") and s. 109 of the Land and Conveyancing Law Reform Act 2009. Thus, the respondents say, by virtue of assigning the loan and security to Pepper, Shoreline (the outgoing lender) transferred to Pepper the entitlement to all money received by the receiver. In other words, Pepper, as the assignee of the loan and related security, became entitled, by virtue of the assignment, to the right, title, benefit and interest of the assignor (Shoreline) in and to that loan and security.

**63.** It is in those circumstances that the respondents contend that all the appellant *qua* borrower/chargor needs to be concerned about is that there is a duty on the second respondent *qua* fiduciary, and by virtue of his office, to apply monies recovered in the receivership properly, the breach of which the second respondent must account to Pepper and to the appellant.

**64.** By virtue of the foregoing, the respondents refute the appellant's *"two masters"* argument.

**65.** The respondents also posit that the issues in *Tyrrell* which gave Butler J. pause for thought, namely that the original lender in that case *"[continues] to have a receiver appointed over property in respect of which it no longer holds a mortgage"* and the new lender *"[holds] the mortgage and security over property in respect of which it has not*

*appointed a receiver"*, do not adequately describe the consequences of a loan transfer in circumstances where, upon a loan transfer, a receiver continues in his or her appointment as agent of the borrower/chargor, thereby dispensing with the need for a new appointment as receiver by the new lender. Hence, the respondents say, in *Healy v McGreal.* Irvine J. was plainly correct to hold that a loan sale does not affect the validity of the receiver's appointment or the ongoing nature of a receivership.

**66.** It will be recalled that in *Tyrrell* Butler J. was of the view that if the receivership had not been validly novated the receiver remained under an express contractual obligation to account to the original lender in respect of monies received from the receivership, and that *"technically"* the borrower would not therefore benefit from those monies being applied towards the outstanding indebtedness. Whilst Butler J. did not have to decide validity of the receivership on that basis, she was of the view (albeit *obiter,* at para. *42*) that if the receivership was not validly novated that would go to the validity of the receivership subsequent to the transfer of the loan to the incoming charge holder. Here, the respondents counter that *dicta* by their recourse to what they say is the fiduciary duty to account which the second respondent now owes to the new charge-holder Pepper following the transfer of the loan/charge and the absence of any contradictory contractual provision. Separately, they rely on the fact that Pepper, as the assignee/transferee of the instrument of charge, is entitled to the receivership recoveries under the express terms of the instrument of charge itself. They reiterate that were the transferor (Shoreline) to receive any monies from the second respondent following the transfer, it would necessarily hold those monies on trust for Pepper since in all events the receivership recoveries must be applied in discharge of the indebtedness, and, so, the borrower/chargor (here, the appellant) inevitably gets credit for that application.

**67.** Accordingly, they say that the Court in *Healy v McGreal* was correct to hold that the only question arising as a result of a loan sale is to whom the receiver should remit the monies recovered in a receivership. More particularly, the respondents point out that the second respondent has not given any undertaking to remit monies received by him to the appointor (Shoreline): rather, he simply accepted the receivership office as expressed in the deed of mortgage.

**68.** In the course of the appeal hearing, having heard the respondents' submissions on the issue, the Court sought to explore with counsel for the appellant as to why, as counsel argued, a novation contemporaneous with the deed of transfer was imperative in circumstances where the respondents were contending as follows: (i) a receiver is appointed as agent of the borrower/mortgagor, (ii) that relationship does not change upon a transfer of the loan and security from the original lender to a new lender (thus ensuring a straightforward continuity in the receiver's appointment), (iii) there is an overarching fiduciary obligation on the second respondent to account, and (iv) , in this case, nothing was done by the second respondent in the period between the deed of transfer and the deed of novation (i.e. between 18 April 2019-8 August 2019) which is sought to be impugned.

