

# THE HIGH COURT

[2023] IEHC 554

Record No. 2021/1248 P

**BETWEEN**

**KEN FENNELL**

**PLAINTIFF**

**- AND -**

**BRIAN REILLY AND IRENE REILLY**

**DEFENDANTS**

**Judgment of Ms. Justice Butler delivered on the 12<sup>th</sup> day of October 2023**

## **Introduction and Background Facts**

1. The plaintiff in this application has been appointed by Promontoria (Oyster) DAC (“PODAC”) as receiver over a residential property in Co. Dublin (“the house”) owned by the defendants subject to a mortgage. The plaintiff seeks an interlocutory injunction to secure possession of the property and to restrain the defendants from taking possession of the property and interfering with the receivership.
2. The defendants bought the property in 1990 and were duly registered as owners. In 2007 they arranged to re-mortgage the property in order to part-finance the purchase of an apartment. The plan was that the defendants would move from the house into the apartment, let out the house and, on their retirement, they would sell the house and, presumably, discharge any balance outstanding on the mortgage for the apartment. On 15 November 2007 Ulster Bank made a loan offer to the defendants of €800,000 of which €600,000 was intended to discharge the outstanding mortgage on the house and €200,000 was to be used

in part-payment of the purchase price of the apartment. This loan was secured by way of a mortgage over the house which was registered on the Folio by Ulster Bank in January 2008. A second loan, also with Ulster Bank, was taken out by the defendants for the balance of the purchase price of the apartment (€550,000). This loan was secured by way of mortgage on the apartment. Thus, the defendants had two loans from the Ulster Bank secured over two different properties.

3. The timing of these loans was unfortunate in light of the severe economic downturn which commenced in 2008. It seems that the first defendant's business failed and the defendants ran into difficulty servicing their mortgages. In his replying affidavit the first defendant claimed that he engaged fully with Ulster Bank and agreed to continue servicing both loans by way of a monthly payment (the defence indicates that this was to be the sum of €1,000 per month split equally between the two loans) and further that the house would be sold voluntarily "*once a sustainable solution was reached*" regarding the apartment.

4. No documentary evidence has been put before the court to support the existence of this agreement and, as will be seen, the manner in which it has been described by and on behalf of the defendants has varied significantly over time. A letter from the defendants' then-solicitor to the plaintiff in December 2017 stated that "*an agreement was reached that a sustainable solution would be put in place in respect of both loans*". This would, of course, suggest that at that point no such solution had actually been reached.

5. The defence filed in March 2022 pleads that a concluded restructuring agreement in respect of both loans was reached in 2011. It is pleaded that under that agreement part of the combined loan was to be "*warehoused*" in that no further capital payments were required in respect of it and that a portion of the loan would be repaid on the voluntary sale of the house, which sale could not take place without the defendants' agreement as to "*time, mode of sale and reserve price*". The other part of the loan would become due only if the

defendants defaulted in the €1,000 monthly payment. Interest on the full balance was to accrue as simple interest only. No evidence was put before the court to support the contention that agreement was reached in these, somewhat unlikely, terms. The terms pleaded are inconsistent with the affidavit evidence of the first defendant and with the contents of the solicitor's letter written on their behalf in 2017 both of which suggest that there was "*an agreement to agree*" rather than an actual agreement between the defendants and Ulster Bank.

6. The defendants' original position seems to have been that although they continued making the servicing payment no agreement was reached regarding the sale of the house or, latterly, the redemption by them of the mortgage over the house. Obviously, that is not consistent with the plea that a relatively detailed agreement had been reached with which the defendants were still complying in late 2016.

7. In December 2016 Ulster Bank sold a tranche of its loan portfolio including the defendants' loan to PODAC. Separately, another tranche of loans was sold by Ulster Bank to a different entity which included the defendants' other loan secured over the apartment. Material exhibited by the plaintiff demonstrates that the loan agreement, the mortgage, and Ulster Bank's rights in the house were all part of the transfer to PODAC.

8. The defendant objected to the transfer. The basis for this objection is not set out in the first defendant's affidavit but it appears from the defence that it was either because of the separation of the loan in respect of the house from the loan in respect of the apartment (which the defendants regard as part of the same transaction) or because the transfer to PODAC was not expressly subject to the terms of the restructuring agreement allegedly reached between the defendants and Ulster Bank in 2011. It also appears to be contended that the loan should not have been transferred because the defendants were not in breach of the revised terms – i.e., they had continued to pay the sum of €1,000 per month.

9. In January 2017 appropriate communication was made with the defendants advising them of the transfer of the loan and of the new arrangements regarding repayment. No payment has been made by the defendants in respect of this mortgage since 23 March 2017. On 29 September 2017 PODAC sent a letter of demand to the defendants advising them that their loan facility was in default and demanding immediate repayment of €845,704.13. The defendants were advised that if the full amount was not paid within seven days of the letter, PODAC would exercise its rights, including enforcement of the security and the appointment of a receiver, without further notice to them.

10. By deed of appointment dated 31 October 2017 the plaintiff was appointed receiver, which appointment was accepted by him on 10 November 2017.

### **Conduct of The Receivership**

11. By letter dated 13 November 2017 the plaintiff informed the defendants of his appointment as receiver and sought certain information, including information as to whether there were tenants in occupation of the property and copies of any lease. The plaintiff also engaged a firm to act as managers in respect of the property. That firm attempted to contact the occupiers to arrange an inspection of the premises but were initially unsuccessful in doing so.

12. On 19 November 2017 an agent acting on behalf of the defendants wrote to the receiver with a view to reaching a settlement on the defendants' behalf. That letter refers to a number of previous meetings and conversations also attempting to reach settlement between the writer and Link Assets Services, agents of Ulster Bank who continued to act on behalf of PODAC. Complaint is made that Ulster Bank had sought a lump sum payment of €800,000. In a replying e-mail from Link it is noted that all proposals for settlement must be in writing and were subject to credit committee approval.

