

THE HIGH COURT

[2022] IEHC 218
[2020 6198 P]

BETWEEN

BRENDAN O'REILLY AND DARREN O'REILLY

PLAINTIFFS

AND

**PROMONTORIA (FINN) LIMITED, PAUL MCCLEARY, JIMMY MURPHY AND
DAMIEN HARPER**

DEFENDANTS

JUDGMENT of Ms. Justice Emily Egan delivered on the 7th day of April, 2022

Introduction

1. The plaintiffs seek interlocutory injunctions (a) directing the second, third and fourth named defendants (“the receivers”) to deliver up possession of two properties in County Meath (“the properties”) and (b) restraining the defendants from selling or marketing the properties.

2. The appropriate legal principles to apply in relation to the grant or refusal of an injunction are those set out in the judgment of O’Donnell J. (as he then was) in *Merck Sharpe and Dohme Corporation v. Clonmel Healthcare* [2019] IESC 65. Those principles are well known and will not be repeated here. In applying those principles, the first issue to be determined is whether or not the plaintiffs have raised a fair issue to be tried. If they have, then it will be necessary to consider the balance of convenience and if necessary to craft a remedy which would achieve the “least risk of injustice”.

Factual Background and issues arising

3. By a loan facility dated 6th April, 2006, Ulster Bank Ltd (“the Bank”) advanced to the plaintiffs €262,000 which was secured by a mortgage dated 8th September, 2006 over 17 Elm Drive, Athlumney Wood, Navan, County Meath (“the Elm Drive mortgage”). By a loan facility dated 21st June, 2006, the Bank advanced €323,000 which was secured by a mortgage dated 29th June, 2007 over 7 Distillery Quay, Mill Lane, Navan, County Meath (“the Distillery Quay mortgage”).

4. It is not disputed that the monies were advanced pursuant to these loan facilities, nor that the plaintiffs have defaulted on their repayment obligations. However, the plaintiffs maintain that interest was overcharged on their accounts in respect of both facilities.

5. These loan facilities were transferred by the Bank to the first named defendant (“Promontoria”) by global deed of transfer dated 29th September, 2015. Promontoria’s interest in the mortgages is registered as a burden on the respective folios of the properties. No argument is raised by the plaintiffs in relation to the validity or effectiveness of this transfer. However, the plaintiffs argue that they were not appropriately notified of the transfer of the loan facilities and related mortgage securities.

6. Letters of demand were sent by Promontoria to the plaintiffs in respect of the Elm Drive mortgage in March, 2017 and in respect of the Distillery Quay mortgage in February, 2013. The plaintiffs challenge the legal validity of these demands.

7. It is not disputed, that the plaintiffs did not make payments on foot of these demands. The plaintiffs however contend that they had previously entered into an agreement with the Bank in the context of Circuit Court proceedings seeking an order for possession, pursuant to which it is alleged the Bank agreed to accept reduced repayments in respect of each facility. The plaintiffs submit that Promontoria is bound by this agreement. Furthermore, the plaintiffs

argue that, as the Bank had elected to commence proceedings seeking possession, Promontoria is not legally entitled to appoint the receivers.

8. The plaintiffs also challenge the legal validity of the various instruments of appointment of the receivers on a number of grounds.

9. Since their appointment, the receivers have been unable to take possession of the properties or to collect any rent therefrom. However, the plaintiffs maintain that the receivers have unlawfully interfered with the sitting tenants and tenancy agreements in relation to both properties in taking unjustified cases to the Residential Tenancies Board, purporting to issue notices to quit and termination notices and removing advertisements for the rent of the properties from Daft.ie.

10. This judgment will now consider the legal issues arising for determination.

Validity of notice of purported transfer by letter of 5th November, 2015

11. Although the plaintiffs' written submissions advanced an argument that the global deed of transfer dated 29th September, 2015 was legally invalid, this was not maintained at the hearing of the action. Rather, the plaintiffs challenge is to the validity of the notice of this transfer by letter of 5th November, 2015 from the Capita Asset Services (Ireland Ltd) ("Capita") addressed to the plaintiffs at an address at 28 Oak Crescent, Athlumney Wood, Navan, County Meath. The subject matter of the letter is stated to be; "*Your loan facilities with Promontoria (Finn) Ltd (formerly your loan facilities with Ulster Bank Ireland Ltd or its affiliates (Ulster Bank) under borrower entity Brendan O'Reilly, Darren O'Reilly ("your facilities")*". Under the heading, "*Important information on your facilities*" the letter states that the Bank "*recently*" wrote to the plaintiffs to inform them that the facilities noted, including the facility letter, security documents and the rights relating to the facilities have been sold to Promontoria. The letter informs the plaintiffs that Capita has been appointed by

Promontoria to provide various loan management administration and relationship management services effective from 23rd October, 2015, which appointment includes managing the collection and repayment of the plaintiffs' loan facilities. The letter goes on to indicate that the loan account numbers would change and provides the details of the former Ulster Bank loan account numbers for each property and the new loan account numbers. The plaintiffs' written submissions argue that whilst the letter sets out the relevant account numbers, there is no express reference to the facility letters or mortgages. At the hearing of the action, the plaintiffs accepted that the reference to the account numbers adequately identified the relevant loan facilities and associated securities. This concession was in my view well made.

