

THE HIGH COURT

[2022] IEHC 331

[RECORD NO 2021 847 P]

BETWEEN

MARTIN DORAN

PLAINTIFF

AND

LUKE CHARLETON and ANDREW DOLLIVER

DEFENDANTS

Judgment of Mr. Justice Dignam delivered on the 31st day of May 2022.

Introduction

1. By Notice of Motion dated the 15th February 2021 the Plaintiff seeks the following reliefs:

“1. An Order restraining the Defendants, their servants or agents, from taking any steps to take possession of or secure control over the Property the subject of these proceedings;

2. An Order restraining the Defendants, their servants or agents, from holding themselves out as receivers over the Property the subject of these proceedings;

3. An Order restraining the Defendant, their servants or agents, from taking any steps to restrict the Plaintiff in his lawful enjoyment of the property the subject of these proceedings;

4. A declaration that the Defendants have not been validly appointed as receivers over the Property the subject of these proceedings;

5. A declaration that a receiver appointed under the Mortgage dated the 2nd February 2006 has no powers other than those set out in the Conveyancing Act 1881... ”.

2. It is clear that the Plaintiff cannot obtain the reliefs at paragraphs 4 and 5 on an interlocutory application and the application is therefore essentially for interlocutory injunctions in terms of paragraphs 1 – 3 of the Notice of Motion. The property in question is lands comprised in Folio 11291 County Wexford.

Background

3. The background to the application is as follows. The Plaintiff is the owner of the lands in Folio WX11291. This is farmland and is part of a larger holding. The Plaintiff is seventy-eight years of age and has farmed the land since 1972 when he inherited it from his uncle.

4. The Plaintiff entered a mortgage with Allied Irish Banks plc (“AIB”) on the 2nd February 2006 in respect of the lands. I will return to the terms of this mortgage.

5. By letter of the 1st February 2021 the First-named Defendant informed the Plaintiff that he and the Second-named Defendant had been appointed as joint receivers over the property. The terms of this letter led to the current application and I therefore set the letter out in full in the next paragraph. The letter was accompanied by a Deed of Appointment which is also dated the 1st February 2021. The Deed recites that the appointment of the Defendants was made by Everyday Finance DAC (“Everyday”) and was supplemental to and made pursuant to the powers contained in the mortgage of the 2nd February 2006. The recitals to the Deed of Appointment also state that AIB transferred, conveyed, assigned and/or otherwise assured all of its rights, title, estate and interest in the mortgage, in the “Total Debt” (as defined in the Mortgage/Charge) and in the Property to Everyday. The Deed of Appointment also recites that “[T]he Secured Liabilities have now become payable by the Mortgagor to EFDAC” The Deed of Appointment additionally provides that “...the Receiver may exercise

all the powers conferred on the Receiver in relation to the Mortgaged Property whether under the Mortgage/Charge or by law or otherwise.”

6. The letter of the 1st February 2021 stated:

“I was appointed Joint Receiver on 01st February 2021 together with Andrew Dolliver over Certain Assets of Martin Doran (In Receivership) which includes the above Property.

As a result of our appointment, the Property is now under our control as Joint Receivers and all powers of management in relation to the Property now rest with us and no transactions may be entered into without our authority. You are therefore no longer permitted to deal with the Property. Furthermore, all rent receivable with respect to the Property is to be made payable to our property management company, who will be in contact shortly.

Kindly forward to us within the next fourteen (14) days a completed Borrower Information Form, which you will find enclosed, along with all relevant records, documents, correspondence and agreements in relation to the Property and the details of any tenants in the Property, together with the names and addresses of other persons who may own any items which are located at the Property or any other belongings not covered by the Mortgage.

Please note that we have put insurance cover in place in respect of the Property over which we have been appointed from the date of our appointment. Please further note the insurance we have put in place covers the Property only and does not include cover for contents.

If you have appointed a property management agent to manage the Property on your behalf, please send us details of the agent and copies of any agreement you have with them.

Kindly forward to us certified copies of passports and certified copies of two utility bills no older than six months...” [emphasis added]

7. The emphasised paragraph is of particular significance to one of the core points made by the Plaintiff and indeed is directly relevant to the first relief sought in the Notice of

Motion, i.e. an Order restraining the Defendants, their servants or agents, from taking any steps to take possession of or secure control over the Property the subject of these proceedings.