**13.** Very shortly after this a solicitor on behalf of the defendants wrote to the plaintiff on 4 December 2017 setting out the position from the defendants' perspective. It is this letter which records, in effect, an agreement to agree a sustainable solution between Ulster Bank and the defendants. It also records that "*the sustainable solution was not in fact finalised by Ulster Bank prior to the purported sale of the instant loan*" and the defendants' assertion that they are not in default as they have "*maintained without interruption*" the monthly payment of €1,000. Of course, by the time this letter was written that statement was no longer accurate as the defendants had ceased paying the €1,000 some nine months earlier. The letter claimed that the sale of the loan was in breach of the defendants' agreement with Ulster Bank, presumably meaning the interim servicing agreement and/or the agreement to agree rather than the terms of the loan itself. The letter objected to the appointment of a receiver and threatened the institution of injunctive proceedings if the plaintiff did not stand down as receiver within a few days. Needless to say, the plaintiff did not stand down and no such proceedings were instituted.

**14.** By February 2018, the plaintiff had instructed agents regarding a proposed sale of the house. However, the plaintiff was unable to secure the co-operation of the tenants, even to the extent of providing him with a copy of their lease, much less to permit an inspection of the house. Despite been advised of the receiver's appointment and requested to pay the rent directly to him, the tenants refused to do so. A fourteen-day notice requiring them to vacate the premises for non-payment of rent was served on 28 February 2018, but the tenants did not vacate. Consequently, the plaintiff referred the matter to the Residential Tendencies Board which ultimately issued a determination on 21 May 2018 requiring the occupants to vacate the house which they eventually did. The receiver took possession of the house, and the property was locked down in October 2018.

**15.** An inspection in February 2019 revealed that the house had been re-occupied. The receiver, through newly appointed property managers, engaged with the new tenants, one of whom was the mother of a young child. The tenants advised that they had a one year fixed-term lease from the first defendant for which they had paid the sum of €4,000 in respect of a deposit and the first month's rent. A tenancy agreement is exhibited which is signed by the first defendant and dated 10 February 2019. These tenants attempted to co-operate with the plaintiff as receiver and paid the rent directly to the plaintiff's agents. However, they then became the subject of a sustained campaign of harassment and intimidation which appears to have been conducted at the behest of the first defendant. Significantly, the averments of the plaintiff and two of his property managers who dealt with these events have not been denied by the first defendant in his replying affidavit.

**16.** The tenants variously informed either the plaintiff or his property managers that they were advised by someone known to them as "*Declan*" who was apparently acting on behalf of the first defendant that their lease with the first defendant was terminated for breach of its terms and that they would be evicted. Declan subsequently attended at the premises unannounced in the company of another man and attempted to gain access. The first defendant called to the workplace of one of the tenants. There appears to have been a number of text messages, telephone calls and visits to the property by Declan and others. Very concerningly, Declan appears to have made a death threat to the property manager through the tenants, threatening to shoot him in the head if he went near the house. Notwithstanding the ongoing harassment and threats, the Gardaí to whom complaints were made refused to become involved on the basis that this was a civil matter. The tenants left the property in mid-August as they were genuinely afraid for their safety and that of the young child and could no longer deal with the stress arising from these events.

**17.** At this point the defendants purported to transfer the house into a supposed private settlement trust operated by an individual who is well known to the courts. This individual, Ben Gilroy, wrote directly to PODAC on 20 August 2019. Leaving aside the various pseudo-legal claims made regarding the receiver's position and alleged breaches of the General Data Protection Regulation, the general thrust of this correspondence was that the defendants wished to redeem their mortgage, had secured the backing of an investor in order to do so and that Mr. Gilroy wished to enter into settlement talks with PODAC on the defendants' behalf. Mr. Gilroy also sought information regarding the title to the property. This request appears connected with a claim now made on behalf of the defendants that PODAC is refusing to reach agreement on the redemption price for the property because it is unable to make good its title to the mortgage and that it has brought this application to secure a court order in order to create a good marketable title. This claim is difficult to understand, especially in circumstances where relief of this nature is not sought in either the Statement of Claim or in this application. In any event, and perhaps unsurprisingly, neither the plaintiff nor PODAC engaged with Mr. Gilroy.

**18.** Separately, it seems that almost immediately following the departure of the second tenants, a third tenant was installed in the house by the defendant. A newly appointed security and property company attended the house on behalf of the plaintiff and spoke with the tenant who again advised that he had paid a sum of €4,000 for the lease and was dealing with a man called Declan. At various times both Declan and Mr. Gilroy advised the personnel of this security company that they had met or spoken with the plaintiff. In his affidavit, the plaintiff has specifically denied speaking with either of these individuals. The plaintiff, through his agents, sent written demands in August, October and November 2019 to the new tenants seeking vacant possession of the property, and eventually threatening legal proceedings if vacant possession was not returned to him.

**19.** In his replying affidavit the first defendant does not engage with and, specifically, does not deny the very serious allegations made against him and his agents regarding the property. He does not dispute his indebtedness on foot of the 2007 loan but claims to have “*engaged fully*” with Ulster Bank and to have paid the monthly servicing payment up to the point where his loans were sold, a sale to which he objected and which he claims “*effectively killed off any possibility of the delivery of a sustainable proposal*” for the apartment. He asserts an entitlement to redeem the mortgage and expresses a desire to achieve settlement but complains that the offers made to date on behalf of the defendants have not been accepted.

**20.** Although the affidavit is vague in its detail and no information is provided regarding when various events supposedly occurred, on the basis of what is now pleaded in the defence the interim agreement referred to was reached in 2011. As the loans were not sold until December 2016, the defendants had a period of approximately six years during which they did not manage to reach agreement with Ulster Bank on a sustainable proposal. Nonetheless, the first defendant takes the view that the continued making of a monthly servicing payment, being a fraction of the monthly payment actually due even on foot of this mortgage alone, indefinitely precluded any action being taken by Ulster Bank either to enforce or to sell the loans. Crucially, the first defendant does not aver to any agreement in terms of that now pleaded in the defence as having been reached between the defendants and the Ulster Bank.

