

THE HIGH COURT

[2024] IEHC 128

[2016 No. 4510 P]

BETWEEN

PATRICK O'CONNOR

PLAINTIFF

-AND-

PROPERTY REGISTRATION AUTHORITY OF IRELAND

DEFENDANT

-AND-

MICHAEL COTTER AND LUKE CHARLETON AND FENITON PROPERTY

FINANCE DAC

RESPONDENTS TO THE MOTION

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 28th day of February, 2024.

INTRODUCTION

1. This judgment concerns an application made by the plaintiff in this matter, Mr. O'Connor, for liberty to issue fresh proceedings against the third defendant, Mr. Charleton.
2. By motion dated 28 September 2023, the plaintiff sought several orders. The first relief sought was an order "*pursuant to the inherent jurisdiction of this Honourable Court, granting*

the Plaintiff herein, permission to initiate proceedings against Luke Charleton.” The remainder of the reliefs comprise a series of orders relating to the actions of Mr. Charleton, in his capacity as a receiver, that concern several properties with which Mr. O’Connor is (or was) connected, and which are framed as injunctive-type relief restraining Mr. Charleton from taking any steps *qua* receiver in respect of the identified properties.

3. Mr. O’Connor needs permission to commence new proceedings arises because he is the subject of an ‘*Isaac Wunder*’ type order made on the 9 October 2017 in these proceedings by the High Court (McGovern J.). That order has the effect of restraining Mr. O’Connor from instituting any proceedings against any persons that directly or indirectly concern certain properties or certain borrowings that are identified in the schedule to the order without the permission of the President of the High Court or a judge nominated by him. I was nominated by the President to take the application for leave to institute the proceedings.

4. For the reasons set out in this judgment, I have concluded that the permission sought should be refused. In summary, I am satisfied (a) that the intended proceedings are proceedings of a type captured by the terms of the existing *Isaac Wunder* type order; (b) that the intended proceedings depend on an erroneous contention regarding the legal effect of certain clauses in mortgage and charge documents executed by Mr. O’Connor and that gave rise to the appointment of Mr. Charleton as a receiver; and, (c) that in all the circumstances the intended proceedings are vexatious in the sense that, fundamentally, they seek to re-agitate matters that arise from and are closely connected to disputes that already have been the subject of final determinations at first instance and on appeal in a number of sets of proceedings.

APPLICABLE LEGAL PRINCIPLES

5. Before addressing the history of the case and the orders being sought by Mr. O’Connor it may be helpful to set out the legal principles that govern an application such as this. I will

address other legal issues relating to premise for the substantive relief sought by Mr. O'Connor later in this judgment. The legal principles relating to the manner in which the court should approach applications to relieve a party from the effects of an *Isaac Wunder* type order have been helpfully summarised by Phelan J. in the case of *Morgan v. The Labour Court* [2023] IEHC 122, and I gratefully adopt her analysis.

6. In *Morgan*, Phelan J. considered the range of matters that must be considered by the court in determining an application for leave to bring proceedings where there is an *Isaac Wunder* order in place. In the first instance, there are weighty reasons why a litigant should not be prevented from exercising right of access to the court:-

“33. A Court in making an Isaac Wunder Order and in determining an application for leave to bring further proceedings notwithstanding the existence of an Isaac Wunder Order must be mindful of the fundamental importance of the constitutional right of access to the Courts. The purpose and effect of the Isaac Wunder Order is not to prevent a party from bringing an otherwise stateable claim. The Isaac Wunder Order is not intended and should not operate to prevent such claims. The purpose of the Isaac Wunder Order is to protect the court process and persons required to defend wholly unmeritorious proceedings from abuse. Leave should be granted where a basis for a sustainable claim is demonstrated but, where I am satisfied that intended proceedings are merely a further step in a chain of frivolous and vexatious litigation, it is appropriate to refuse leave.”

7. In addressing the applicable legal principles in a situation such as this, the court also considered a number of judgments, including *Kenny v. Trinity College Dublin* [2008] IEHC 320, *S.P. v. U.G.* [2016] IEHC 693 and *Riordan v. Ireland* (No. 5) [2001] 4 IR 463.