12. However, the plaintiffs maintain that the notice of the 5th November, 2015 amounted to no more than a claim by Promontoria to the Ulster Bank debt and that this was insufficient. They argue that the statement in the letter that the loan facilities had been “*sold*” to Promontoria was insufficiently specific to convey to the plaintiffs what had occurred in relation to their loans and that the notice ought to have specified that the loans had been assigned (rather than merely “*sold*”).

13. S. 28 (6) of the Supreme Court of Judicature (Ireland) Act, 1877 provides that any absolute assignment of any debt or other legal chose in action of which express notice in writing shall be given to the debtor shall be deemed to have been effectual in law to pass and transfer the legal right to such debt or chose in action from the date of such notice. The plaintiffs rely on *AIB Mortgage Bank v. Thompson* [2017] IEHC 515 in which Baker J. held that the test in the circumstances of each case is whether there was sufficient information to enable the debtor to know not merely that a third party claims to own his debt, and claims to have the right as a matter of law to give a discharge for that debt, but that the third party in question has taken an assignment or assurance of that debt from the party with whom he or

she originally contracted. The plaintiffs emphasise that while Baker J. accepted that a notice does not have to be sent with the intention of constituting a statutory notice, it must be sufficiently clear. A notice such as that in these proceedings which only impliedly identifies an assignment, is said to be sufficient.

14. In *AIB v. Thompson*, the court decided that the two documents relied upon by the plaintiff in that case as together constituting notice to the borrower for the purposes of s. 28 (6) were insufficient. In this respect, however, I note that the first such document, being an account statement, merely stated that Allied Irish Bank had transferred substantially all of its Irish mortgage business to the plaintiff. However, a person receiving this notice could not have known that the individual debt of that person was included in the bundle assigned. This is not the case here as the letter from Capita expressly refers to the plaintiffs' loan facilities by their relevant account numbers and indicates that those facilities have been sold to Promontoria. The notice in this case is therefore distinguishable from the first document relied upon by the plaintiff in *AIB v. Thomson*.

15. The second document relied upon by the plaintiff in *AIB v. Thomson* is a demand letter which asserted that the plaintiff was "entitled to the benefit of the agreement" (i.e. the defendant's loan agreement). Baker J. concluded that the letter was most properly viewed as one in which the plaintiff claimed to own the benefit of the loan agreement, not one which notified the debtor of the fact or means by which this had happened, namely that the plaintiff had taken an assignment of the debt. In such circumstances, the borrower ought not be required to extrapolate that the benefit had been transferred from the original creditor to the company now claiming the benefit of the debt. In the present case, the letter of the 5th November, 2015 is distinguishable in that it expressly states that the loan facilities had been sold to Promontoria. This is more than a vague assertion that Promontoria is entitled to the benefit of the loan facilities.

16. Furthermore, the letter of 5th November, 2015, which is essentially a “hello letter” specifically refers to a previous letter from the Bank informing the plaintiffs that their loan had been sold to Promontoria, i.e. “the goodbye letter”. Although the Bank’s “goodbye letter” has not been exhibited, the plaintiffs do not deny its existence or aver that they did not receive it. The plaintiffs’ affidavits are silent in this regard. It is also notable that, notwithstanding that the importance of the “goodbye letter” was highlighted in an affidavit sworn by Promontoria in February 2021, no further specific reference was made to this issue in the plaintiffs’ further replying affidavit in April of that year (or any time since).

17. In this case, the unchallenged evidence is that the plaintiffs ceased to make any payments whatsoever on foot of either loan agreement on 1st March, 2015. So, even prior to the transfer/assignment of the plaintiffs’ loan facilities to Promontoria, payments had ceased. No suggestion can therefore be made by the plaintiffs that payments ceased because they were labouring under a misapprehension as to the identity of their lender. No argument has been made that the plaintiffs’ impression was that the loan remained with the Bank. Further, I note that at no time after November 2015 did the plaintiffs raise any query or issue in relation to the role of Promontoria in relation to the loans. This suggests that the plaintiffs were given sufficient information to understand that the Bank had sold the debt to Promontoria with whom the plaintiffs could deal with for the purposes of discharging the debt. Indeed, I note that the plaintiffs made an offer of €100,000 to Promontoria in full and final settlement of all debts on or about 9th June, 2020.

18. I also reject the plaintiffs’ argument that the use of the phrase “*sold*” rather than “assigned” in the notice of 5th November, 2015 is fatal. A debt may only be transferred by assignment and there has been no suggestion in the plaintiffs’ affidavits that they did not understand the nature of the relevant transaction.

19. On this issue, as on other issues, the plaintiffs' affidavits and indeed their written and verbal submissions, repeatedly refer to putting Promontoria "on strict proof" of certain matters that it is contended Promontoria have "failed to establish". As the plaintiffs are seeking interlocutory relief, they bear the burden of putting forward credible evidence demonstrating that there is a fair issue to be tried on each issue. It is therefore for the plaintiffs to set out the facts necessary to enable the court to exercise its discretion to grant an interlocutory injunction. It is not for the plaintiffs to call upon the defendants to satisfy the court as to certain factual matters in order to persuade the court not to grant interlocutory relief.