**21.** The first defendant avers that he involved the private settlement trust out of frustration and that the trust installed the third tenant. Apparently, the defendants were paying half of the rental income from the property to the trust until a court order was made that the rent should be paid into an escrow account. An offer to that effect was made by the first defendant at para. 12 of his affidavit. Although there is subsequent reference in the affidavit to “*the above undertakings*”, the affidavit does not offer any undertakings as to damages nor to restrain from interference with the conduct of the receivership pending the trial of the action.

The defendants assert their right to exercise their equity of redemption as regards the balance of convenience.

22. The second defendant has sworn a short affidavit in which she claims the proceedings against her are misconceived as no evidence had been adduced of obstruction by her of the plaintiff in his dealings with the house.

### **Plaintiffs' Proceedings and Application for Injunction**

23. A plenary summons was issued by the plaintiff in February 2021 seeking relief by way of an order for possession of the house, injunctions restraining the defendants, their servants or agents, from taking possession of the property and/or from interfering with the receivership and damages for trespass or, alternatively, mesne rates. An application for an interlocutory injunction was issued shortly thereafter. This was grounded on an affidavit of the plaintiff exhibiting a large volume of documentation and two supporting affidavits from two of the property managers/ security personal engaged by the plaintiff. These affidavits set out the history of the loans from the point at which they were transferred by PODAC and the conduct of the receivership much as I have described it in the previous sections of this judgment. The relief sought in the injunction application is slightly more detailed and includes orders restraining the defendants, their servants or agents, from trespassing on or interfering with the property and delivery up of all keys, electronic access devices etc. to the property.

24. A Statement of Claim was served in July 2021. It expressly pleads that the mortgage empowers the receiver to take possession of and to receive the rents from the property. No equivalent plea is made regarding a power of sale although the plaintiff in his affidavit acknowledges that he had instructed agents "*to bring the property to market*" as long ago as

2018. Further, following particulars of interference with the receivership, it is pleaded that as a result of these actions the plaintiff has been unable to bring the property to market.

**25.** A defence and counterclaim were not delivered until very shortly prior to the hearing date for the injunction. Although the defendants purport to consent to an interlocutory order “*of appointment [of the plaintiff] as receiver of rents*”, the consent offered is meaningless as it is predicated on the plaintiff undertaking to account to the court as a court appointed receiver. The plaintiff is not a court appointed receiver, having been appointed by PODAC under the terms of the mortgage. Many of the pleas made in the defence are very difficult to understand. For the purposes of this motion others do not appear to be supported by the documentation exhibited by the plaintiff and the defendants have not themselves exhibited any other documentation. This is of some significance as counsel for the defendants seemed, erroneously, to regard the defence itself as evidence of the matters pleaded in it.

**26.** The defendants dispute the validity of the transfer of the loan in respect of the house to PODAC and its separation from the loan in respect of the apartment which was transferred to a different fund. It seems to be pleaded that because of this “*parcelling*” of the loan, PODAC cannot make good title to the property. Although the precise basis for this plea remains unclear, the contention that PODAC does not have good title to the property and that the receivership and this application for interlocutory relief are some sort of a contrivance to make that title good, is central to the way in which the defence has been pleaded.

**27.** The defence goes on to plead that the defendants are entitled to a substantiable restructuring of their loan pursuant to the Mortgage Arrears Resolution Process (MARP) under the Central Bank’s Code of Conduct on Mortgage Arrears (CCMA). The application of the CCMA to this case is questionable since, in its terms, it applies to mortgages on a borrower’s primary residence, i.e. the residential property actually occupied by a borrower.

The defendants reside in the apartment – which may well come within the CCMA – but as their house is a rental property it does not appear to be covered, although the defendants may well seek to persuade the trial court otherwise.

**28.** Further, and more significantly, the defendants plead that a loan restructuring agreement was agreed between themselves and Ulster Bank in 2011, the terms of which have been set out above. I have previously noted that no mention of this alleged restructuring agreement was made in correspondence from the defendants' agent and their solicitor in 2017 nor in the defendants' affidavits sworn in response to the motion. Strikingly, it is pleaded in the alternative that "*the same modifications were made by justiciable Central Bank code, by statute and by statutory instrument*". No indication is given of what code, statute or statutory instrument made these apparently very specific changes to the terms of the defendants' mortgage. It is then pleaded that the alienation of the loan to PODAC was in breach of the agreed restructure although no modification is pleaded of the term of the mortgage which expressly permits the transfer of the mortgage, debt and security (clause 10). Alternatively, it is pleaded that PODAC took the loan subject to the agreed restructure.

**29.** There then follows a section headed "Unfair Contract Terms". No particular statute or other legal instrument is cited in support of the pleas made under this heading although in argument counsel relied on Directive 2002/65/EC and national measures implementing that directive. It seems to be pleaded that clause 10 of the mortgage, which in principle allows the lender to transfer the mortgage, did not allow for its transfer to "*an unregulated vulture fund*". Clause 10 of the mortgage does not restrict the category of persons to whom the lender was entitled to transfer the loan. Leaving aside the defendants' characterisation of PODAC, a requirement that an entity purchasing a loan itself be regulated by the Central Bank was not introduced until January 2019 by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018. As this loan was transferred in 2016 any requirement created by

the 2018 Act clearly did not apply. More generally, the argument seems to be that a fund in the nature of PODAC has different “*sustainability*” issues with regard to its financing than a main-stream bank such as Ulster Bank, leading to some difference in its assessment of creditor “*sustainability*” such that a transfer under clause 10 was necessarily under less favourable terms and consequently was illegal. This may not be an entirely accurate paraphrasing of the plea which is poorly drafted and thus extremely difficult to understand.