8. In *Kenny v. Trinity College Dublin*, Clarke J. (as he then was) made the following observations at para. 2.4:-

“It is clear, of course, that the whole purpose of the jurisdiction of the court to make an Isaac Wunder order is to protect persons from being the subject of frivolous or vexatious litigation. Obviously any proceedings which are frivolous or vexatious can be struck out. However, in the ordinary way there is nothing to prevent a litigant from commencing frivolous and vexatious proceedings and placing a burden on the defendant concerned to consider those proceedings and, if thought appropriate, to bring an application before the court seeking to have the proceedings struck out. However, where a party has abused the process of the court, by means of bringing a number of frivolous or vexatious proceedings, the court has a jurisdiction to make an Isaac Wunder order so as to give the defendant in such circumstances the added protection of precluding the plaintiff from maintaining proceedings against that defendant without court leave. It would, of course, be wholly inappropriate to prevent a party who is the subject of such an order from having an opportunity to persuade the court that whatever may have been the past history of litigation between the parties, new proceedings were contemplated which were not frivolous and vexatious and which should, therefore, proceed.”

9. As noted by Ó Caoimh J. in *Riordan v Ireland (No. 5)*, in assessing if the proceedings are vexatious, the court may consider the *“whole history of the matter and it is not confined to a consideration as to whether the pleadings discloses a cause of action”*. In the *Riordan* judgment Ó Caoimh J. identified a number of features that would tend to show that a proceeding was vexatious:

“(a) the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;

(c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) where the person instituting the proceedings has failed to pay the cost of unsuccessful proceedings;

(f) where the respondent persistently takes unsuccessful appeals from judicial decisions.”

THE HISTORY OF THE PROCEEDINGS

10. The court has been furnished by the lawyers for the third-named defendant with an extensive series of booklets that set out the history of the proceedings brought by Mr. O’Connor, and which led to the making of *Isaac Wunder* orders in this case. Those matters have been produced as exhibits to a replying affidavit sworn by Ricky Kelly on behalf of the third-named defendant on 19 October 2023. It is not necessary for the purposes of this judgment to rehearse the full details of the cases and the issues that were engaged. However, it is necessary to set out a brief history of how they were decided, and the orders were made.

11. Mr. O Connor has brought the following proceedings:

- a. High Court proceedings bearing the record number 2012 No. 12108P, brought by the plaintiff against Bank of Ireland Scotland (Ireland), Bank of Scotland Plc, Michael Cotter and Luke Charleton and Others (described by Mr. Kelly as the “*2012 lis pendens proceedings*”).

- b. High Court proceedings bearing the record number 2012 No. 4449S, brought by Bank of Scotland against Mr. O'Connor (the "**2012 judgment proceedings**").
- c. High Court proceedings bearing the record number 2015 No. 2002P, brought by Mr. O'Connor against Michael Cotter and Luke Charleton defendants (the "**2015 Receiver proceedings**").
- d. The High Court proceedings bearing the record number 2016 No. 1704P, brought by Mr. O'Connor against Sherry Fitzgerald Ltd and Ronan Daly Jermyn solicitors (the "**2016 Sherry Fitzgerald proceedings**").
- e. High Court proceedings bearing the record number 2017 No. 4894P, brought by Mr. O'Connor against James Kelly, Amy McCarthy, and Adrian MacNamara trading as Murphy MacNamara & Company Solicitors, defendants (the "**2017 Purchaser proceedings**"), and
- f. High Court proceedings bearing the record number 2016 No. 4510P, brought by Mr. O'Connor against The Property Registration Authority of Ireland (the "**2016 PRAI proceedings**").

12. It should be noted that the application for leave to bring the new proceedings was brought in the context of the *2016 PRAI proceedings*, as required by the Orders made by McGovern J. in 2017.

13. In the 2012 *lis pendens* proceedings, Mr. O'Connor, *inter alia*, challenged the validity of the appointment of the joint receivers as receivers over the properties that had been mortgaged and/or charged by him to the bank. As part of his defence and counterclaim in the 2012 judgment proceedings, the validity of the appointment of joint receivers over the properties also was challenged. The properties that were the subject of those proceedings included a property at 16 Amberley Heights, in Douglas County Cork, which also was the

subject of the 2016 Sherry Fitzgerald proceedings, the 2016 PRAI proceedings, and the 2017 Purchaser proceedings.