20. In short, I find that the plaintiffs have not established a fair issue to be tried to the effect that the notice of 5th November, 2015 is insufficient to constitute express notice of the transfer. Although therefore there are certain matters which may require clarification at the hearing in order that a final determination may be made on this issue, for example in relation to the receipt by the plaintiffs of the "goodbye letter" sent by the Bank, the plaintiffs have not discharged the necessary onus of proof to obtain interlocutory relief.

Validity of demand letters

21. The plaintiffs' written submissions dispute that there are valid demands to ground the appointments of the receivers. Different arguments are made in relation to the Elm Drive property on the one hand and the Distillery Quay property on the other.

22. In respect of the Elm Drive property, the plaintiffs rely upon clause 16 of the mortgage deed of 8th September, 2006 which provides:

"A demand or notice hereunder shall be in writing signed by an officer or agent of the bank and may be served on the mortgagor either by hand or by post... a demand or notice by post may be addressed to the mortgagor at the registered office or address

or place of business last known to the bank and shall be deemed to have been received on the day following the day on which it was posted and shall be effective notwithstanding it be returned undelivered and notwithstanding the death of the mortgagor.”

23. The plaintiffs argue that the demand in respect of the Elm Drive property dated 14th March, 2017 was not properly served as it was sent directly to the mortgaged property itself, rather than to the “*last known address*” of the plaintiffs, which was 28 Oak Crescent, Athlumney, Navan, County Meath. The plaintiffs argue that Promontoria ought to have been well aware of the correct address and observe that the Civil Bill dated 11th November, 2013 pursuant to which the Bank had sought an order for possession of the Elm Park property pleads that both individuals reside at the Oak Crescent address. They also emphasise that the notice of 5th November, 2015 previously referred to was also sent by Capita to the correct Oak Crescent address.

24. In *McDonald v. Hill* [2014] IEHC 629, Binchy J. found that it was clear from the terms of the relevant mortgage deed that it was a prerequisite that a letter of demand was issued by the bank to the defendant before it may exercise its power of appointment of a receiver. Binchy J. held that although it was not necessary to send the demand by registered post, or indeed to prove that the demand had been received by the borrower, the bank must nonetheless demonstrate that the letter of demand was sent by post or left at the defendant’s usual or last known abode or place of business. In *McDonald*, Binchy J. was ultimately satisfied that a serious issue to be tried between the parties had arisen in relation to whether the bank could prove definitively that the letter of demand had been sent. However, the judgment makes it clear that the defendant stoutly denied ever having received the letter of demand. There was therefore a clear dispute of fact which could have not been resolved on affidavit at the interlocutory stage. In the present case, on the other hand, the plaintiffs do not

expressly deny having received the 2017 letter of demand which was served by registered post to the mortgaged property or even state that they have no recollection of same. One does not find in the lengthy exchange of affidavits, or the multitude of documents referred to therein, any averment or even suggestion that this demand was not received. Rather than stating that the letter was not received, the plaintiffs state that they “*require proof that this purported demand was served on them.*” This is entirely different to the situation that pertained in *Hill*.

25. Overall, it seems to me that the plaintiffs’ approach to this issue is similar to their approach to the issue of the notice of 5th November, 2015. Thus, rather than stating plainly that the demand letter was not received, the plaintiffs state that they “*require proof*” that this purported demand was served on them.

26. The wording of clause 16 to the effect that the demand “*may*” be addressed to the last known address of the mortgagor does not state that it is mandatory to send the demand only to the address specified and that service on any other address is ineffective, even if received.

27. Therefore, whilst it may well have been that the mortgagee could not avail of that part of clause 16 which deems a demand addressed to the mortgagor’s last known address to have been received, this is not determinative of the present application in the absence of an averment that the demand was not received.

28. It is clear that the purpose of service, in the context of a demand pursuant to a mortgage deed, as in the context of court proceedings, is to give the borrower/defendant notice and sufficient warning of the demand or proceedings, as the case may be. Although it is not for this court to decide on an interlocutory basis whether the relevant demands were received, I am not satisfied that the plaintiffs have raised a fair issue to be tried that the letter of demand was not received by them or that, in all of the circumstances, service of the

demand by registered post to the mortgaged address is insufficient service such as to render invalid the appointment of the receivers to the Elm Drive property.

29. In respect of the Distillery Quay property, the Bank sent a letter of demand on 25th February, 2013 addressed to the Oak Crescent address. The plaintiffs do not deny receiving this letter. They make no argument that the subsequent transfer of the loan facility and security of Promontoria or the passage of time since this demand in any way renders it invalid. However, the plaintiffs maintain that Promontoria is estopped and/or has waived its right to rely on such demand by reason of an agreement between the plaintiffs and the Bank in the context of the Circuit Court proceedings pursuant to which the Bank sought repossession of the Elm Park premises. The plaintiffs aver that they came to an agreement with the Bank that the sum of €250.00 would be paid per month on an ongoing basis in respect of the Elm Drive property and that a separate amount of €250.00 per month would be paid in respect of the Distillery Quay property. The plaintiffs aver that “*at all material times*” these sums were paid over to the Bank in respect of each property, but that the Bank and Promontoria erroneously failed to reflect this new agreement in the assignment documentation, in the “hello letter” or in the demand for repayment. In this regard, the plaintiffs refer to an affidavit sworn by the Bank in the Circuit Court proceedings which exhibits an up-to-date statement of account including evidence of payments in the amount of €250.00 per month over the period 1st April, 2014 to 1st March, 2015. The plaintiffs argue that, by entering into an agreement for the reduced payments, the Bank (and Promontoria as its successor in title) has effectively waived or suspended its strict entitlements under the mortgage deed.