**30.** Under the heading “*Mala Fides*” it is pleaded that there was no default on the defendants’ account when the plaintiff was appointed receiver. Again, this plea is very difficult to understand when, on the first defendant’s own evidence (which is consistent with the mortgage account exhibited by the plaintiff) the defendants ceased making the servicing payment in March 2017 when the loan in respect of the apartment was transferred by Ulster Bank to a different fund. Even if the court were to accept the terms of the restructuring agreement as pleaded by the defendants, there was a seven-month period after the transfer of the loan to PODAC and before the plaintiff was appointed receiver in October 2017 during which no payment at all was made by the defendants. Manifestly, there was a default on this account unless the defendants can persuade the court that the fact of a transfer, which they disputed, entitled them to cease all payment on foot of the loan until that dispute was resolved noting, of course, that the defendants took no steps to bring that dispute before the courts.

**31.** This section of the defence is replete with what can only be described as conspiracy pleas. On the asserted basis that PODAC cannot complete the redemption because they do not have title, it is pleaded that the injunction is designed to manufacture a marketable title – a plea which, in my view, evidences very little understanding of how title operates. Alternatively, it is pleaded that the appointment of a receiver was to unjustly enrich the plaintiff – apparently on the basis that a receiver sale will not be necessary. Complaint is made of a delay on the part of the plaintiff in requesting possession which is ascribed to his

having knowledge of the 2011 restructuring agreement. Further, it is contended that the plaintiff contrived to create an incident at the house to suggest misbehaviour on the part of the defendants. It is not clear which of the many acts of interference and harassment set out in the plaintiff's affidavit the defendants are characterising as the contrived incident.

**32.** Running through the entire of the defence is the contention that the defendants want to exercise their right to redeem the equity of redemption in the house under their mortgage. However, this contractual right is described as being either a right to redeem or "*to negotiate a restructure of the loan on a basis which is "sustainable" for the mortgagee*". This seems to me to be two different things rather than two aspects of the one right. Further, it is pleaded that the obligation to offer sustainable terms fell jointly on PODAC and the body to which the loan secured on the apartment was transferred.

**33.** Finally, the defendants include a counterclaim against the plaintiff to restrain him from further involvement with the property and seeking damages against him under s.44 of the Central Bank (Supervision and Enforcement) Act 2013 or otherwise. I am not certain that the plaintiff, as a receiver, comes within the scope of s.44, but this will be a matter for the trial court. The relief concludes by seeking a declaration that PODAC is not the legal owner of a mortgagee's title to the house or, alternatively, that it is bound by the restructuring agreement and seeking orders for redemption and re-conveyance to the defendants. Obviously, these reliefs cannot properly be sought by way of counterclaim in proceedings to which PODAC is not a party.

### **The Receiver's Case**

**34.** The case made on behalf of the plaintiff at the hearing was relatively straightforward. Counsel for the plaintiff contended that there were three essential questions before the court which, if answered positively in favour of the plaintiff, would entitle him to the injunction

sought *ex debito justitiae* regardless of whether the normal test for interlocutory injunctions is applied (per *Merck Sharp & Dohme Corporation v. Clonmel Healthcare* [2019] IESC 65) or whether the higher *Maha Lingham v HSE* [2005] IEHC 186 standard is applied.

**35.** The three questions identified by counsel for the receiver were, firstly, whether the receiver was validly appointed; secondly, the scope of the receiver's powers and, thirdly, whether the defendants have interfered with the plaintiff in the exercise of those powers. Counsel then took the court carefully through the exhibited material in order to establish each of these matters. Counsel made the point, validly in my view, that pleas made in the defence are not evidence of the matters pleaded and, in this case, that what has been pleaded in the defence is not consistent with the evidence that has been adduced, primarily by the plaintiff, but also in fact in the affidavit sworn by the first defendant. This point was an important one because counsel for the defendant appeared to assert that once the validity of the receivership was put in issue, the plaintiff could not make out a strong arguable case to the effect that he had been validly appointed and therefore was validly exercising the powers conferred upon him either by statute or under the mortgage deed. The mere assertion in a defence that the appointment is invalid without any substantive grounds being advanced or any evidence to support the plea does not offset the case made out on evidence on behalf of the plaintiff.

**36.** In looking at the balance of convenience, counsel for the plaintiff pointed out that the borrowers have been unable to pay their debt over an extended period of time and consequently will not be in a position to pay damages if an injunction is not awarded. The plaintiff has received very limited rent since the commencement of the receivership, in effect, only from the second tenants who were forced out of their property because of their co-operation with the receivership. No payment has been received from the defendants

despite their having been in receipt of rental income during a considerable portion of the period of the receivership.

### **Threshold for the Grant of Relief**

37. The standard applicable to the threshold question of whether the moving party's case is legally sufficient to justify the grant of interlocutory relief in principle differs depending on whether the relief sought is prohibitory or mandatory. If the relief sought is prohibitory and therefore primarily designed to preserve the *status quo* until the trial of the action the standard is that derived from *Campus Oil Ltd. v Minister for Industry and Energy (No. 2)* [1983] IR 88, namely whether the moving party has established a fair question to be tried. If the relief sought is mandatory and will require the respondent to take some positive step in advance of the determination of the disputed issues at trial, then a higher standard, namely whether the moving party has established a strong arguable case (per Fennelly J in *Maha Lingham v HSE* (above)) applies. The characterisation of relief as mandatory or prohibitory can be difficult to ascertain in many cases as quite often the same relief can be phrased in both positive and negative terms.

38. Either way, if the threshold standard is satisfied, the court must then consider where the balance of convenience (also referred to as the balance of justice) lies as between the grant or the refusal of interlocutory relief pending trial. Whilst the financial position of the parties, their ability to pay damages in the event that interlocutory relief is shown to have been wrongly granted or withheld in light of the outcome at trial and the adequacy of such damages are important issues, they form only part of the overall analysis of where the balance of justice lies (per *Merck, Sharpe & Dohme* (above)). More broadly, the Court of Appeal, Murray J. in *Murphy v. McKeown* [2020] IECA 75 - also a receivership case - suggested that where it has been established that there is a serious issue to be tried which, if

established at trial, it would provide the basis for a permanent injunction, the decision to grant or refuse an injunction becomes an assessment of where the balance of justice lies, appropriate regard being had to the adequacy of damages in the overall assessment.