**69.** In his response to questions posed by the Court, counsel for the appellant disputed the respondents' premise that the second respondent's fiduciary duty to Pepper operated independently of the deed of novation. As support for his contention, he pointed to Clause 2.2 of the deed of novation which, he says, purports to capture *all* of the second respondent's duties and obligations including, it was said, the second respondent's fiduciary duty to account (there being no mention in the novation deed of the second respondent's fiduciary duties existing independently of Clause 2.2).

**70.** Clause 2.2 is expressed as follows:

> *"**Performance of Obligations:** The Continuing Party [the second respondent] hereby agrees, as and with effect from the Effective Date, that he shall perform all liabilities and obligations whatsoever from time to time to be performed or discharged by him by virtue of the Receiver Agreements to which he is a party in all respects as if the Transferee [Pepper] were the original party to those receiver Agreements instead of the Transferor [Shoreline]. The Transferor and the Continuing Party agree that with effect from the Effective Date they shall have no further obligations to, or rights against each other under or in connection with the Receiver Agreements."* (Emphasis in bold in original)

**71.** The proposition that the appellant thus advances is that given that the expressed intention was to transfer *all* of the second respondent's liabilities and obligations to Pepper (and the likely understanding of the contracting parties that the deed of novation captured all the duties and obligations (fiduciary or otherwise) of the second respondent), if there has not been a valid novation, the second respondent's obligations pursuant to his office (including his fiduciary duties) have not in fact transferred to Pepper. The appellant further asserts that Clause 2.2 of the deed of novation is of significance in that it provides that the agreements referred to in the deed include the *"Receiver Agreements"* which, counsel argues, must refer to the deed of appointment of the second respondent.

**72.** Counsel also counters the respondents' argument that Pepper does not require a novation to carry on the receivership by pointing to the difficulties which, he says, arise regarding the termination of the receivership in the absence of a valid novation. He contends that if Pepper were to attempt to terminate the second respondent's appointment it would be in the face of a deed of appointment which shows Shoreline as the mortgagee who appointed the second respondent. On the other hand, if Shoreline were to attempt to terminate the receivership, it cannot since the mortgage is now transferred to Pepper. It is

submitted that it is not sufficient for the respondents to say that Shoreline and the second respondent have a contractual relationship which Shoreline can terminate regardless of the fact that it has sold the loan and security to Pepper. Counsel asserts that the second respondent's authority (and presumably the charge holder's power to terminate that authority) derive from the deed of mortgage *and* the deed of appointment of the second respondent. Whilst the deed of mortgage has transferred to Pepper, absent a valid deed of novation, the appellant says, the second respondent remains contractually bound to Shoreline. In essence, the appellant contends for a misalignment of the second respondent's contractual duties as between Shoreline and Pepper absent a valid novation and that a similar misalignment pertains as regards the respective rights of Shoreline and Pepper *vis a vis* the receivership.

**73.** Insofar as the appellant's argues that Pepper cannot terminate the second respondent's appointment in the face of a deed of appointment that shows Shoreline as the mortgagee, I note the respondents' contention that even if there was a need to remove the receiver (which the respondents say does not arise in any event), the deed of mortgage/charge in any event incorporates s. 24(5) of the 1881 Act which empowers the mortgagee (now Pepper) to remove the receiver.

**74.** It is axiomatic that the arguments the appellant advances are premised on there not being in existence a valid deed of novation of the receivership in circumstances where the deed was not executed at the same time as the deed of transfer. This begs the question as to where the legal basis for the appellant's proposition is to be found. The appellant says that support for his argument on the need for contemporaneous novation is found in the *dicta* of Gilligan J. in *The Merrow Ltd v. Bank of Scotland* [2013] IEHC 130, a decision that is cited and approved by McDonald J. in *McCarthy v. Moroney* [2018] IEHC 379, albeit, as far as I understand it, the appellant is not contending that the question of novation of a

receivership directly arose in the case law just referred to. Nevertheless, the appellant asserts that the jurisprudence supports him.