30. The plaintiffs’ averments in this regard are startlingly bare. They have placed no supporting evidence before the court to support their averment that any agreement was reached with the Bank in respect of either the Elm Drive property or the Distillery Quay

property. Nor have they averred to the details of the alleged agreement such as when or by whom it was concluded; nor is there any averments as to the essential terms of this agreement, such as for example, whether the reduced repayments were intended to be a temporary or permanent arrangement and what was to occur in the event of further default. The plaintiffs do not aver as to whether the Circuit Court possession proceedings were struck out, discontinued or adjourned generally on foot of this agreement. No correspondence referring to this alleged agreement has been placed before this court and no order in the Circuit Court proceedings reflecting such agreement was exhibited or referred to. Nor were the plaintiffs able to shed any light whatsoever on any of the above matters during the course of the hearing. The plaintiffs' position at the hearing before this court was that they did not know what became of the Circuit Court proceedings.

31. It is striking that the statements of account exhibited by the plaintiffs, which record payments of €250.00 into the account over a short number of months, are in respect of the Elm Drive property only and not the Distillery Quay property. In respect of the latter property there is no evidence whatsoever that this intended agreement applied to it and no evidence of payments of €250.00 per month on foot of this agreement.

32. Furthermore, it is clear that the payments in respect of the Elm Drive property over the period 1st April, 2014 to 1st March, 2015, were made during the currency of the Circuit Court possession proceedings. The relevant statements of account were exhibited in the Bank's affidavit sworn for the purposes of grounding the application for possession. This state of affairs is inconsistent with the proposition that the payment of €250.00 per month was acceptable to the Bank as either a temporary or permanent settlement of the possession proceedings.

33. In addition, there is no suggestion that any payments were made by the plaintiffs on foot of this alleged agreement in respect of either property after 1st March, 2015. No

payments whatsoever have been made by the plaintiffs to Promontoria since September 2015. Therefore, even if some form of temporary agreement had been reached in respect of the Distillery Quay premises, it has long since been breached by the plaintiffs.

34. In any event, if the plaintiffs genuinely believed that a legally binding agreement had been entered into with Ulster Bank for reduced monthly payments on either property with which they had complied or with which they wished to comply, then it is very difficult to understand why they did not raise this with Promontoria or Capita at an earlier point in time. It is equally difficult to fathom the plaintiffs continued reticence in clearly setting out the terms of this settlement agreement, averring in sufficient detail as to the circumstances in which the agreement was concluded and demonstrating their compliance therewith by regular payment of the alleged settlement amount. All of this is entirely lacking. The existence of this agreement is denied by Promontoria. I find therefore that there is not a fair issue to be tried that the demand in respect of the Distillery Quay property is invalidated by the contended for agreement or any estoppel arising on foot of same.

Exclusivity of remedies

35. The plaintiffs also make a related point in relation to the Circuit Court proceedings and maintain that the lender cannot institute Circuit Court proceedings seeking possession and at the same time appoint a receiver.

36. The plaintiffs rely upon a comment by McDonald J. in *Moroney v. Bank of Scotland* [2018] IEHC 379 in which the learned Judge stated at paragraph 169, that if the lender had wished to ensure that no point could be taken against it in relation to the contended validity of the appointment of the receiver, it would have been a relatively straightforward matter to proceed in accordance with the strict terms of clause 9 of the relevant mortgage deed, or alternatively, to bring its own proceedings for possession under s. 62(7) of the Registration of

Title Act 1964 (emphasis added). The plaintiffs rely upon McDonald J.'s use of the phrase "*or alternatively*" to argue that the two potential remedies, proceedings for possession and appointment of a receiver, are mutually exclusive.

37. The quoted passage does not bear this interpretation. McDonald J. was not addressing the issue of exclusivity of remedies or whether the mere commencement of proceedings seeking an order for possession necessarily disentitles the lender from appointing a receiver.

38. The plaintiffs' argument would have force if the Bank had obtained an order for possession and, furthermore had taken up possession on foot of this order. At that point, the mortgagee in possession would be responsible in law for the property in the usual way. Once this occurred, there would be an inconsistency in simultaneously appointing a receiver who would take possession as agent of the mortgagor. However, this does not arise in this case as neither the Bank, nor Promontoria have either obtained an order for possession or taken up possession of the properties. It is therefore open to Promontoria as charge holder and mortgagee to exercise its rights under the mortgage deed to appoint a receiver. Accordingly, I find that the plaintiffs have not raised a fair issue to be tried that any principle of exclusivity of remedies prevents or renders invalid the appointment of the receivers in this case.