**39.** However, in this case the plaintiff asserts that if he succeeds in satisfying the court on the three issues identified by him as the essential questions, then the court need not proceed to examine the balance of justice and relief should be granted *ex debito justitiae*. A range of authority was proffered for this proposition. In *Havbell DAC v. Dias* [2018] IEHC 175 Costello J. followed Laffoy J. in *Kavanagh v. Lynch* [2011] IEHC 348 and her own earlier judgment in *Tyrrell v. Wright* [2017] IEHC 92 to the effect that a landholder, including a receiver, whose title is not in issue, is entitled to an injunction to restrain a defendant from trespassing by continuing in occupation of property over which he has been appointed receiver without it being necessary to consider where the balance of convenience lies. Even where a plea is made as to the plaintiff's title, this remains the case unless the defendants adduce evidence to establish an entitlement to remain in the property as against the plaintiff.

**40.** At the hearing the defendants did not engage with the plaintiff's arguments as to the appropriate threshold which must be met for the grant of interlocutory relief in this case. In their written submissions reliance was placed on a paragraph in the judgment of Stack J. in *Tyrrell v. O'Connor* [2022] IEHC 274 to argue that, as the plaintiff has expressed an intention to sell the property, the application for interlocutory relief amount to an effort to secure summary judgment and thus it follows from *Charleton v. Scriven* [2019] IESC 28 that relief should be refused. It is noteworthy – and perhaps a basis for distinction - that in *Tyrrell v. O'Connor* the receiver did not have a power of sale, although this is merely noted by way of observation in Stack J's judgment.

**41.** As the plaintiff points out in replying submissions, Clarke C.J. in *Charleton v. Scriven* does not say that an interlocutory injunction cannot be granted to a receiver where this may

result in the sale of the property prior to a full hearing. He does say that in such cases a claim for interlocutory relief framed in ostensibly prohibitory terms should be regarded as mandatory and the higher threshold test of a strong arguable case should be applied. No purpose would be served in applying a higher threshold test at the commencement of the analysis if, as a matter of law, interlocutory relief could never be granted because it might result in the sale of the property. Further, his observations are qualified by Clarke C.J. and only apply where an issue of substance has been raised concerning the validity of the appointment and the powers of the receiver. In circumstances where “*no real case of any substance is made by a defendant*” to suggest that the receiver is not validly appointed or is seeking to exercise powers he does not have, then even the question of whether the receiver needs to establish a strong arguable case rather than a fair case to be tried is irrelevant as the former, higher standard will have been met in any event.

**42.** If *Tyrrell v O'Connor* (above) is to be interpreted as meaning that following *Charlton v Scriven* interlocutory relief can never be granted to a receiver who has a power of sale because it might result in the sale of the property before the trial, then I do not think this is a correct reading of the latter judgment. The potential for the sale of the property undoubtedly feeds into the height of the threshold the moving party must meet and must also be considered again in the balance of convenience but it does not automatically preclude the grant of interlocutory relief to a receiver.

**43.** In circumstances where the plaintiff indicated from the outset of the receivership that he proposed placing the house on the market, I am satisfied that in order to succeed in this application he must establish that he has a strong arguable case that he is entitled to the relief sought in the proceedings. Although I accept that a landowner may be entitled to relief *ex debito justitiae* against a trespasser to restrain that trespass, because the potential effect of the grant of relief in this case would be to permit the sale of the property before the

defendants have their case heard at trial, I propose to proceed to consider where the balance of justice lies without necessarily determining whether this is something that might be dispensed with in other cases.

### **The Defendants' Position**

44. The case made on behalf of the defendants was not coherent. Much of it was predicated on the repeated assertion that the receivership was invalid and there had been breaches of the consumer protection law at EU level without counsel being able to clarify, notwithstanding repeated requests to do so, why the receivership was allegedly invalid or what the alleged breaches of EU law were. In circumstances where a coherent argument had not been made on behalf of the defendants, the parties were afforded the opportunity to file written submissions after the hearing. The argument made on behalf of the defendants was duly expanded under these two headings.

45. Insofar as the alleged invalidity of the receivership appears to be based on the assertion that a receiver could not be appointed as long as the defendants were not in arrears, this argument completely ignores that fact that on the first defendant's own admission no payments had been made since March 2017, some seven months before the receiver was appointed at the end of October 2017. This argument is not simply weak, it is unstateable.

46. In their written submission the defendants made a number of arguments on the terms of the security documents which, it was contended, went to the validity of the plaintiff's appointment. Of these, the most substantive is a complaint that it is unclear from the terms of the loan offer whether the loan was to be on an interest only basis for an initial period of two or for five years. However, there is no readily apparent link between this complaint and the assertion which follows that this deprived the defendants of – unspecified – rights. The high point of the argument is the general assertion that this amounts to a lack of transparency

regarding the debt sums which in turn amounts to an unfair contract term. It is not clear from the papers that any complaint had been made by the defendants regarding this alleged uncertainty prior to these submissions being filed. It is also difficult to see how the term could be characterised as unfair. At most, assuming that Ulster Bank only applied the interest free period to the first two years and the defendants can establish that it should have been applied for a period of five years, it would mean that the figures might have to be recalculated. This is not crucial to this application which is not an application for judgment on foot of the loan debt. Further, it seems from the defendant's submissions that the €1,000 per month servicing payment had been paid by them for six or seven years before the loan was transferred to PODAC. This would suggest that from a very early stage they were not even paying the amount of interest due on foot of the loan much less the full amount due such that the question of whether payments should have continued on an interest only basis is largely academic.