8. Solicitors on behalf of the Plaintiff replied by detailed letter of the 8th February 2021. Many of the points raised in this reply were reflected in the submissions made at the hearing and I therefore do not propose to set the letter out in full as I consider the points later in this judgment. In summary the letter disputed the appointment of the Defendants as joint receivers on a number of grounds and further contended that, even if validly appointed, their appointment would not entitle them to communicate with the Plaintiff in the terms of the letter of the 1st February: specifically their appointment, even if valid, would not entitle the joint receivers to take control of the property and to exercise all powers of management in respect thereof and would not prohibit the Plaintiff from dealing with the property, as stated in the letter of the 1st February. In this latter regard, the Plaintiff's solicitor stated, inter alia:

“...the deficiencies in the pre-2009 editions of the AIB Mortgage Deed, insofar as same give only limited powers to a receiver appointed pursuant to such a Mortgage Deed, are well known, and have been acknowledged by AIB for some time now. With regard to the Mortgage, in common with all other standard form of pre-2009 editions of the AIB Mortgage Deed, the only power which a receiver validly appointed on foot of the mortgage deed is (sic) a power to act as a rent receiver i.e. to make demand for and receive payment of rent. The Property is not, and never has been, rented to any party. The Property is, and always has been actively farmed by our Client, in connection with his bloodstock business, since he acquired ownership of the Property from his late uncle in 1972. This fact was known to AIB when advancing monies to our Client and seeking the Property as security...

...In light of the fact that your and Mr. Dolliver's powers pursuant to any valid receivership appointment are limited solely to issues pertaining to Property rental, and given that the Property is not, and for the avoidance of doubt will not be, rented, subject to your and Mr. Dolliver acknowledging this fact, it would appear to us that the issue of your purported appointment as a receiver over the Property is moot and not an issue that requires at this time further Proceedings

and/or for our Client to seek urgent relief from the Court to protect his interests and property rights. This position is however without prejudice to our Client's entitlement to otherwise issue and advance Proceedings, and seek interim relief, with regard to the purported receivership.

In the circumstances, on behalf of our Client we are instructed to seek by return and in any event by 4pm on Wednesday the 10 February 2021, from you and Mr. Dolliver that:

- (a) You furnish written confirmation that you accept that you have no entitlement to seek to demand and/or secure control or possession of the Property;*
- (b) that You, your servants or agents undertake that you will take no further steps or action to seek to demand and/or secure control or possession of the Property;*
and
- (c) that insofar as you have been validly appointed as receivers over the Property your receivership powers are limited to those set out in Section 24 of the Conveyancing Act 1881, which in summary, give a rent receiver "power to demand and recover all the income of the property of which he is appointed receiver".*

9. There was no reply to this letter and the Plaintiff issued proceedings on the 11th February and issued the Notice of Motion on the 16th February 2021.

10. Part of the background and, indeed, part of the Plaintiff's argument that the Defendants were not validly appointed at all is that multiple sets of proceedings had been commenced between the Plaintiffs and AIB relating either directly or indirectly to the lands the subject of these proceedings and/or to the underlying debt. These were all commenced prior to the transfer to Everyday. It is convenient to set out the nature of these different sets of proceedings at this stage:

- (i) Plenary proceedings between the Plaintiff and his son and AIB in which they are suing AIB and others for damages for the sale by AIB and others of an investment product known as "Belfry 6" which the plaintiffs in those proceedings claim were mis-sold to them ("the Belfry proceedings"). These appear to have been compromised very shortly before the hearing.

(ii) Summary proceedings in which AIB sought judgment against the Plaintiff and his wife for €421,398.94 plus interest which AIB claimed was due on foot of two loan accounts and part of which relates to monies advanced to the Plaintiff and his wife for the purpose of making the Belfry 6 investment (“the Summary proceedings”). This is the same underlying debt grounding the appointment of the Defendants. The Plaintiff says that it was on foot of this facility that the Plaintiff for the first time encumbered his lands. On the 9th April 2018 the High Court granted judgment to AIB against the Plaintiff and his wife in the sum of €209,696.23. The balance of the motion for summary judgment was adjourned to plenary hearing. No appeal was brought against the judgment and the judgment amount remains wholly undischarged.

(iii) Special Summons proceedings in which AIB seeks an Order for Possession of the lands the subject of these proceedings on the basis that the power of sale pursuant to the mortgage has arisen. The proceedings have been adjourned generally with liberty to re-enter. They concern the same debt as the Summary proceedings which is the same debt referenced as the “Total Debt” in the Defendants’ Deed of Appointment (“the Possession proceedings”).

(iv) Plenary proceedings brought by AIB against the Plaintiff in which AIB seeks declaratory relief that the sum of €421,398.94 plus interest is due and owing and that in default of payment of that sum that payment be enforced by sale of lands or by the appointment of a receiver over lands in the Plaintiff’s ownership comprised in Folio WX13945. These are separate lands owned by the Plaintiff. These proceedings also stand adjourned generally (“the Lien proceedings”).