Invalidity of appointments of receivers

39. The sequence of events pertaining to these appointments, which is somewhat involved, is set out below.

40. The second named defendant, Mr. McCleary was originally appointed as receiver over the Elm Drive property pursuant to an instrument of appointment dated 15th May, 2017. The plaintiffs maintain that this deed of appointment is invalid given that it referred to a mortgage dated 8th October, 2006 when there was no such mortgage over the Elm Drive property. Promontoria states that this was a typographical error in the instrument of

appointment and that out of an abundance of caution, Mr. McCleary was therefore discharged as receiver on 9th October, 2019 and correctly re-appointed on the same date. The plaintiffs also allege that both the deed of discharge of 9th October, 2019 and the instrument of appointment of the same date are invalid for a number of reasons.

41. In respect of the Distillery Quay property, joint receivers were appointed on 23rd December, 2013. The plaintiffs allege that this appointment was invalid because there was no provision in the mortgage deed dated 29th June, 2007 for the appointment of more than one receiver, or joint receivers. The joint receivers were discharged by deed of discharge dated 8th January, 2016 and the third named defendant, Mr. Murphy was appointed as receiver by instrument of the same date. The plaintiffs also allege that both the deed of discharge and the instrument of appointment of 8th January, 2016 are ineffective *inter alia* because there is no evidence that the joint receivers ever accepted their purported discharge. Mr. Murphy indicated his intention to retire from practice in 2020 and was discharged on 18th November, 2020. By instrument of appointment of the same date, the fourth named defendant, Mr. Harper, was appointed as receiver over the Distillery Quay property. The plaintiffs also allege legal infirmities in relation to the appointment of Mr. Harper.

The Elm Drive property

42. Insofar as concerns the Elm Drive property, the plaintiffs allege that the instrument of appointment of Mr. McCleary of 17th May 2017, the deed of discharge of Mr. McCleary of 9th October, 2019 and the instrument of appointment of Mr. McCleary of 9th October, 2019 are all invalid.

43. Any potential frailties in the first instrument of appointment are of little relevance for the purposes of determining the interlocutory application before the court. Any invalidity in relation to the prior appointment, which may or may not mean that actions taken by the

receiver between May, 2017 and October, 2019 lack a legal basis, is a matter for damages at the hearing but could not entitle the plaintiffs to an injunction at this time.

44. The plaintiffs argue that the deed of discharge of 9th October, 2019 is invalid because the mortgage deed did not expressly authorise the discharge of a receiver and, further because the correct formalities were not complied with. It does not seem to me to be necessary to consider these arguments. In the first place, if the plaintiffs are correct in contending that the first appointment was invalid, then no discharge was necessary. I note that in *McCleary v. McPhillips* [2015] IEHC 591 Cregan J. made a similar point observing, at paragraph 143, that in circumstances where the receivers' original appointment was invalid "*it arguably follows that his deed of discharge was not necessary*". In the second place, I accept the submission of the defendants that, even if the correct formalities were not followed in relation to the discharge of Mr. McCleary as receiver over the Elm Drive property on 9th October 2019, such discharge is nonetheless legally effective as between the borrower, the plaintiffs in this case and the mortgagee, Promontoria. As a matter of first principles, the primary impact of such invalidity in the deed of discharge would be that the receiver may have a potential claim against the relevant lender. I do not see how such legal invalidity could permit the borrower to maintain that the new appointment is invalid. In any event, it is very difficult to see how any of this is of relevance given that Mr. McCleary was the same receiver throughout.

45. Therefore, all that this court is presently concerned with is whether interlocutory orders ought to be granted to restrain the current receivers appointed pursuant to the current instruments of appointment. Insofar as concerns the Elm Drive property, this judgment will therefore focus on the instrument of appointment dated 9th October, 2019.

46. The instrument of appointment of 9th October, 2019 provides that in pursuance of the powers contained in the mortgage deed and in reliance on the global deed of transfer, Promontoria thereby appoints Mr. McCleary to be receiver. The deed of appointment is stated

to have been signed “*under hand*” and is accepted to bear the signature of Mr. Donal O’Sullivan. Mr. Donal O’Sullivan is described as “*Director*”. The deed of appointment states that the receiver has set his hand by way of receipt and acknowledgment of appointment. Although the time and date of Mr. O’Sullivan’s signature is not noted, the confirmation of acceptance of appointment as receiver by Mr. McCleary is dated 9th October, 2019 at nine o’clock in the morning.

47. At the hearing, the plaintiffs advanced two arguments in respect of this particular document. First, the plaintiffs “*require proof*” that Mr. O’Sullivan did not “*for reasons of convenience*” execute the instrument of appointment at the same time as the date of discharge of the previous appointment i.e. 11 am on the same day, 9th October, 2019, as result of which the purported appointment would have predated the acceptance of the said discharge by Mr. McCleary on 9th October, 2019. For the reasons explained at paragraphs 41 and 42 above, this issue is of no relevance. In any event, Mr. McCleary has averred that he was discharged as receiver and “*thereafter*” was re-appointed by instrument on the same date.