14. The 2012 *lis pendens* proceedings were dismissed, and the *lis pendens* vacated. In the 2012 judgment proceedings, the High Court granted judgment to the bank in a sum of over €7 million. Both cases were the subject of unsuccessful appeals brought by Mr. O'Connor.

15. In June 2015 Mr. O'Connor instituted new proceedings – the 2015 Receiver proceedings against the joint receivers. Those proceedings were dismissed by Haughton J., which order was appealed to the Court of Appeal unsuccessfully; and the Supreme Court refused Mr. O'Connor's application for leave to appeal. The 2016 Sherry Fitzgerald proceedings were brought against the estate agents and solicitors appointed by the receivers in connection with the sale of secured properties. In those proceedings, Mr. O'Connor was the subject of an adverse judgment and orders made by McGovern J. on 8 June 2016. The 2017 Purchaser proceedings were brought against the purchasers of 16 Amberley Heights together with their solicitor.

16. Mr. O'Connor did not succeed in any of the cases. All the proceedings have been the subject of final determinations, including determinations on appeal.

- a. The 2012 *lis pendens* proceedings, the 2012 judgment proceedings, and the 2015 Receiver proceedings were the subject of a determination of the Supreme Court, dated 23 June 2017, dismissing Mr. O'Connor's application for leave to appeal orders of the Court of Appeal dismissing his various appeals.
- b. In the 2016 Sherry Fitzgerald proceedings, the 2016 PRAI proceedings and the 2017 Purchaser proceedings, in this court, McGovern J. dismissed Mr. O'Connor's claims on the grounds that they were an abuse of process as Mr. O'Connor was seeking, in effect, to relitigate a matter, the validity of the

appointment joint receivers, that had already been decided by courts of competent jurisdiction.

17. Hence, all of the proceedings referred to above were the subject of decisions adverse to Mr. O'Connor in the High Court. In addition, the Court of Appeal made decisions adverse to Mr. O'Connor in the various proceedings, with judgments bearing the following neutral citations: [2017] IECA 24; [2017] IECA 25; [2017] IECA 54; [2018] IECA 67; and [2019] IECA 235.

18. More centrally to this application, there are two relevant orders made in the High Court, neither of which have been disturbed on appeal.

19. First, on 8 June 2016, in the 2016 Sherry Fitzgerald proceedings, the High Court granted orders *inter alia* joining Mr. Cotter and Mr. Charleton as defendants to the proceedings, and then dismissed the proceedings on the grounds that they were an abuse of process. The basis for the orders was recorded in the order in the following way:

“... as the plaintiff seeks to re-litigate a matter, namely, the validity of the appointment of joint receivers, that has already been decided by a court of competent jurisdiction in proceedings entitled” [thereafter the order sets out the details of the 2012 *lis pendens* proceedings, the 2012 judgment proceedings, and the 2015 receiver proceedings].

20. By the same order, the court ordered that the proceedings be dismissed on the grounds that the plaintiff is precluded, under the rule in *Henderson v. Henderson* (1843) 3 Hare 100, from litigating one or more issues that have not previously been decided which could have been brought forward in previous proceedings. On the 8 June 2016, by the same order, the High Court ordered that the plaintiff be restrained from instituting any proceedings without leave of the court (to be sought on not less than four clear days' notice to them) against any or all of:-

(a) *Michael Cotter and Luke Charleton;*

...

(d) any servant(s) or agent(s) of, or any consultant or other party assisting Michael Cotter and/or Luke Charleton in relation to any matter involving or relating to the receivership, the subject of the 2012 Lis Pendens Proceedings or the 2012 Judgment Proceedings or any act of them or any of them in the course thereof.”

21. For reasons that were described at the hearing, it became apparent that the order made in June 2016 may not have been adequate to prevent Mr. O’Connor from seeking to relitigate matters arising from the joint receivership, and this led to the second order of importance .