**75.** In *McCarthy v. Moroney,* with reference to *The Merrow*, McDonald J. explained the requirement for strict adherence to the terms of a mortgage in the context of the appointment of a receiver, as follows:

> *"154. …in The Merrow Ltd. v. Bank of Scotland [2013] IEHC 130…Gilligan J. referred to a number of authorities which stressed the importance of observing any formalities in a debenture or deed of mortgage when it comes to the appointment of a receiver. Among the authorities considered by Gilligan J. was the decision of the Supreme Court of Western Australia in Wrights Hardware v. Evans (1988) 13 A.C.L.R. 631 where Franklyn J. emphasised the importance of complying strictly with the terms of the relevant debenture. In that case, Franklyn J. said:-*
>
> > *'I am satisfied that the relevant law applying to the appointment of a receiver or receiver and manager … pursuant to the charge is as follows:*
> >
> > *(1) The manner in which a receiver is to be appointed is prescribed by the debenture deed … and must be strictly followed. …*
> >
> > *(2) The existence of a power in the debenture holder to appoint in a particular manner will not relieve a de facto receiver from liability for trespass if the appropriate appointment procedure is not strictly observed. …'.*
>
> *155. In his judgment in The Merrow, Gilligan J. also identified the rationale for the requirement of strict compliance with the terms of the relevant deed or debenture. In this context, he drew attention to what was said by Smith J. in R. Jaffe Ltd. (in liquidation) v. Joffe (No. 2) in New Zealand where he said:-*

> *'The importance of the strict observance … is shown … by other considerations. A receiver is not an officer of the court, but, if he is duly appointed, his title is superior to that of a person interfering with the assets under his control, and the court will then grant an injunction …. If a receiver were unable to prove his title according to the terms of his contract, then I doubt whether he would be entitled to an injunction. Furthermore, while the company is a going concern, a receiver, if the conditions of the debenture so provide, may be the agent of the company, and the company will then be responsible for his contracts. This is particularly important if the debenture-holder has power to appoint not merely a receiver, but a receiver and manager. Under such circumstances the company must be entitled to insist I think, upon the fulfilment of the terms of appointment as a condition of its liability.'*

*156. On the basis of the authorities cited to him, Gilligan J. came to the conclusion that the terms of the debenture in that case had to be very strictly followed and the failure to seal the Deed of Appointment in that case was fatal to the purported appointment of a receiver there.*

*157. I was not referred to any other authorities in this context other than the decision of Gilligan J. While the decision of Gilligan J. was dealt with extensively in the oral and written submissions made by Mr. Moroney, the decision was not canvassed extensively in the submissions made on behalf of Mr. McCarthy. The oral submissions on behalf of Mr. McCarthy on this issue run from p 103 to p 105 of the transcript on Day 3."*

**76.** McDonald J. observed that the decision of Gilligan J. was applied and considered in a number of subsequent authorities, including by Cregan J. in *McCleary v. McPhillips* [2015] IEHC 591. With reference to the latter decision, McDonald J. stated:

> *"158. ... In that case, Cregan J. summarised the applicable principles as follows:-*
>
> *"1. The receiver's authority to act is derived from the contracts, or mortgages, or deeds of charge, entered into between the Bank and the borrower.*
>
> *2. The receiver is to be appointed according to the terms of the contract between the parties.*
>
> *3. Because 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.*
>
> *4. The consequence of non-compliance with the formalities for the appointment of a receiver, in accordance with the terms of the instrument, is that the appointment is void.*
>
> *5. If the instrument provides that the appointment is required to be by deed, or under seal, that formality must be observed.*
>
> *6. If the instrument requires that the appointment is to be made in writing under hand, that formality must also be observed.*
>
> *7. An invalidly appointed receiver may be a trespasser on company property.*
>
> *8. Considerations of basic fairness and contractual interpretation mean that the Bank should be obliged to comply with the terms it chooses to impose in the instrument involved'.*

*159. It is, I believe, crucially important to observe that a receiver's authority to act is, as Cregan J. said, derived from the relevant deed entered into between the mortgagor and the mortgagee. As the case law shows, it is also crucial to bear in mind that an appointment will not be valid unless it is made in accordance with the relevant Deed."*

**77.** Albeit he did not express it thus, as best I understand it, the appellant's essential argument is that in light of what has been set out in the case law just quoted as regards the need for strict adherence, when appointing a receiver, to the requirements of the relevant mortgage deed, it must follow that any instrument purporting to appoint a receiver or reconstitute a receiver's appointment (such as the deed of novation here) must be construed strictly not just as to its content and effect, but also as to its timing.