47. The defendants then argued that the power of attorney of the borrowers under clause 21 of the mortgage deed does not extend to the appointment of the plaintiff as receiver and that clause 9(a)(ii) only allows for the appointment of a person to collect rents and profits. This completely ignores clause 13 of the mortgage under which a range of additional powers are conferred upon a receiver appointed by the lender under clause 9(a)(ii). These include the statutory power of sale under the Conveyancing Acts 1881-1911 and, separate to these statutory powers, a power to enter upon and take possession of and to "*manage, sell, let, repair, decorate, alter, develop, improve or add to*" the mortgaged property. Further, additional powers are conferred on the receiver under clause 25. Thus, the scheme of the mortgage deed is that the lender has a right to appoint a receiver to collect rents under clause 9. A receiver so appointed has additional powers under clauses 13 and 25. A receiver, once appointed, becomes the agent of the borrowers but the lender's entitlement to appoint the

receiver arises as a lender's remedy under clause 9(a)(ii) and not on the basis of the lender exercising a power of attorney on behalf of the borrower under clause 21. Equally, in conducting the receivership the receiver is not purporting to act on foot of the borrowers' power of attorney under clause 21. He is exercising the powers conferred upon him under clauses 9, 13 and 25 of the deed and under statute.

**48.** The defendants also challenge the letter of demand issued by PODAC on 29 September 2017 prior to the appointment of the plaintiff on the grounds that it is based on hearsay evidence and that an entity such as PODAC is not entitled to rely on the provisions of the Bankers Books Evidence Act 1891 (*per Promontoria (Aran) Ltd. v. Burns* [2020] IECA 87). However, the defendants do not seem to understand the distinction between the service of a letter of demand which is designed to notify a borrower of the fact that the lender is formally demanding repayment of the loan and may proceed to enforce its security and the proofs necessary to proceed before a court in an action for judgment on foot of the same debt. This is not an action for judgment on foot of the defendants' debt and PODAC does not have to meet the standard of proof that would be required in court in order to serve a letter of demand.

**49.** Moreover, in their replying affidavits the defendants have not actually disputed their indebtedness nor challenged the evidence of the plaintiff as to the amount of that indebtedness as of September 2017. The emphasis in the first defendant's affidavit is on his frustration at the fact that attempts to negotiate settlement of the debt in order to redeem the mortgage have to date been unsuccessful. The second defendant acknowledges the taking out of the loans and the mortgages and then tries to distance herself from the complaints made regarding the conduct of the receivership.

**Equity of Redemption**

**50.** In the course of her submissions counsel for the defendants contended not just that the defendants had a contractual right to redeem their mortgage and that they wished to do so but that they had the backing of an investor which would enable them to do this. The submissions on this point were, again, somewhat confused as counsel vacillated between saying that the defendants wished to exercise their right to redeem the mortgage and that they wished to negotiate the redemption of their mortgage. The exercise of a right and the conduct of negotiations with the view to achieving a settlement are not the same thing.

**51.** The equity of redemption vested in a mortgagor is a right to redeem the mortgaged property on repayment in full of the debt secured by the mortgage. Depending on the terms of the loan, this is likely to include all relevant interest and costs due under the loan agreement. If the defendants are prepared to pay PODAC the entire sum due under the loan agreement then they are, of course, entitled to redeem their mortgage. However, this does not seem to be what is proposed. Instead, it appears the defendants want to negotiate a settlement with PODAC for a sum that is less than that due on foot of the mortgage but which, as a full as final settlement of the debt, would nonetheless allow them to redeem the mortgaged property. The crucial difference is that the former is a contractual right whereas the latter is not. Leaving aside how the right to exercise an equity of redemption might be affected in situations of default (as here), if a mortgage is discharged in full then the mortgagee must return the encumbered property to the mortgagor. However, a mortgagee is not obliged to negotiate with a mortgagor with a view to settling the debt for less than that secured by the mortgage, much less to reach an agreement to that effect. It may well make commercial sense to so do, but it is not a legal obligation.

**52.** Part of the case made on behalf of the defendants was if the plaintiff were granted interlocutory orders in the terms sought in this application, he may proceed to sell the

property which would inevitably frustrate the defendants in exercising their equity of redemption. Consequently, it was argued that the defendants' desire to redeem their mortgage and their claim to be in a position to do so went to the balance of convenience and the maintenance of the *status quo*. Of course, if the defendants were not actually in a position to redeem the mortgage, then the balance of convenience might inevitably tilt in the other direction and the court might conclude that the plaintiff, as receiver, should not be precluded from exercising an undisputed power of sale in circumstances where no payment had been made on foot of the mortgage for nearly seven years.

**53.** Because it was such a central feature of the defendants' case, at the conclusion of the hearing I afforded the defendants an opportunity to establish that they were in a position to exercise their equity of redemption in the property. I directed that the plaintiff advise the defendants of the up-to-date redemption figure (i.e. the outstanding amount on the mortgage together with whatever sums were due in respect of interest and costs under the loan agreement). I then afforded the defendants a period of time within which the entire of that amount could be lodged to an escrow account to be held by the defendants' solicitor. At that point, the rental income from the property was already being paid into an escrow account pursuant to an earlier court order.

**54.** The solicitors acting on behalf of the plaintiff duly advised the defendants' solicitor that the amount required to redeem the mortgage as of 21 April 2022 was €957,541.82. On the last day of the stipulated period a solicitor's letter written on behalf of an entity called Columbia Ventures Corporation (CVC) was sent to the defendants' solicitor stating:

*"We have last week received and hold in our client account a sum of €850,000 which money has been sent to us at the direction of CVC to whose order we hold it.*

*We are instructed the CVC intends to advance from these funds an amount for the redemption of the mortgage on the Reilly home when an arrangement has been reached on that matter with the mortgage holder and a Loan Agreement with CVC is finalized”.*

This letter was duly forwarded to the court and to the plaintiff’s solicitor.