22. Hence, in these proceedings, a further order was sought from and granted by McGovern J. in the High Court. By that order, the court dismissed those proceedings on the grounds they were an abuse of process and were frivolous and vexatious because the plaintiff sought to relitigate the validity of the appointment of joint receivers which have already been the subject of decisions by courts in, at that point, four separate sets of proceedings. In addition, the court made the following order:-

*“And **IT IS ORDERED** that the Plaintiff be restrained from instituting any proceedings against any person whomsoever that directly or indirectly concerns any of the properties the subject of the said proceedings (the “**Properties**”) or the borrowings the subject of the said proceedings (the “**Borrowings**”) without the prior leave of the President of the High Court, or some other judge nominated by him, such leave to be sought by an application in writing addressed to the Chief Registrar of the High Court, which Properties and Borrowings are listed in the Schedule to this Order.”*

23. The schedule lists seven properties, and describes the borrowings as “[m]onies advanced to the Plaintiff by Bank of Scotland (Ireland) Limited pursuant to a Facility Letter dated 24 May, 2010, duly accepted by the Defendant on 9 June, 2010, pursuant to which the Bank of Scotland (Ireland) Limited, as lender, agreed to advance to the Defendant, as borrower, a facility in the amount of €5,404,000 (the “Facility”) for the purposes more

particularly described therein on the terms and conditions therein contained or thereby incorporated, including the Bank's General Conditions (ref:10.09) which Facility (and the related security) was transferred to Bank of Scotland plc by virtue of a cross-border merger made in accordance with Directive 2005/56/EC of the European Parliament and of the Council that was approved by order of the Court of Session of Scotland to take effect at 23:59 hours GMT on 31 September, 2010 and thereafter to Feniton Property Finance Limited, now Feniton Property Finance DAC."

THE UNDERLYING DISPUTE

24. All of the proceedings so far brought by Mr. O'Connor have their origins in borrowings from the then Bank of Scotland Ireland Ltd. As security for the loans advanced to Mr. O'Connor, properties were made the subject of mortgages and charges dated 2002, 2007, 2009 and 2010, respectively. On the 21 September 2012, relying on powers contained in the mortgage and charge documents referred to above, Bank of Scotland plc (in whom the business of Bank of Scotland (Ireland) Ltd had been vested with effect from 31 December 2010) appointed joint receivers. In each of the proceedings, Mr. O'Connor has sought to avoid the consequences of his indebtedness, by suing not just the Bank and the receivers but also the prospective purchasers of properties that were to be sold by the receivers, and the estate agents and solicitors involved in the sales.

25. In order to understand the arguments now sought to be made by Mr. O'Connor it is necessary to set out the basis upon which the Bank was entitled to appoint receivers and the terms of their appointment. The relevant portion of the deed of appointment is as follows:-

"...the bank hereby appoint Michael Cotter and Luke Charleton of Ernst & Young, Chartered Accountants, City Quarter, Lapps Quay, Cork, to be the joint receivers of all the property comprised in and charged by the charge documents to enter upon and

take possession of the same in the manner specified in the charge documents and such receiver shall have and be entitled to exercise the powers conferred upon them by the charge documents and by law.”

26. Having considered the various charges under which the receivers were appointed, I am satisfied that there is no material difference, if any, in the way that the appointment powers are described in the various charges. These are described in Clause 9.1 of each of the charges as follows: -

“9.1 At any time after power of sale has become exercisable ... the Bank may from time to time appoint under seal or under hand of a duly authorised officer or employee of the Bank any person or persons to be receiver and manager or receivers and managers (herein called “Receiver” which expression shall where the context so admits in the plural and any substituted receiver and manager or receivers and managers) of the Secured Assets or any part or parts thereof and from time to time under seal or underhand a duly authorised officer or employee of the Bank remove any Receiver so appointed and may so appoint another or other in his stead. If the Bank appoints more than one person as Receiver of any of the Secured Assets, each such person shall be entitled (unless the contrary shall be stated in the appointment) to exercise all the powers and discretions hereby or by statute conferred on Receivers individually and to the exclusion of the other or others of them.”

THE NEW CLAIMS

27. Mr. O’Connor now seeks leave to issue fresh proceedings against Mr. Charleton. In that regard, the court has been furnished with a draft statement of claim prepared by Mr. O’Connor. This statement of claim is problematic as it is framed more as an affidavit rather than a proper

pleading, however the court is able to grasp the gravamen of the claims to be made by Mr. O'Connor if permission is granted.