**78.** The essence of the appellant's argument is that since the appointment of a receiver is a fundamental matter (as recognised in the case law referred to above), without a novation of the deed of appointment at the time of the transfer of the loan and security the second respondent's receivership cannot be said to have been validly reconstituted, counsel's premise being that the novation of the second respondent's receivership is a separate and distinct contract to what had gone before. Therefore the appellant argues that it is not permissible to retrospectively "novate" the appointment of the second respondent. Counsel asserts that what Pepper and the second respondent are endeavouring to do, by virtue of the deed of novation in issue here, is to backdate the second respondent's appointment, which is not permissible. He also points to the fact that, here, the transfer/loan sale to Pepper was entered into after the deed of appointment of the second respondent and that post the loan/security sale, Shoreline continues to be named on the deed of appointment of the second respondent. Counsel also relies on the fact that the contract for the sale of the lands

is referred to the deed of novation which, it is said, suggests that the deed of novation was considered an important factor in the contract for the sale of the Lands.

**79.** The appellant further contends that even if, as the respondents argue, the second respondent's fiduciary obligation to remit the proceeds of the sale of the Lands to Pepper arises independently of the deed of novation, it nevertheless remains the case that absent a valid deed of novation, the duties and obligations pertaining to the second respondent's fees remain with Shoreline. In those circumstances, counsel says, the second respondent's duties *qua* receiver and his personal interests are in conflict. In my view, this argument is not without merit, if it proves to be the case that contemporaneity was required.

**80.** It is also argued that support for the appellant's position on the need for contemporaneity between the novation and the transfer of the loan and security from Shoreline to Pepper is found in Schedule 3 Part 6 of the deed of loan transfer of 18 April 2019. Schedule 3 Part 6 includes a proforma *"Form of Receiver Novation Deed".* There is a reference in this latter document to an *"Effective Date"* defined in the document as *"... the Completion Date as set out in the Transfer Deed".* This, counsel says, suggests that at some point, a novation of the receivership contemporaneous with the deed of transfer was within the contemplation of the parties. Furthermore, as counsel pointed out, there is no provision in the *"Form of Receiver Novation Deed"* found in Schedule 3 Part 6 for the *"Retrospective Commencement"* that is ultimately included at Clause 9.11 of the deed of novation dated 8 August 2019. Again, these are not unreasonable observations, in my view. However, whether anything really turns on the fact that at one point the parties to the deed of transfer may have contemplated a contemporaneous deed of novation depends on how fundamental the issue of contemporaneity turns out to be at the trial of the action.

**81.** Insofar as the respondents rely on *Flynn v. NALM* for the proposition that the novation may be backdated, the appellant says that *Flynn v. NALM* is distinguishable on

the basis of its facts. In that case, the retrospectivity in issue was to *"reduce to writing"* a prior oral agreement reached between the parties whereas in the present case the deed of novation simply *"deems"* that the relationship between the parties is to be governed by the deed of novation as and from 18 April 2019. The appellant also asserts that unlike the situation here, *Flynn v. NALM* did not concern a retrospective attempt to circumvent what counsel describes as the infirmities surrounding the continuity of the appointment of the second respondent and/or the slander of title to the appellant's propriety rights which, it is alleged, arises here by virtue of the second respondent's ongoing involvement with the Lands.

**82.** Whatever about the strength of the appellant's *"slander of title"* argument, in my view there is some force in the argument that a distinction can be drawn between the factual matrix in *Flynn v. NALM* and the factual matrix here, in circumstances where there is no suggestion that the deed of novation executed on 8 August 2019 was intended to reflect a prior oral agreement between the parties.