11. When the current proceedings were instituted, the Plaintiff made the point that Everyday had not been substituted for AIB in any of these sets of proceedings, that Everyday had not been substituted as the registered owner of the Mortgage and that no application appeared to have been made to the Property Registration Authority to register Everyday as the owner of any interest in the mortgage. Some of these points were clarified during the course of the exchange of affidavits and I address them below.

12. As noted above, there are two limbs to the Plaintiff's case: (i) the Defendants have not been validly appointed as receivers; and (ii) even if validly appointed they are seeking to exercise powers which they do not possess.

The legal principles

13. The parties were agreed as to the correct approach to an application for a prohibitory interlocutory injunction. That approach was set down in *Campus Oil v Minister for Industry and Energy (No. 2)*[1983] IR 88) and was restated in *Okunade v Minister for Justice & Ors* [2012] 3 IR 152 and was recalibrated by the Supreme Court in *Merck Sharpe & Dohme v Clonmel Healthcare* [2019] IESC 65 where O'Donnell J stated:

"...it may be useful to outline the steps which might be followed in a case such as this:-

(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief pending the trial could be granted;

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanamid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined.”

14. In the circumstances of this case, it is not necessary to consider all of these steps in detail and the test for the purpose of this case may be stated as whether the applicant has established that there is a fair, serious or bona fide (these terms being used interchangeably) question to be tried and, if so, how best matters should be arranged pending trial (which involves a consideration of whether the balance of convenience/justice favours the grant or refusal of the injunction, including a consideration of whether damages would be an adequate remedy). The first consideration is often described as a “*threshold*” test in the sense that if the applicant does not reach that threshold then he is not entitled to an injunction and the Court does not need to consider how matters should be arranged pending trial.

15. That threshold, in the case of a prohibitory injunction – whether there is a fair or serious or bona fide question to be tried - is a low hurdle. Barniville J in *O’Gara v Ulster Bank Ireland DAC [2019] IEHC 213* described the test in the following terms:

“It may be helpful to view the threshold in terms of requiring a plaintiff who seeks an interlocutory injunction to demonstrate that there is a question or issue which would withstand an application to dismiss...as disclosing no reasonable cause of action or as being frivolous or vexatious. The threshold is of that order and so unless the case is un-stateable, it is generally not a difficult threshold to meet.”

16. Collins J in *Betty Martin Financial Services Ltd v EBS DAC* [2019] IECA 327 said:

*“neither party takes issue with the judge’s view that the requirement to show a fair question/serious issue does not mean that the Agent must establish a very strong case and that the threshold to be surmounted is generally recognised as low (paragraph 11 of the judgement under appeal). It may be useful to regard this threshold as akin to the threshold that applies where a party seeks to dismiss a claim against it pursuant to the inherent jurisdiction and that was the approach taken by the High Court in a number of decisions cited to us including *Wingview Ltd v NS Property Finance DAC* (per Haughton J, paragraph 14) and *O’Gara v Ulster Bank DAC* (per Barniville J paragraph 42)”*

Is there a fair question to be tried?

17. As noted above, the Plaintiff challenges (i) the appointment of the Defendants as joint receivers and raises a number of points on which he submits he has established a fair question such as would justify an interlocutory injunction in terms of paragraph (2) and (3) of the Notice of Motion, and (ii) what might be termed the “*overreach*” by the joint receivers in claiming powers to take control of and manage the property. It is fair to say that the Plaintiff’s emphasis was on the second point and I will therefore address this first and then return to the challenge to the appointment of the receivers.

Overreach by the Defendants

18. The Plaintiff's case on this point is very straightforward. It is that the powers of any receiver appointed pursuant to the particular mortgage in this case are limited and do not extend to the types of powers claimed by the Defendants. I am satisfied that the Plaintiff has established a fair question to be tried in this regard.

19. As noted above, the Deed of Appointment provides:

"1. EFDAC HEREBY APPOINTS the Receiver to be the receiver over the Mortgaged Property TO THE INTENT that the Receiver may exercise all the powers conferred on the Receiver in relation to the Mortgaged Property whether under the Mortgage/Charge or by law or otherwise.

2. The Receiver hereby agrees and undertakes that he shall act as such receiver and exercise all of the powers conferred upon him by the Mortgage/Charge or by law or otherwise subject to and in conformity with the provisions in that behalf contained in the Mortgage/Charge."

20. These provisions reflect the long-established position that a receiver only has those powers that are conferred on him by the security document and/or statute.