48. Secondly, the plaintiffs also challenge the formalities attending the instrument of appointment of 9th October, 2019. The plaintiffs contend that, in the absence of any wording in the mortgage deed, the appointment can only be valid if carried out under deed and not under hand. The plaintiffs cite no specific authority for this proposition. The plaintiffs rely by analogy on *McCleary v McPhillips* [2015] IEHC 591 in which Cregan J. held that documents which are executed by a company under seal and documents which are to be executed “*by writing under its hand*” are in fact and in law separate and distinct modes of execution and that the mode of appointment must follow the exact terms of the debenture or deed of mortgage/charge. The mortgage deed in *McCleary* specifically required that the deed of appointment be executed under hand whereas it was executed under seal. The learned judge was not satisfied that those persons who witnessed the affixing of the seal were also

authorised to sign documents on behalf of the bank “under hand”. Therefore, as the mortgage deed in that case specifically required that the deed be executed under hand, execution under seal was held to be insufficient. The present case is distinguishable as the mortgage deed specified no formalities whatsoever for the appointment of a receiver.

49. Clause 8 of the mortgage deed provides that ss. 17 to 20 of the Conveyancing Act, 1881 shall not apply to the mortgage and that the statutory powers of sale and other powers shall be exercisable at any time after the demand. In such circumstances, as the mortgage is silent as to formalities, the formalities specified in the 1881 Act are incorporated by reference.

50. S. 24 (1) of the 1881 Act provides that a mortgagee entitled to appoint a receiver under the power conferred by the Act may do so by “*writing under his hand*”.

51. Promontoria thus maintains that the instrument of appointment is valid as an instrument signed “under hand” and relies upon *Foley v. Promontoria Oyster Designated Activity Company and Stephen Tennant* [2021] IEHC 638 in which Stack J. observed, on the authority of *McCleary*, that it is sufficient for an appointment which is required to be “under the hand” of a company to be effected in writing and signed on behalf of the company by someone with authority to act on its behalf.

52. In determining whether the signatory has such authority, s. 48 of the Companies Act, 2014 provides that a document or proceedings requiring authentication by a company may be signed by a director, secretary, registered person or other authorised officer of the company and need not be under its common seal. In *Foley*, relying upon *Kavanagh v. Walsh* [2019] 1 IR 619 Stack J. accepted that it could be inferred from the face of the document that a person was a director at the relevant time. Stack J. was accordingly satisfied on the evidence before her that the document had been validly executed “under hand”. In the present case, although

Mr. O’Sullivan is not included in the list of authorised signatories which is exhibited in Promontoria’s affidavits, he describes himself as a director on the deed of appointment.

53. Crucially, the plaintiffs’ affidavits do not dispute that Mr. O’Sullivan was a director of Promontoria at the time of Mr. McCleary’s appointment in 2019. This is significant as many other matters are put in issue in the plaintiffs’ affidavits all of which the defendants have attempted to deal with seriatim in replying affidavits. Nor was this issue presaged in the plaintiffs’ written submissions. The high point of the plaintiffs’ case on this issue was an oral submission at the hearing to the effect that the defendants have not demonstrated that Mr. O’Sullivan was a director at the relevant time.

54. It is not, in my view reasonable to put the defendants “*on full proof of all matters*”, advance a myriad of different legal and factual arguments on affidavit and in the written legal submissions, and then in argument raise a fresh issue which has not previously been raised in the affidavits. If the plaintiffs had wished to put in issue Mr. O’Sullivan’s status as director at the time of his signature to the deed of appointment in 2019, then this ought to have been stated on affidavit to enable the defendants to make the necessary averments in reply. Failing that, I fully adopt the views of Stack J. in *Foley*. In all of the circumstances, I am prepared to infer for the purposes of these interlocutory proceedings that Mr. O’Sullivan was a director of the company at the relevant time. I therefore find that the plaintiffs have not raised a fair issue to be tried in relation to Mr. O’Sullivan’s authority or capacity to sign the relevant deeds and instruments of appointment.

55. I further note that in *Fennell v. Slevin* [2020] IEHC 677 Sanfey J. commented upon the manner in which the defendants in that case had alleged invalidities in relation to the formalities concerning the receiver’s deed of appointment and stated:

“The defendants allege that it is legitimate for them to challenge the authority of signatories ‘where no evidential proof has been provided of their authority to sign the

documents in question’ ...It is submitted that the onus is on the plaintiff to ‘substantiate his claim with the necessary proofs’.

It was submitted on behalf of the receiver that it was not incumbent on him to rebut an unspecified allegation of lack of authority of this kind, ...

It has always been permissible for a party to point out a lack of authority on the part of a deponent or the author of a crucial document, if that lack of authority has a bearing on the issues before the court. What is not permissible is that a party purports to insist, without adducing any evidence that there is any specific infirmity in the capacity or authorisation of a deponent or author of a document, that such deponent or author produce evidence of his authorisation as a precondition of the admissibility of the document in question. ... here is no authority for such a proposition.”

56. The comments made by Sanfey J. above apply with even greater force where, as in a case such as the present, the party alleging a lack of authority is the plaintiff and moving party who bears the burden of demonstrating, on the balance of probabilities, that a fair issue to be tried has been raised.