**55.** Whilst this correspondence indicates that the defendants may now be in a position to borrow money from an alternative source in order to discharge their liabilities to PODAC, it does not meet with the Court’s directions that a sum sufficient to discharge the mortgage be lodged in an escrow account held by the defendants’ solicitor. To start with, whilst the amount lodged would have been just about sufficient to redeem the mortgage in September 2017, it was significantly short of the redemption figure by April 2022. Secondly, the funds were not transferred to an escrow account as between the parties to these proceedings but were retained by CVC’s solicitor to CVC’s order. Finally, the availability of the money in question for the purposes of discharging the defendants’ mortgage was subject to two further agreements. The letter envisages that there would be an “*arrangement*” between the defendants and PODAC and not simply the discharge by the defendants of the amount owed to PODAC. In addition, the availability of the money to discharge the defendants’ mortgage was subject to a loan agreement with CVC being finalised, a matter in which PODAC would have no involvement. Therefore, I am not satisfied that the defendants have established that they are in a position to redeem their mortgage. Indeed, logically, one might expect that if the defendants wished to redeem their mortgage and were actually in a position to do so that this could be readily arranged. At its height, this correspondence suggests that the defendants might be able to organise alternate financing in order to negotiate the redemption of their mortgage for less than the full amount due.

### **Unfair Contract Terms**

**56.** The defendants' written submissions make a number of general points, supported by authority from the CJEU, as to the Unfair Terms Consumer Contracts Directive (93/13/EEC) and its associated Irish Regulations (S.I. 27/1995). It was contended that the defendants acted as consumers in the re-mortgaging of what had been their primary residence for the purposes of purchasing an alternative residence and letting the first property to tenants. Reliance was placed on the decision in *Costea* Case C-110/14 in which the Court of Justice held that a lawyer who had concluded a credit agreement with a bank and agreed to the registration of a mortgage against a building belonging to his law firm acted as a "consumer" for the purposes of Directive 93/13/EEC. The key factors which appear to have led the Court of Justice to that conclusion was that the purpose of the credit was not specified, and the agreement was not linked to the borrower's profession as a lawyer.

**57.** Assuming that the defendants are, in fact, consumers (and I note the plaintiff's submission that no evidence has been adduced to ground this claim), it is nonetheless difficult to see how the very general arguments made under this heading avail them.

**58.** I readily accept that a court should take account not just of the contested term but of all elements that may be relevant to understanding it in its context (*per Lintner Györgyné v. UniCredit Bank Hungary Zrt.* Case C 5-111/17). The difficulty for the defendants is that not only has no particular term or terms been identified by them as being potentially unfair, they have provided no evidence that might assist the court in understanding the context in which such term(s) might be so regarded. The plaintiff points to the distinction between the term found to be unfair in *Lintner* (a clause which allowed a bank to make unilateral amendments to a contract with a consumer) and the terms of this loan agreement. He also argues that, according to *Lintner*, the court is not under an obligation to examine of its own motion whether the terms of the original loan agreement were unfair at the interlocutory stage. It is

acknowledged by the plaintiff that it may be appropriate to do so at the full hearing of the action but, even then, the court's obligation will be circumscribed by "*the limitations of the subject matter of the dispute as defined by the parties by their claims, in the light of the pleas they have raised*" (Lintner at para. 30).

**59.** The lack of jurisdiction vested in a court to revise an unfair contract term, the exclusion of such term from the contract and the effect this may have on whether the contract can continue to exist and be enforced without the excluded term (see *Banco Santander SA v. Mahamadou Demba* Case C-96/16) are irrelevant to the defendants' case unless a court has firstly identified a term or terms which are unfair. At the hearing of this application counsel on behalf of the defendants was unable to identify any term in the loan agreement or the mortgage which was allegedly unfair, despite being repeatedly requested to do so. In the written submissions there are general allegations of a lack of certainty in the contractual terms and, in the defence it appears to be contended that insofar as clause 10 allowed Ulster Bank to transfer the mortgage to what the defendants characterise as a vulture fund it was unfair. Even this plea is qualified by the proviso that insofar as the term permits such a transfer it is unfair unless it is restrictively interpreted "*as an assignment subject to consumer and regulatory codes*". Unhelpfully, no indication is given as to what consumer or regulatory codes are allegedly in issue and if it is contended that PODAC or the plaintiff are in breach of them. It goes without saying that if the loan was subject to laws or regulations designed to protect the consumer, then it remains subject to the same laws and regulations when transferred to PODAC.

**60.** I am satisfied that the defendants have not made out any argument following from their status as consumers (a status which I have assumed without necessarily deciding) as to or allegedly unfair terms in either the loan agreement or the mortgage which would justify me

in refusing the plaintiff the relief he seeks. In this regard I echo the comments of Stack J. in *O'Brien v. McMahon* [2022] IEHC 246 to the following effect:

*“Whatever may be the correct characterisation of the defendants in this context, I nevertheless find that this argument fails, because it is not clear to me at all what the ramifications of the defendants having the status of “consumers” are said to be. Neither the Directive nor the Irish Regulations were opened to the court and no submission was made which purported to identify any unfair term in any Facility Letter or Deed of Mortgage or Charge.”*

**Analysis of and Conclusions on the Plaintiff’s Application:**

**61.** In the foregoing sections of this judgment, I have analysed the pleas and arguments made by the defendants and the evidence adduced by them. Many of the arguments are made at a level of generality which is of little assistance in an attempt to apply them to the facts of this case. There is also a dearth of evidence to support the arguments the defendants wish to make. Some arguments (such as the contention that there were no arrears due on the loan at the time the receiver was appointed) are manifestly contrary to all the evidence in the case. Other (such as the terms of the agreement allegedly reached between Ulster Bank and the defendants in 2011) have changed during the course of the case. I have conducted this analysis with a view to considering whether the defendants had raised a real case of any substance as part of my assessment of whether the plaintiff has met the “*strong arguable case*” threshold for the grant of interlocutory relief which can be characterised as mandatory in nature.

**62.** I am satisfied that the plaintiff has met this threshold. The defendants do not dispute the fact that they borrowed money from and executed a mortgage in favour of Ulster Bank. The folio to the property shows the mortgage initially registered as a charge in favour of

Ulster Bank and then transferred to PODAC on 9 March 2017. The plaintiff has exhibited redacted versions of the global transfer documentation as between Ulster Bank and PODAC showing the transfer of the defendants' loan and mortgage to PODAC. The defendants have objected to the transfer of their loan but have not advanced any stateable legal grounds in support of this objection. The defendants do not dispute their indebtedness and did not dispute the figure of €845,704.13 as representing the amount of that indebtedness as of September 2017. (As noticed, that figure has since increased to €957,541.82 as of April 2022). In principle, the defendants dispute that this debt is now owed to PODAC, but as noted, no substantive legal basis is advanced for this objection.