21. The powers under the security document (the mortgage of the 2nd February 2006) are contained in clause 8 which provides:

"8.01 The Bank shall have the statutory powers conferred on mortgagees by the Conveyancing Acts with and subject to the following variations and extensions that is to say:

(a) The secured moneys (whether demanded or not) shall be deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of these presents.

(b) The power of sale shall be exercisable without the restrictions on its exercise imposed by Section 20 of the Act of 1881.

(c)

(d) Any receiver appointed by the Bank under the power to appoint a receiver shall be deemed to be the agent of the Mortgagor and the Mortgagor shall be solely responsible for the acts and defaults of such receiver and for his remuneration and the Bank shall not under any circumstances be answerable for any loss or misapplication of the rents and profits of the mortgaged property or any part thereof by reason of any default or neglect or breach of trust or by such receiver for the time being and all moneys received by any such receiver after providing for the matter specified in paragraphs (i) to (iii) of sub-section (8) of Section 24 of the Act of 1881 and the remuneration of such receiver and the discharge of all costs charges or expenses of or incidental to the exercise of any of the powers of such receiver may and shall if the Bank in its absolute discretion shall so direct be applied in or towards satisfaction of the secured moneys and in such order as the Bank may from time to time conclusively determine.

8.02 At any time or times after the execution of these presents the Bank may without any consent from or notice to the Mortgagor or any other person to enter into possession of the mortgaged property or any part thereof or into receipt of the rents and profits of the mortgaged property or any part thereof”.

22. Thus, the mortgage in this case does not expressly confer any powers on a receiver appointed under the mortgage and does not appear to delegate or provide for the delegation of any of the mortgagee’s powers to the receiver. Indeed, the receiver is expressly stated to be the debtor/creditor’s agent. It appears therefore that the Defendants’ powers as receivers are only those which are set out in Conveyancing Act, 1881 or its successor post 2009, the Land and Conveyancing Law Reform Act 2009. Section 24(3) of the 1881 Act provides:

“The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name of the mortgagor or of the mortgagee, to the full extent of the estate or interests which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.”

23. Its successor, section 108(3) of the 2009 Act provides:

“The receiver may –

(a) demand and recover all the income to which the appointment relates, by action or otherwise, in the name either of the mortgagor or mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of,

(b) give effectual receipts accordingly for such income,

(c) exercise any powers delegated by the mortgagee or other person to the receiver.”

24. As Allen J put it in *Charleton v Hassett* [2021] IEHC 746 in relation to a receiver who, in that case, was also appointed as the agent of the mortgagee (who claimed to be in possession):

“The Plaintiff, as I have said, was appointed in a dual capacity. He was, at the same time, appointed as receiver - invested with the powers created by the deed of charge and by law – and as the mortgagee’s agent – invested with whatever powers the mortgagee had under the deed of charge. It is acknowledged that qua receiver, the plaintiff is entitled to the rents and profits from the property: but there are none such and the plaintiff does not intend to let the property. It is acknowledged – quite correctly – that the plaintiff qua receiver has no power of sale. The case made is that the plaintiff, qua mortgagee’s agent, has lawfully taken possession of the property and is entitled to sell it and is entitled, as of right, to an injunction restraining the defendant from interfering with the sale.”

25. It has not been asserted on behalf of the Defendants that they have been appointed as agents of the mortgagee; nor could it have been so claimed in light of the terms of the Deed of Appointment and no other appointment has been relied upon. Thus, the Defendants’ powers are limited to those qua receiver, which, in light of the absence of any express powers in the mortgage, are limited to those conferred by the 1881 Act or the 2009 Act, i.e. to receive the rent and income.

26. The Defendants appear to acknowledge that they have not been expressly conferred with the powers to take control of and to manage the property but contend that they must have these as ancillary to, or supportive of, the power to receive or collect rents or profits. No authority as to the existence of such implied powers was opened to me.

27. This seems to me to be an argument which will have to be fully ventilated at the trial of the action but in circumstances where the express terms of neither the mortgage or the Deed of Appointment confer those powers on the Defendants and where reliance is placed on implied terms or powers, there is undoubtedly a fair question to be tried that the Defendants do not have such powers.

28. There is therefore a fair question to be tried that the Defendants only have those powers conferred on them by the Conveyancing Acts which in the circumstances of this case are the powers to receive the income to which the appointment relates (rent-receiver) and to give effectual receipts for such income.

29. The real issue is whether the Defendants purported or threatened to attempt to exercise any greater powers than this. It was suggested on behalf of the Defendants that the letter from the Defendants which led to this application simply contained innocuous questions and that the matter had not got to the point of possession or sale (powers which the mortgagee has) yet and the application was therefore premature.