**83.** Of course, the respondents also rely on *Trollope & Holland* as authority for the proposition that a contract can have retrospective effect. They cite the *dicta* of Megaw J. at p. 339:

> *"But, so far as I am aware, there is no principle of English law which provides that a contract cannot have retrospective effect, or that, if it purports to have, in fact, retrospective effect, it is in law a nullity. If, indeed, there were such a principle, there would be many important mercantile contracts which would, no doubt to the consternation of the parties, be nullities. Frequently in large transactions a written contract is expressed to have retrospective effect; and this in cases where the negotiations on some terms have continued up to almost, if not quite, the date of the signature of the contract. The parties have meanwhile been conducting their*

*transactions with one another, it may be for many months, on the assumption that a contract would ultimately be agreed on lines known to both parties, though with the final form of various constituent elements of the proposed contract still under discussion. The parties have assumed that when the contract is made-when all the terms have been agreed in their final form- the contract will apply retrospectively to the preceding transactions. Often, as I say, the ultimate contract expressly so provides. I see no reason why, if the parties so intend and agree, such a stipulation should be denied legal effect."*

**84.** With regard to the respondents' reliance on *Trollope & Holland*, whilst, as far as I can ascertain, counsel for the appellant does not take issue with the *dicta* just cited, he nevertheless maintains that that decision can be of no assistance to the respondents in circumstances where, as counsel contends, the principles espoused in *The Merrow, McCarthy v. Moroney* and later case law (including *Tyrrell*) support the appellant's argument that a strict approach must be taken to a transfer of a receivership.

**85.** Having had regard to the factual matrix in the case, and parties' respective submissions, it seems to me, in the first instance, that the appellant's overarching proposition, namely that contemporaneity of the deed of novation of the receivership with the deed of loan transfer is a precondition for a valid subsisting receivership post the loan/mortgage transfer, meets the threshold of a fair issue to be tried. This is in circumstances where many of the arguments the appellant advances in support of his proposition appear not to have been argued in *Healy v. McGreal.*

**86.** Whilst not all the arguments canvassed by the appellant strike me as germane to the issue of the alleged invalidity of the deed of novation and the consequences of any such invalidity, and whilst it is the case that the appellant can advance his arguments on the novation issue at the trial of the action, even if an injunction is not granted, as I have said,

for the purposes of the interlocutory injunction which the appellant seeks, I am satisfied that he has established a fair issue to be tried in the action as to whether, on the facts here, the second respondent's receivership was validly reconstituted post the deed of transfer of the loan and security from Shoreline to Pepper in circumstances where the deed of novation neither pre-dated nor was not contemporaneous with the deed of loan transfer. There is also, in my view, a fair issue to be tried as to whether, as the respondents contend, the appellant's concerns regarding the remittal of any monies received by the second respondent (if the sale of the Lands is ultimately completed) are in fact allayed by the fiduciary obligations which the respondents say inhere in the second respondent's receivership regardless of the deed of transfer or any alleged invalidity of the deed of novation.

**87.** These are matters which were not explored in *Healy v. McGreal*. It seems to me that the rationale arrived at by Irvine J. *Healy v. McGreal* largely derived from the proposition that deeds of novation *"were in fact matters only material to [the transferor and the transferee] and did not affect the relationship between the receiver and the plaintiffs".* That indeed may prove to be the case, but I consider that the appellant's argument merits a consideration that only a full trial can achieve particularly in circumstances where in *Tyrrell*, Butler J., albeit in *obiter dicta*, accepted as a matter of principle that an invalid deed of novation could have consequences for the borrower (as she outlined at para. 42). Bearing these factors in mind, and on the basis that I consider the appellant's contention that instruments concerning the establishment and/or the reconstitution of the office of a receiver should be construed strictly is arguable, I am not satisfied, on the basis of the limited arguments to date, that the second respondent's entitlement, post the deed of transfer of the appellant's loan, to deal with the Lands is as clear cut as the respondents contend.