The Distillery Quay property

57. Insofar as concerns the Distillery Quay property, the plaintiffs allege that the instrument of appointment of the joint receivers dated 23rd December, 2013, their deed of discharge of 8th January, 2016, the instrument of appointment of Mr. Murphy of the same date, his deed of discharge of 18th November 2020 and the deed of appointment of Mr. Harper of the same date are all invalid for a number of reasons.

58. For the reasons set out above in relation to the Elm Park receivership, it is not presently necessary to consider many of these issues. For the purposes of the present

application the validity of the prior instruments of appointment and discharge pertaining to both receiverships is largely irrelevant because same have been overtaken by events.

59. For the purposes of the interlocutory orders sought it is necessary to consider only the validity of the appointments of the present receiver, Mr. Harper by instrument of appointment dated 18th November, 2020. This purports to be executed under seal and to be witnessed by Mr. Donal O’Sullivan, Director and by Mr. Sean Donnelly, secretary. The common seal does not in fact appear on the exhibited copy of the instrument.

60. The plaintiffs maintain that as it was therefore intended that the document would be executed “by common seal” rather than by “writing under hand” the deed is invalid because the document having intended to be executed under seal cannot take effect as a document executed under hand.

61. I fully agree with counsel for the plaintiff that, as with the relevant instruments in the *Foley* case, the appointment is not effective as an instrument under seal, not only because the document does not on its face appear to bear the common seal of the company but also because of lack of information in relation to the authority of the signatories, Mr. Donal O’Sullivan, director and Mr. Sean Donnelly, secretary to witness the common seal of the company. However, at risk of repetition, the mortgage deed in this instance is silent as to the relevant formalities and does not require appointment under seal. It would therefore be sufficient if the relevant deed validly takes effect as an instrument under the hand of the person executing it.

62. In this regard also, I adopt the reasoning of Stack J. in *Foley* in which it was noted that there is established authority that a document which is intended to take effect as a deed, but fails to do so, could nevertheless take effect as an instrument under the hand of the person executing it. Authority for this principle is also to be found in *Fennell v. Gilroy & Ors* (unreported High Court, Gilligan J. 20th April, 2016) in which the court held, at the

interlocutory stage, that a deed of appointment executed by the bank under its seal was sufficient to also constitute a document executed by the bank “in writing under its hand” for the purposes of s. 24 of the Conveyancing Act, 1881. In *Fennell v. Gilroy* [2021] IEHC 7, when the same matter came on for plenary hearing, Sanfey J. agreed with this reasoning. Sanfey J. also distinguished *McCleary* upon which the plaintiffs in this case place much emphasis, as that case turned on the fact that the key people who had been authorised to execute the deed were expressly not authorised to execute such documents in writing under hand.

63. In the case before this court, the plaintiffs have advanced no evidence whatsoever that similar limitations were placed upon the ability of Promontoria’s directors to execute such documents under hand. As stated, the authority of Mr. O’Sullivan to sign these documents has not been put in issue in the pleadings by the plaintiffs who bear the burden of proof. Therefore, notwithstanding the fact that Promontoria’s affidavits do not deal expressly with Mr. O’Sullivan’s authority to execute documents in writing under hand, it is sufficient for present purposes for Promontoria to rely upon s. 48 of the Companies Act, 2014 pursuant to which, as indicated above, a document requiring authentication by a company may be signed by a director.

64. In summary, it is my view that the plaintiffs have failed to demonstrate a fair issue to be tried that there is any legal invalidity or infirmity in the relevant deeds of appointment of both receivers.

The ECB rate

65. The plaintiffs maintain that they were overcharged interest on their accounts in respect of both facilities by reference to the interest rate agreed. The applicable interest rate was stated in the facility letters to be “*ECB rate plus 1.35%*”. The plaintiffs rely upon an

expert report from Mr. Eddie Fitzpatrick of Bankcheck which sets out in his opinion that the “ECB rate” being applied at the time of the loan facilities was the main financing operations minimum bid rate or “minimum bid rate”. The plaintiffs’ argument is that the minimum bid rate ceased to exist on 9th October, 2008 and that thereafter, the Bank unlawfully sought to calculate interest by reference to the “fixed rate” tender rate of the ECB’s main refinancing operations which it had no legal or contractual right or entitlement so to do. As a result of this breach of contract, the plaintiffs maintain that the Bank and Promontoria are estopped from seeking to claim any interest subsequent to 9th October, 2008 or alternatively are limited to recovering purely the marginal rate of 1.35%.

66. The defendants have obtained an expert report from Mr. Barry Robinson of BDO Simpson Xavier in response to this issue. The defendant’s position is that when the loan was advanced, the ECB interest rate which was applied was the main refinancing operations rate (“the MRO”). At this time, the MRO was calculated using a variable rate, the minimum bid rate. In October 2008 the ECB altered the method by which the MRO was calculated from the minimum bid rate to a fixed rate. The defendants submit that this was merely an alteration in the manner in which the MRO was calculated and did not have the effect of abolishing the MRO in its entirety.