30. I am, however, satisfied that the Plaintiff has established a fair question that the Defendants were claiming or threatening to exercise powers which they do not possess in light of the contents of the letter of the 1st February. The relevant portion of that letter bears repeating:

“As a result of our appointment, the Property is now under our control as Joint Receivers and all powers of management in relation to the Property now rest with us and no transactions may be entered into without our authority. You are therefore no longer permitted to deal with the Property. Furthermore, all rent receivable with respect to the Property is to be made payable to our property management company, who will be in contact shortly.”

31. It seems to me that on any reasonable reading of this passage there is a fair question that the Defendants were claiming an entitlement (and an intention) to (i) take control of the property, (ii) manage the property, (iii) prohibit any transactions by the Plaintiff unless authorised by them, and (iv) prohibit any dealings by the Plaintiff with the property. As held above, there is a serious question whether the mortgage provides for the conferral of those powers on the Defendants. I am further reinforced in my view that there is a serious question in relation to the meaning of this letter by the final sentence in the quoted paragraph, which begins “Furthermore”. This sentence suggests that the Defendants were claiming a power to receive rents *in addition* to the powers referred to in the previous two sentences rather than as ancillary to them. It could of course also be read as simply directing that the rents should be paid to the property management company. I do not have to resolve this question of interpretation at this stage.

32. Thus, I am satisfied that the Plaintiff has established a fair question that the Defendants, in asserting that the property was under their control and asserting an entitlement to all powers of management, were purporting and therefore threatening to exercise powers over the Plaintiff’s lands which they did not possess under the Deed of Appointment or the mortgage.

Wrongful Appointment of Receivers

33. As noted above, the Plaintiff also challenges the validity of the appointment of the Defendants as Receivers. He does so on a number of bases, although a number of grounds fell away during the course of the exchange of affidavits.

34. Firstly, the Plaintiff contended that Everyday was not the registered owner of the mortgage and had not taken any steps to have itself registered as the owner of any interest in the mortgage. It therefore did not have any power under the mortgage to appoint a receiver.

35. In fact in Mr. Charleton’s replying affidavit he exhibited an extract from Land Direct showing pending applications in respect of the Folio which shows that an application for registration was lodged by Everyday on the 13th September 2019. He also deposed to the

outstanding dealing having been completed at the time of swearing his affidavit and that Everyday was registered as the owner of the charge over the Folio. He exhibited the relevant extract registering Everyday's ownership of the charge from the 13th September 2019, i.e. prior to the appointment of the Defendants as receivers. Thus, the supposed fact that Everyday was not the registered owner of the charge can no longer be a basis for contending that the appointment was wrongful or invalid.

36. Secondly, it was contended that the appointment is an abuse of process on the basis that there had been no applications to substitute Everyday for AIB in any of the sets of proceedings referred to above and that Everyday was simply trying to short-circuit the litigation and the Court's determination of the merits of the parties' respective positions through the appointment of receivers rather than taking over the proceedings and prosecuting those proceedings. Mr. Charleton also addressed this in his replying affidavit. He deposed that Everyday had been substituted for AIB in the Possession Proceedings and the Lien Proceedings and that an application was being prepared for the Summary Proceedings. It appears that Murphy J made an omnibus Order relating to a very large number of cases involving AIB, which included substituting Everyday for AIB in the Lien and Possession proceedings. This application was made ex parte and the Order provided it should be served on each of the Defendants and that they should be informed that (a) the grounding affidavits and exhibits to the application are available on request, (b) they may make an application to Court to set aside the Order and (c) they are entitled to contest the transfer to Everyday at the hearing of the action. The Order was not served on the Plaintiff until the 30th March 2021 despite having been perfected on the 22nd September 2020. Perhaps even more concerning is the fact that no notice of the making of the Order was given until that date. No explanation for these failures was given.

37. While this is far from satisfactory, the factual position is that Everyday has now been substituted for AIB in the Lien and Possession proceedings and thus any reliance that might have been placed by the Plaintiffs on Everyday not being a party to those particular proceedings no longer applies.

38. Mr. Charleton stated in his affidavit that a substitution application was being prepared for the Summary Proceedings. It appears however that no such application has been made to date and that Everyday has not been substituted for AIB.

39. The real question, however, is whether the appointment of the receivers is an abuse of process as an attempt to short-circuit the litigation in circumstances where some of the litigation is concerned with the same underlying debt and the same lands.

40. This must be examined both on the level of general principle and by reference to the particular facts of this case, i.e. what was being sought to be done by the receivers in this case.