**88.** In concluding that the appellant has established a fair issue to be tried, I have had regard to the respondents' argument that the *obiter* views expressed in *Tyrell* can only be described as tentative since that case itself concerned an application for an interlocutory injunction whereas the decision of this Court in *Healy v. McGreal* was rendered in circumstances where it affirmed the judgment of the High Court following a full plenary hearing. I have also taken account of the respondents' submission that the *obiter dicta* in *Tyrrell* did not address *Healy v McGreal* which appears not to have been cited to the judge in that case.

**89.** Whilst, at first blush, the emphasis the respondents place on these factors has some force, the overarching consideration, as I have already alluded to, is that that none of the specific arguments upon which the appellant relies (and which he wishes to pursue at the trial of the action) appear to have been raised or considered in *Healy v. McGreal* (which may be accounted for by the fact that the plaintiffs in that case were lay litigants).

**90.** For the reasons set out, therefore, I consider that the appellant has done enough to establish that there is a fair issue to be tried on the question as to whether the second respondent's appointment as receiver has been validly reconstituted. Of course, whether he will prevail at trial on the novation issue is a different question altogether but that it not something this Court has to be concerned with at this juncture, the Court only requiring to be satisfied that a fair issue to be tried has been established.

***The balance of justice***

**91.** Whilst the appellant has established a fair issue to be tried, the next matter to be considered is the balance of justice.

**92.** The appellant's first argument in aid of his submission that the balance of justice favours the granting of the injunctive relief concerns the nature of the Lands. At para. 40 of his affidavit sworn 17 November 2021 the appellant avers that *"the lands are farmlands*

*and have been in this Deponent's family for over seventy years".* The reality, however, is that the Lands were not handed down to the appellant: rather, he purchased the Lands from the estate of his late uncle. This is also not a case where the appellant can lay claim to being a full-time farmer albeit he has cattle on the Lands. The appellant is employed elsewhere. The height of his personal connection to the Lands is his averment that he finds farming *"as a great way to relax and getaway from everything".* Furthermore, albeit the appellant has undoubtedly spent money on the Lands, neither this nor the foregoing factors suffice, in my view, to swing the balance of justice in his favour.

**93.** As we see, the Judge found that if he is successful at trial, damages would be an adequate remedy for the appellant. The appellant takes issue with this finding. He argues that if he succeeds at trial in respect of his claim that absent a novation contemporaneous with the deed of transfer of the loan and mortgage the contract of sale of the Lands was invalid, then damages would not be an adequate remedy. In aid of this argument, he relies on the *dicta* (pp. 336-337) of O'Dalaigh C. J. in *Holohan v. Friends Provident* [1966] I.R. 1.

**94.** Having regard to the factual matrix in that case, I am not persuaded that it assists the appellant in any relevant regard. On the other hand, however, I accept, as a matter of principle, that if the sale of the Lands proceeds to completion and the second respondent were later to be found at trial not to have been entitled to enter into the contract for the sale of the Lands, then the appellant's propriety rights will have been encroached upon by someone without lawful authority. That is a factor to which this Court, at this juncture, must have regard in compliance with the obligation on the Court to *"fashion an order which runs the least risk of injustice"*, adopting the words of Clarke J. in *Charleton v. Scriven* [2019] IESC 28 at para. 6.12). Accordingly, the potential effect on the appellant's propriety rights is a factor which weighs in the appellant's favour.

**95.** One of the factors that militated against the appellant in the High Court (assuming he had established a fair issue to be tried) was the Judge's view that the appellant's own undertaking as to damages was *"illusory".* In his written submissions, counsel for the appellant asserts that the Judge adopted *"an overly restricted"* view of the appellant's undertaking as to damages in circumstances where the appellant had offered €120,000 to buy out the Lands and where there was additional secured property in place. In oral submissions, counsel accepted that the appellant's undertaking as to damages was not the *"strongest"* in circumstances where it was accepted that no repayments have been made in respect of the mortgage for almost a decade. Nonetheless, counsel urged that it would be unjust if the second respondent were permitted to complete the sale of the Lands before the matter came on for plenary hearing. In this regard, the appellant cites the *dictum* of Stewart J. in *McGarry v. O'Brien* [2017] IEHC 740 that *"…While an unsubstantiated undertaking would normally militate against the grant of interlocutory relief, it would also seem to be quite unjust to decline highly warranted relief on the basis of a lack of resources…"* (para. 39).