28. Essentially, Mr. O'Connor asserts that Micheal Cotter retired or was discharged from the joint receivership in or about August 2020. He claims that the discharge or retirement had the effect of terminating joint receivership and preventing Mr. Charleton from acting as a receiver on his own since that date. Mr. O'Connor seeks to argue that on foot of that event, which will be discussed in more detail below, Mr. Charleton has unlawfully appropriated the plaintiff's property since August 2020, has been a trespasser on all of his properties since August 2020, has engaged in fraudulent misrepresentation and deception since August 2020, has acted in bad faith, has engaged in theft by depriving the plaintiff of a rental income, has engaged in false accounting by deliberately undervaluing a identified property, has engaged in extortion, and has breached his duty of care and breached the plaintiff's constitutional and European Charter of Human Rights' civil and property rights. Furthermore Mr. O'Connor seeks permission to bring a claim that Mr. Charleton has committed a fraud on the courts, has unlawfully interfered with the plaintiff's contractual relations, has caused unlawful interference with the plaintiff's co-ownership and beneficial property interest rights of third parties, and has engaged in a series of unconscionable actions.

29. On foot of those assertions, Mr O'Connor seeks permission to claim *inter alia*, “*the return of possession of all of the Plaintiff's properties to the Plaintiff by Luke Charleton, while acting on his own, from August 2020 and/or such earlier date as this Honourable Court may decide*”, and, “*for all the applicable market rental income, including for all properties, complete or otherwise, which were unlawfully appropriated, and any damages in an amount to be determined for economic loss, duress and damage, by Luke Charleton, while acting on his own, from August 2020 and/or such earlier date as this honourable court may decide.*”

30. A curious and unfortunate element in the current application is that the defendants have been unable to identify the original signed copy of a deed of discharge executed by Mr. Cotter in or around August 2020. In his affidavit, Mr. Kelly avers that Michael Cotter retired and signed a deed of discharge in or around August 2020, but he avers that “*the original, signed copy of such discharge has been mislaid*” and he therefore refers to and exhibits a final unsigned draft copy of the deed, which he avers was the version signed by Mr Cotter. For the purposes of this application, I am prepared to accept that Mr. Cotter signed a deed of discharge in August 2020; in fact, if that were not the case the central factual premise of Mr. O’Connor’s application would seem to fall away.

THE ARGUMENTS

31. Mr. O’Connor presented his arguments to the court in a careful and courteous manner. His arguments, while very extensive, are premised on a relatively straightforward legal proposition: Mr. O’Connor states that the retirement of Mr. Cotter had the effect of preventing Mr. Charleton from acting on his own as receiver over the various secured properties.

32. Mr. O’Connor seeks to make his arguments by reference to a desire to litigate matters arising in the aftermath of Mr. Cotter’s retirement, with the implication being that these are not matters captured by the *Isaac Wunder* type order and that they do not engage with the disputes that have been resolved in the previous proceedings. In my view, there is no doubt that in reality his objective is to reach back and seek to reverse the effects of the appointment of the joint receivers themselves. Mr. O’Connor is seeking to litigate matters that clearly:

- (i) originate in his borrowing from Bank of Scotland (Ireland) Limited,
- (ii) relate to the properties that were provided as security for that borrowing,
- (iii) concern the appointment of receivers pursuant to the various security agreements entered into by him, and

(iv) focus on the actions taken by the receivers on foot of that appointment.

33. Hence, even though the events that occurred in August 2020 had not occurred when the *Isaac Wunder* order was made, there is a close and clear connection between the proposed new proceedings and the previous proceedings. Unless the court is persuaded to give permission, the bringing of the intended proceedings would contravene the existing *Isaac Wunder* orders.

34. By reference to the criteria identified in the authorities referred to above, and, in particular, the various features of frivolous and vexatious litigation identified by Ó Caoimh J. in *Riordan v. Ireland (No. 5)* the proposed proceedings have all the hallmarks of a case brought for an improper purpose.

35. Of more significance to the question of whether the proposed proceedings are vexatious, the application to bring new proceedings depends on an assertion that is capable of being resolved with some clarity, because it involves the construction of Clause 9.1 in the four mortgage documents.

36. Having considered the entirety of the mortgage document, and the particular language utilised in Clause 9.1, it is clear that the clause contemplated the possibility not only that one or more persons could be appointed as receiver, but that that situation could alter from time to time. Hence, assuming that the appointment of another receiver was done in accordance with the provisions of Clause 9.1 (i.e., under seal or under hand of a duly authorised officer or employee of the bank), the charge does not contemplate that there is any requirement for the originally appointed receiver or receivers to remain in place for the duration of the receivership.