41. In my view, it is difficult to see how it could be said on the level of general principle that a charge holder cannot appoint a receiver simply because it has also engaged other remedies available to it either under the security document or the general law. Under the mortgage deed, the mortgagee (AIB/Everyday) has a power of sale and is therefore entitled to seek an Order for Possession and sale from the Court. I see no basis for saying that they cannot also avail of the remedy of appointing a receiver to receive the rents and incomes from the lands or even to act as a receiver/manager if that was properly provided for. They are two separate remedies, both of which are available under the mortgage. Similarly, the right to appoint a receiver where there has been a default in repayment and the right to sue to recover the debt by way of judgment (and the enforcement mechanisms that will follow) are two separate remedies and are not, it seems to me in the absence of any authority to the contrary, mutually exclusive.

42. Thus, if it were being suggested that as a matter of general principle the appointment of the Defendants as joint receivers was wrongful because the charge holder had previously availed of the right to sue for possession and sale of the same lands or for summary judgment in respect of the debt I would be forced to conclude that the Plaintiff had not established that there was a fair question to be tried on that point.

43. However, there is more nuance to the contention being made by the Plaintiff. The first point made on his behalf is that as a matter of fact the receivers were threatening to take possession of the property and this was part of the basis for saying that there was an attempt to short-circuit the litigation because AIB had already applied to Court for an Order for possession and that application had been adjourned generally. However, I do not believe that the evidence supports the contention that there was a threat to take possession of the property.

I have quoted the letter of the 1st February 2021 from the Defendants in full above and there is nothing in that letter on which I could conclude that a fair question has been raised that there was an immediate or any threat to take possession of the lands.

44. The second point made is that the underlying debt has not become payable to Everyday. This has a number of different limbs: (i) while there is undoubtedly a debt owed on foot of the judgment in the Summary proceedings, that judgment is in favour of AIB and not Everyday and is therefore not owed to Everyday, (ii) the balance claimed in the Summary proceedings has been adjourned to plenary hearing and is therefore a disputed debt and is therefore not yet owed, and (iii) there has been no demand for repayment by Everyday.

45. In respect of limb (iii), it is not disputed that no demand for payment was made by Everyday prior to the appointment of the Defendants as receivers. However, I am not satisfied at this stage, in the circumstances of this case, that the Plaintiff has established a fair question that this is fatal to the appointment of the Defendants. The Defendants relied on section 28 of the *Judicature (Ireland) Act 1877* and the Deed of Transfer of the 14th June 2019 which transferred AIB's interests to Everyday in arguing that it was not necessary for Everyday to make a demand. Section 28 of the *1877 Act* provides, inter alia:

“ ...

(5.) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sign and cause to be served notices to quit, determine tenancies, or accept surrenders thereof and sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person; and such action suit or proceeding shall not be defeated by proof that the legal estate in the lands the possession of which is sought to be recovered, or in respect of which the rents or profits are sought to be recovered, or in respect to which the trespass or other wrong has been committed, is vested in such mortgagee: Provided always, that a mortgagor shall not be at liberty to exercise any of the

powers hereby conferred if an express declaration that they shall not be exercised is contained in the mortgage.

(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.”

46. The Global Deed of Transfer provides, inter alia:

“[redacted] the Sellers hereby unconditionally, irrevocably and absolutely grants, conveys, assigns, transfers and assures unto the Buyer, subject to the subsisting rights of redemption of the Borrowers and any Obligor and to the extent capable of assignment, all of their rights, title, interest and benefit (past, present and future) in and under each Underlying Loan, each Mortgage Asset and each of the Finance Documents and including, but not limited to, the following:

....

the benefit of and the right to sue on all covenants with and undertakings to the Sellers in each Underlying Loan;

the right to demand, sue for, recover, receive and give receipts for all principal moneys payable or to become payable (in respect of each Mortgage Asset, the Underlying Loans and the other Finance Documents) or the unpaid part thereof and the interest (including any accrued and unpaid interests) due or to become due thereon after the Completion Date;

...”

47. It is clear that AIB made a demand, even if only in the form of the issuing of summary proceedings for the recovery of the mortgage amount and it seems to me at this stage that the effect of section 28 of the 1877 Act and the Global Deed of Transfer is that Everyday steps into the shoes of AIB. It seems to me that it would be artificial to require AIB’s successor to have to make a separate demand. In light of my findings on limbs (i) and (ii) I do not need to consider this point in detail but on the basis of the argument to date I am not satisfied that the Plaintiff has discharged the burden of establishing a fair question on this point.