**96.** In his submissions, counsel for the respondents argues that the issue of the adequacy of damages must also be viewed from the perspective of the respondents. He points out, in the first instance, that the appellant is clearly impecunious given that no repayments on the loan have been made for over nine years and where the sum owing by the appellant stood at the point of hearing before the High Court upwards of €275,000, well in excess of €230,000 originally borrowed. Counsel says that there are no assets available to the appellant to cover an undertaking as to damages. He further asserts that insofar as the appellant had offered €120,000, that was an offer to settle the debt as a whole and that this sum was never vouched.

**97.** The respondents contend that the appellant's capacity to give an acceptable undertaking as to damages is at the heart of this case, something, it is said, the appellant cannot provide. They also argue that the appellant cannot derive solace from the words of Stewart J. in *McGarry v. O'Brien* in circumstances where, in that case, there was no evidence that the receiver was preparing the property in dispute for sale, unlike the position here where in fact the second respondent has already entered into a contract for sale.

**98.** Whilst I note the respondents' submission in this regard, I also note that in *McGarry v. O'Brien*, the court found that damages would not be an adequate remedy for the plaintiff because *"serious questions subsist over the receiver's appointment"* (para. 37). Likewise, in the present case, and albeit counsel for the respondents argued forcefully to the contrary, I have found that the appellant has established a fair issue to be tried regarding the validity of the second respondent's actions post the deed of transfer of the mortgage, absent a novation of the receivership prior to or contemporaneous with the deed of transfer. In my view, this must weigh in favour of granting the relief being sought here, bearing in mind where *"the greatest injustice might lie"*.

**99.** There remains, of course, the fact that the second respondent has entered into a contract for the sale of the Lands with a third-party purchaser. That being the case, the respondents argue that were the appellant to be granted interlocutory injunctive relief, the second respondent could be met with a claim for specific performance by the purchaser of the Lands. They assert that the most that is at stake for the appellant, if injunctive relief is not granted, is the loss of amenity to lands to which he has no real personal attachment, whereas for the second respondent, if injunctive relief is granted, there is the possible exposure to a specific performance suit by the purchaser and the consequent damage to the second respondent's reputation.

**100.** Albeit the appellant's undertaking as to damages is less than desirable, and accepting, as I do, that his connection to the Lands is not such that it requires to be weighed heavily in his favour, and accepting that there is in existence a contract for the sale of the Lands and possible attendant risks for the second respondent if such sale is not completed, overall, it seems to me, that there are other more persuasive factors that militate in favour of granting the appellant the relief he seeks.

**101.** Primarily, the appellant has established a fair issue to be tried as to requirement for the novation of the second respondent's receivership to be contemporaneous with the deed of transfer of the loan/ mortgage, in order for the second respondent to have entered into a valid contract for the sale of the Lands. The appellant has succeeded in persuading the Court that the discrete arguments he advances in aid of his contention that the novation here was not validly entered into were not considered in *Healy v. McGreal* and that, consequently, *Healy v. McGreal* should not be considered determinative of the appellant's arguments, at least until those arguments are tested at the trial of the action.

**102.** Secondly, the application for interlocutory injunctive relief is being made against a backdrop where the plenary action, as it stands, is very near readiness for trial, which, to my mind, is a factor to be weighed in the appellant's favour, in the circumstances of this case, when assessing where the balance of justice lies. I note that the amended statement of claim was delivered on 29 June 2023 and that the amended defence and counterclaim was delivered on 10 July 2023. A reply and defence to counterclaim was delivered on 1 November 2023. A request for particulars has also been replied to by the appellant. Accordingly, the pleadings have closed.