67. The plaintiffs rely upon a decision of MacGrath J. in *Governor and Company of the Bank of Ireland v. Phelan* [2020] IEHC 484 in which the court held in the context of possession proceedings that a borrower had an “arguable defence” that “the effect of the decision by the ECB on 8 October 2008 and the failure by the plaintiff to certify the unavailability of [the minimum bid rate] resulted in no interest being chargeable thus leading to overcharging of interest.”

68. I am in agreement with the submissions of the defendants that *Phelan* is distinguishable because in that case the relevant facility letter specifically stated that the

applicable rate was the “*MRO minimum bid procedure*” and provided that if the lender certified that rate as being unavailable, its home loan rate would apply. Therefore, as the lender had not appropriately certified that the MRO minimum bid rate was unavailable, it was not appropriate to apply an alternative rate. By contrast, however in the present case, the facility letter merely states that the applicable rate is the “*ECB rate plus 1.35%*” and the borrower therefore has no specific contractual entitlement to assert that the method by which the MRO was calculated must be by means of the minimum bid rate.

69. Needless to say, this court cannot enter upon an adjudication of the competing arguments of the parties’ respective accountancy experts. However, it is clear that the loan facility does not support the proposition that the minimum bid rate was the only applicable rate. Further, whilst the expert report exhibited by the plaintiffs states that “*it is the client’s instruction that the ECB rate was to be used for the purpose of interest calculating is the main refinancing operations minimum bid rate which ceased to exist from 9 October 2008*” this understanding does not appear to be averred to in any of the plaintiffs’ affidavits and is therefore evidence of little weight.

70. I therefore find that the plaintiffs have not raised any fair issue to be tried in respect of this issue.

Balance of convenience/Balance of justice

71. The plaintiffs seek interlocutory injunctions (a) directing the receivers to deliver up possession of the properties and (b) restraining the defendants from selling or marketing the properties.

72. On the basis of the affidavit evidence before the court, I find that the plaintiffs have not raised any fair issue to be tried in these proceedings such as would entitle them to the

interlocutory reliefs sought. As no fair issue to be tried has been raised the plaintiffs therefore fail to pass the first hurdle in their application for injunctive relief.

73. In these circumstances, it is not strictly speaking necessary to consider the balance of convenience or the balance of justice. However, I should say that had that been necessary, for the reasons set out below, I would have determined that same was evenly balanced and, in the light of the undertakings offered by the plaintiffs, that injunctive relief would have been merited.

74. The defendants contend that damages would be an adequate remedy for the plaintiffs. They emphasise that the two properties are commercial properties and that, although the plaintiffs aver to an emotional attachment to the Elm Drive property, it is not averred that it is a family home, and no further details are provided in this regard. I accept that, as this is commercial property, on the authority of *Ryan v. Dengrove*, [2021] IECA 38, the court should be robustly sceptical of any claim that damages are not an adequate remedy for plaintiffs should they ultimately succeed at trial.

75. The defendants also observe that it is entirely unclear whether the plaintiffs would be capable of meeting either any undertakings as to damages or, should same arise, meeting any claim to damages brought on behalf of the lender should they fail at the ultimate hearing. Should the injunction be granted therefore, the defendants cannot therefore be compensated by damages for the temporary suspension of their right to enforce their security.

76. I note that, notwithstanding the appointment of both receivers for a significant period of time, neither of the receivers have yet been able to take up the possession of the properties. Therefore, insofar as the plaintiffs claim - an order directing Mr. McCleary and Mr. Murphy to deliver up possession of the properties, same is not necessary as they do not have possession of the properties. For this reason, I will refuse the first relief sought by the plaintiffs.

77. Insofar as the plaintiffs claim an order restraining the defendants from selling the properties, the defendants emphasise that it is not disputed that the receivers in this case do not have power of sale. Therefore, they say that whilst it is possible that if the receivers entered into possession, Promontoria could take up possession as mortgagee in possession and thereby attempt to effect sale, there is no imminent or anticipated risk of this occurring. This point is well made. On the other hand, the defendants did not tender any undertaking that, if the receivers obtained possession, Promontoria would not in due course, and in advance of the trial, attempt to exercise their power of sale. It would obviously not be an efficient use of the parties' resources or of court time to require the plaintiffs to reapply afresh to the court should these circumstances present. Naturally, if the plaintiffs succeed at trial in establishing the invalidity of the appointment of the receivers, then of course, the power of sale will never have become exercisable in the first place.

78. Overall, it seems to me that the balance of convenience/balance of justice in respect of the second relief sought is evenly balanced between the parties. In such circumstances, were I satisfied that the plaintiffs had raised a fair issue to be tried, the scales would have been tipped in favour of the plaintiffs by reason of the fact that, at the hearing before this court, they tendered an undertaking that between the date of the order of this court and the date of the ultimate resolution of the proceedings they would retain the rental income from the properties in an account in the name of their solicitor, furnish information on the lettings and accounts in relation thereto to the defendants on a three monthly basis and undertake not to sell or otherwise dispose of the property other than by way of short term lease for a period to be ordered.

79. However, for the reasons explained above, this does not now arise.

I will hear argument from the parties in relation to the question of costs and any other matters arising on foot of this judgment on Thursday, 28th April, 2022 at 11am.