48. Turning then to the other two limbs upon which it is argued that the debt has not become payable to Everyday, in essence, what is argued by the Plaintiff in respect of limb (i) is that once judgment was obtained by AIB in respect of a portion of the underlying debt, that portion ceased being a debt under the mortgage, and was a debt solely under the judgment instead; that the benefit of that judgment has not been transferred to Everyday (particularly in circumstances where Everyday has not been substituted for AIB in the Summary proceedings in which that judgment was obtained) and that in any event no demand for payment to Everyday has been made by Everyday. In respect of limb (ii) the Plaintiff argues that a receiver can not be appointed in respect of a disputed debt; that the remaining portion of the claim in the Summary proceedings has been adjourned to plenary hearing and can only be seen as constituting a disputed debt and can not therefore form a basis for the appointment of the Defendants.

49. It seems to me to be beyond doubt that the Defendants could not rely for the appointment of a receiver on that portion of the alleged debt which has been adjourned to plenary hearing. Therefore, in the circumstances of this case, the real question is whether the

judgment in favour of AIB (no substitution application having been made) means that it is no longer a debt under the mortgage and can therefore not ground the appointment of receivers by Everyday.

50. No explanation has been given as to why a substitution application has not been made and in fact there was no real discussion at the hearing whether this would have the effect of passing the benefit of the judgment to Everyday other than that it was accepted on behalf of the Defendant that substitution would be necessary for Everyday to enforce the judgment *per se*. But the Defendants did not accept that the fact that Everyday had not been substituted for AIB prevented Everyday from recovering the underlying debt, of which the judgment amount remains part.

51. The current state of affairs is that there is a judgment in favour of AIB for a significant portion of the underlying debt. The Plaintiff's essential argument is that there is nothing in the Global Deed of Transfer to confer the benefit of the judgment on Everyday - the fact of a judgment having been obtained has changed the nature of this debt and takes it outside the terms of the mortgage.

52. I anticipate difficulty with this argument. As appears from paragraph 6(b) of Mr. Doran's grounding affidavit, AIB sought judgment against the Plaintiff and his wife in the sum of €421,298.94. Part of this amount was advanced on foot of a loan facility letter dated the 11th January 2007. As is apparent from Mr. Doran's affidavit this was secured by the 2006 mortgage. That amount remains unpaid. The Plaintiff's argument that once judgment was obtained over part of the debt which was secured by the mortgage it ceased being secured by that mortgage risks creating a degree of artificiality in that it relies on establishing that the nature of a debt changes absolutely once judgment is obtained. It seems to me that it is certainly arguable on behalf of the Defendants that the amount can be a debt under the judgment but also a debt secured by the mortgage. Of course, obtaining a judgment also gives the judgment creditor additional means of enforcement.

53. However, it is not the Court's function at this stage to conclusively decide this issue and implicit in my language in the preceding paragraph is that there is an argument as to the status of the amount due on foot of the judgment. While I anticipate that the Plaintiff might have difficulty on this point, I am satisfied, given how *Barnville J* in *O'Gara* describes the

threshold to be met by an applicant for a prohibitory injunction, that the Plaintiff has established that there is a fair question to be tried on this point.

Arrangements Pending Trial/Balance of Convenience

54. Given that I am satisfied that the Plaintiff has satisfied the ‘threshold’ test I must consider how best matters should be arranged pending trial and part of that consideration is where the balance of convenience or balance of justice lies and whether it is in favour of or against the grant of any of the injunctions. As noted above, I must consider the adequacy of damages as part, and the most important part, of that exercise.

55. Were it not for the fact that the judgment given in the Summary proceedings remains wholly undischarged I would readily conclude that the balance of convenience favours the grant of the injunctions. Unlike some other “receiver injunction” cases (as described by Allen J in *Hassett*) the Receivers in this case have not sought possession and have not taken any steps to sell the property (which are often the triggers for injunction applications and for the court’s intervention). Even though a threat of possession or sale has not arisen, it seems to me that were it not for the outstanding debt, the balance of convenience would nonetheless favour the grant of the relief. The lands in question are a working farm. An interference in the control and management of the lands, an entitlement to which appears to be claimed in the letter of the 1st February 2021, is of particular significance in those circumstances and could be extremely prejudicial to the Plaintiff’s right and ability to carry on his farming business. That in itself could not be determinative.

56. Conceivably any prejudice to the Plaintiff’s right and ability to farm the lands could be compensated by damages but in circumstances where the receivers have not stated what they envisage “control” or “management” to mean it is impossible to assess how deep any impact would be.