**103.** On 8 November 2023, the solicitors for the respondents wrote to the appellant's solicitors enclosing a request for voluntary discovery. At the hearing of the appeal, counsel for the appellant advised that the respondents have in fact made discovery and that the

appellant proposed to make his discovery shortly. Moreover, the action is being case managed in the court below. On any reading, the plenary hearing in this case is well advanced.

**104.** Thirdly, I am satisfied that the respondents have not established that either they or the purchaser of the Lands will be prejudiced if an injunction is granted. As we see, in their submissions, the respondents raised the spectre of legal proceedings by the purchaser of the Lands as a basis for not granting the injunctive relief being sought by the appellant. However, there is no evidence before the Court that any specific performance proceedings are being contemplated by the purchaser. In fact, in his third affidavit sworn on 15 June 2023, the second respondent avers as follows:

> *"4. The purchaser was promptly made aware of these proceedings and is aware of the difficulty they present for completion of the Sale Contract.*
>
> *5. I have not received, whether directly or indirectly, any correspondence or communication from the purchaser to the effect suggested by the Plaintiff in his most recent affidavit or any request from the purchaser for the termination of the Sale Contract (or to any like effect), and for completeness I note that nor has the First Defendant. In particular, no request has been received for return of the deposit in the amount of 12,000 paid by the purchaser."*

In light of the foregoing the concern expressed by the respondents as to possible damage to the second respondent's reputation falls away.

***Is delay a bar to injunctive relief?***

**105.** All of the foregoing being said, there remains, of course, the question of the appellant's delay in seeking interlocutory injunctive relief and whether this should be a bar to the granting of the relief he now seeks.

**106.** It is common case that the notice of motion seeking interlocutory relief did not issue until January 2022, some six months or so after the second respondent entered into a contract for the sale of the Lands. It is also common case that the respondent's dealings with the Lands were known to the appellant much earlier than November 2021 when the proceedings issued. As we know, the respondents' position is that the appellant could have brought an application for an injunction as early as September 2019 in circumstances where he was aware at that stage that the Lands had been put up for auction. The respondents in fact point out that the Lands were withdrawn from auction in September 2019 to facilitate engagement with the appellant. The property was again offered for sale in November and December 2020, again with no intervention by the appellant at that time by way of application for injunctive relief. The Lands were offered for sale a final time in July 2021, again something known to the appellant at the time as is averred to in his affidavits. The contract for sale was entered into on 28 July 2021.

**107.** The respondents contend that the appellant has not explained why he did not issue proceedings in July 2021 by which time he was long aware that the Lands were on the market for sale. It is contended that the appellant's explanation (as set out at para. 9 of his supplemental affidavit sworn 19 May 2022) for not moving for injunctive relief in July 2021, namely that his solicitor had been led to understand by Pepper that the Lands had not sold, should not be accepted. The respondents contend that the appellant's delay had *"a deliberate quality, exacerbating its unreasonable nature".*

**108.** Undoubtedly, the appellant had opportunity on more than one occasion to seek to restrain the sale of the Lands. This was certainly a factor that exercised the Judge in his decision not to grant the injunction, the Judge opining that it would be unjust to the respondents and the purchaser of the Lands to grant the relief sought.

**109.** Albeit I accept entirely that there has been substantial delay on the part of the appellant, which has not been accounted for adequately, in my view, the delay factor has been diluted by the absence of evidence of any specific prejudice accruing to either the respondents or indeed the purchaser of the Lands, and the fact that from the pleadings and documentation put before the Court, it is indisputably the case that the action is almost ready for trial. In those circumstances, I do not consider the delay a bar to the relief the appellant claims.

**Summary**

**110.** For the reasons set out herein, I would allow the appeal and grant the relief sought by the appellant at para. 1 of the notice of motion dated 26 January 2022.

**Costs**

**111.** The appellant has succeeded in his appeal. It would seem to follow that he should be awarded his costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 14 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 14-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

**112.** As this judgment is being delivered electronically, Pilkington J. and Butler J. have indicated their agreement therewith and with the orders I have proposed.