**63.** The defendants challenge the validity of the plaintiff's appointment as receiver but have not advanced any legal grounds to support this challenge apart from the generalised assertion that it is in breach of unfair contract terms. The mortgage provides at clause 8 that the total debt became immediately payable if the defendants defaulted in even one periodic payment due on foot of it. Even if it were to be accepted for the purpose of this analysis that some agreement was reached between the defendants and Ulster Bank in 2011 which involved the making of a servicing payment of €1,000 as between two mortgages, the defendants ceased making that payment in March 2017. Under clause 9(a)(ii) of the mortgage, PODAC as successor-in-title to Ulster Bank was entitled to appoint a receiver at any time after the total debt became due. The plaintiff has established a strong arguable case that he was validly appointed as receiver.

**64.** As receiver, the plaintiff not only has power to collect and receive rents and profits from the property under clause 9(a)(ii), but also has additional powers conferred by statute and under clauses 13 and 25 of the mortgage deed. These include, expressly, the power to take possession of the property and the power to sell the property (clauses 13(c) and (e)). Thus, the plaintiff has established a strong arguable case that the powers exercised and

proposed to be exercised in the course of the receivership are ones validly conferred on him. The defendants have not established any real or substantial case to the contrary.

**65.** The plaintiff and two of the deponents have set out in detail the various actions of the first defendant and his agents which were both intended to and which did interfere with the conduct of the receivership. The defendants have not responded to or disputed that evidence. As the details have been set out earlier in this judgment, I do not propose to repeat that evidence here. I would, however, express particular concern at the level of harassment, intimidation and threat directed at tenants who cooperated with the receivership and at the plaintiff's property manager. Conduct of this nature cannot be condoned. I reject absolutely the attempt by counsel to dismiss it as conduct engaged in by the first defendant's agent rather than the first defendant himself. I equally reject the second defendant's attempt to distance herself from her husband's actions and those he engaged to act on their behalf. She may have taken a backseat but presumably she benefited from the rental income diverted by the first defendant from the receivership. She certainly made no effort to cooperate with the receiver and has not suggested to the court that she intends doing so now. I am satisfied that the interferences with the conduct of the receivership are properly characterised as a joint enterprise between the defendants for their mutual benefit even if the second defendant chose not to engage in detail with the arrangements the first defendant was making on both of their behalf.

**66.** As noted, counsel for the plaintiff suggested that if I were satisfied of the matters dealt within the immediately preceding paragraphs, it would be unnecessary for me to conduct a balance of convenience analysis as the plaintiff is entitled to interlocutory relief *ex debito justitiae*. Without necessarily finding this proposition to be incorrect, I will briefly look at the balance of convenience which, in the circumstances of this case, I find comprehensively

favours the grant of the relief sought. Obviously, if I were to have reached the opposite conclusion on this issue, it might have been necessary to consider the point in more detail.

**67.** The defendants have a significant indebtedness on foot of this loan. Full repayments have not been paid since 2009 or so and no repayment at all has been made since March 2017. It is highly unlikely they will be able to meet any order for damages. The defendants state that they wish to redeem their mortgage but have not been able to establish to the Court's satisfaction that there is any realistic prospect of them being able to do so. The receiver was appointed nearly six years ago. The defendants, either personally or through their agents, have persistently interfered with the conduct of the receivership. They have received rental income from the property which was not applied to discharge the loan and was not passed to the receiver until a court order was made requiring payment into an escrow account in December 2021. They have harassed, intimidated and threatened those tenants who were prepared to cooperate with the receivership. They have not offered any undertaking to the court that they will cease such conduct in the absence of court orders.

**68.** On the other hand, the making of the order sought gives rise to a real prospect that the receiver will sell the property prior to the trial on foot of the power of sale under the mortgage. I acknowledge that this is a real prospect. Whilst an enforced sale of property is an interference with the defendants' property rights nonetheless, in my view, the balance of justice permits such interference in this case for a number of reasons. Firstly, the property is not the defendants' family home, and they are not residing in it. The tenants currently residing in the property may be a family, but their tenancy is illegal as it was granted to them by the first defendant at a time when the receivership was in place. (I note a finding to this effect was made against the first defendant by the Residential Tenancies Board in the context of the tenancy of the second tenants so he can have had no doubt as to this legal fact). Secondly, for the reasons already discussed there does not appear to be any reality to the

defendants' stated desire to redeem their mortgage. Thirdly, no payment at all has been made on foot of this loan for in excess of six years. Fourthly, I am satisfied that damages would be an adequate remedy for the defendants if they succeed on any of the grounds set out in their defence. This is primarily because the property is an investment property and not one in which the defendants reside.

**69.** Finally, the court cannot ignore the egregious conduct of the defendants. Interference with a receivership can take many forms but conduct which results in tenants who are cooperating with the receiver being forced out of their home with genuine fears for their personal safety and that of a small child and suffering from stress caused by an ongoing campaign of harassment and intimidation cannot be ignored when a court is considering where the balance of justice lies. Sight should not be lost of the fact that an injunction is an equitable remedy and a court should not lightly make or refuse orders the effect of which would be to condone blatantly illegal behaviour of this kind.

**70.** In all of the circumstances, I propose making the orders sought by the plaintiff in terms of paras. 1 to 5 inclusive of the Notice of Motion. As the plaintiff has succeeded in this application, I also propose making an order for the plaintiff's costs as against both defendants to be adjudicated in default of agreement, such order to be stayed pending the determination of the proceedings by this court. If the defendants wish to contend for a different costs order, I will allow a period of four weeks from the date of this judgment within which written submissions (not to exceed 1,500 words) may be filed on this issue. If such submissions are filed, the plaintiff shall have a further two weeks to file a reply. In default of submissions being received within that time frame, the order will be drawn up in the terms proposed.