57. While I did not hear any evidence as to how a farming business can be rebuilt, I think it would be accepted that in the event that, for example, the farming business and the herd or stock had to be reduced and the Plaintiff were ultimately to succeed, it could take a considerable period to build it back up. It is also relevant to bear in mind that the Plaintiff is

of advancing years, that he has farmed these lands for 50 years, and that his use of the lands goes beyond a mere commercial enterprise though it clearly has a large commercial element to it (as did the enterprise in *Betty Martin*). It seems to me that when all of these are taken in the round damages would not be an adequate remedy. The inconvenience for the Defendants on the other hand is that the performance of their functions is delayed until the trial of the action. The Plaintiff has deposed, and there has been no challenge to it, that the lands do not earn any rent so there is no question of the Defendants being denied rents to which they might be entitled. Any real financial prejudice would be caused to the charge holder (Everyday) who is not a party to these proceedings. I am slow therefore to have regard to their interests in assessing the balance of convenience but in any event it seems to me that the only prejudice to them would be a delay in the receivers commencing their work and potentially a delay in them realising their security. But no evidence has been placed before the Court to suggest that any such delay would prejudice the value of the security or would mean that they would not ultimately recover the full amount of the indebtedness or that there are insufficient assets to satisfy any award of damages against the Plaintiff on foot of his undertaking as to the damages.

58. However, the Court, in exercising its equitable jurisdiction, can not ignore the fact there has been a judgment against the Plaintiff since April 2018 and it remains unsatisfied. While the Plaintiff argues that the judgment debt is no longer part of the underlying indebtedness and that it is currently still owed to AIB and not Everyday, it seems to me that there is a direct and sufficient connection between the judgment amount and all of the matters the subject of this application (indeed it was a core part of the Plaintiff's arguments) such as to require me to consider this judgment debt when considering where the balance of convenience lies and how best matters should be arranged pending trial. While my view is that it would not be appropriate to treat the non-payment of the judgment debt as a bar to the Plaintiff securing relief, as urged by the Defendants, particularly where he has given a large portion of the amount outstanding to his solicitor, it can not be ignored that if the Court were to grant an injunction without conditions in respect of this judgment it would effectively be giving the Plaintiff a further period of non-payment. In my view that could not be countenanced in any assessment of where the balance of justice lies. It simply could not be an appropriate balance to conclude that the Plaintiff is entitled to the benefit of equitable relief from the Court while he has not and continues not to satisfy a judgment of the same court in

respect of the underlying debt, particularly where he has sworn to the fact that he is, or at least was, in funds to discharge the judgment amount.

59. In this regard, Mr. Doran stated in his second affidavit that:

“...I say that your Deponent is, and always has been, in funds for the purpose of discharging the said judgment. Further in this regard I say that your deponent in fact lodged funds in the amount of €130,000 with my Solicitors in August 2018, which funds my solicitors continue to retain. I say that it was my intention to transfer a further sum of circa €80,000 to my solicitors to discharge the balance of the judgment sum (which totals €209,696.23), however I was advised by my solicitors not to do so in circumstances where your Deponent’s efforts, through my solicitors, to make arrangement to discharge the said sum, and indeed post the Order made on 9 April 2018 to reach an overall compromise or otherwise agreement as regards the ongoing progress of each of Judgment Proceedings, the Possession Proceedings and the Lien Proceedings, having particular regard to the progress of the Belfry Proceedings, through contact with AIB’s solicitors, Holmes O’Malley Sexton solicitors, met, and have continued to meet with, no response. I say that insofar as this position pertains through the fact that AIB has disposed of its interest in the facilities at issue in the Judgment Proceedings, same was never formally communicated to my solicitors (or otherwise to your Deponent) by or on behalf of AIB or its solicitors.”

60. In circumstances where the Plaintiff has not disputed the judgment debt, has lodged €130,000 with his solicitor, which they continue to retain, and had €80,000 available to put with the €130,000, and seeks equitable relief from this Court, it seems to me that the balance of justice could only favour the grant of the relief sought if these moneys were applied towards the discharge of the judgment. Having concluded that a serious question has been established in relation to both the powers that the Defendants appear to have purported to exercise and the validity of the appointment of the Defendants as receivers, and having considered the balance of justice, I am disposed to granting interlocutory injunctions in terms of paragraphs 1-3 of the Notice of Motion, subject to arrangements being made in respect of the discharge of the said judgment amount. I appreciate that this may require some period of time and some practical steps in circumstances where, for some unexplained reason,

Everyday has not been substituted for AIB in the summary proceedings and where the Plaintiff has not been told to whom that amount should be paid. I will, therefore, adjourn the proceedings for a period to be discussed with the parties with the interim injunction continuing for that period in order for the parties to discuss and take whatever steps are necessary.