37. Having considered the document, I am in a position to find that the charge document expressly provides that where more than one person is appointed as receiver “*each such person shall be entitled ... to exercise all the powers and discretions hereby or by statute conferred on Receivers individually and to the exclusion of the other or others of them*”. Very clearly, this sentence in Clause 9.1 confirms Mr. Charleton’s ongoing entitlement to act as receiver and

to exercise all the powers and discretions conferred on him individually. The clause expressly encapsulates a proposition that the powers to be exercised by the receivers were not required to be exercised jointly. Hence, on the plain language of the contractual terms agreed by the parties, the retirement of Mr. Cotter had no material effect on the powers of Mr. Charleton to continue to act as a duly appointed receiver.

38. That conclusion is confirmed by the decision of the Court of Appeal, *Sheedy v. Jackson* [2020] IECA 167. That was a case in which two receivers were appointed at different times under the same debenture over some of the same property. The case involved a challenge to the validity of an action of one receiver undertaken without the participation of the other, and that challenge was premised on the contention that the two receivers were required to act jointly. The judgment of the Court of Appeal was delivered by Murray J., who made the following general point: -

“29. Obviously, the precise analysis in any given case will depend on the mode and context of appointment, and the specific question thus arising. However, generally speaking the approach adopted in other cases to the resolution of these issues suggests an unsurprising sequence of inquiry. The first is directed to whether – and if so how – there was authority to appoint more than one receiver to begin with. Second, where there is such authority, whether the specific terms of the underlying mortgage, charge or debenture and the appointment itself, are consistent with an authority that is joint, or several. Third, where the matter is not expressly addressed in the relevant instrument, whether there is a basis for implying or deducing a joint or a several power.”

39. The court went on:-

“42. ... the question of whether the power is joint or several starts as one of interpretation of the deed of mortgage. That exercise is properly approached in

accordance with the analysis reflected in Law Society v. Motor Insurers Bureau of Ireland [2017] IESC 31 and Jackie Greene Construction Ltd. v. Irish Nationwide Building Society [2019] IESC 2, described by Clarke CJ in the latter decision as that of 'text in context' (para. 3.2). Recognising that phrases or terminology rarely exist in the abstract, and thus that the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence, the court must approach the mortgage here on the basis that governing legal rights and obligations should be interpreted as they would be understood by a reasonable and informed member of the public who understands the purpose and intent of, and background to, the document in question. Important to that exercise (but obviously not dispositive of it) is the 'commercial and practical context in which the agreement was meant to operate' (per O'Donnell J. Law Society v. MIBI at para. 12)."

40. Murray J. went on to caution that it would be wrong to focus unduly on nuances of language:-

"45... The context is critical, and a key part of that context lies in the reality that those parts of a mortgage deed enabling the appointment, and prescribing the powers and duties, of a receiver are of limited – if any - relevance to the interests of the mortgagor."

In that regard, the Curt highlighted the duality in the receiver's agency – *"although agent of the mortgagee his concern is for the benefit of the mortgagor, who will be responsible for the appointment, and who will have the immediate interest in the scope and definition of the receiver's powers"*.

41. Significantly, for the purposes of this application, Murray J. went on at para. 46 to suggest that it was difficult to discern what, in the context, would justify the conclusion that a

mortgage deed envisaged receivers only with joint powers. Having considered various possible scenarios, which do not appear to arise in the current application, Murray J. noted:-

“47. Against these possibilities stand the far greater likelihood that dual receivers required to act jointly on all matters require the consent and participation of the other will face unnecessary logistical complications in the discharge of their functions. That is acknowledged by the minority in Kendle v. Melsom in the concession that some functions could be discharged separately once the general course of the receivership was determined jointly. The distinction between the two appears to me to be laden with potential ambiguity.”

42. Returning to the specific language of Clause 9.1, it is important to bear in mind that the context here is that – where that power was triggered under the debenture – the bank had the power to appoint the receivers for the purpose of assisting the bank, as mortgagee, to recover the moneys that it was owed, *inter alia*, by way of recourse to the secured assets. It is clear to me that the receivers although identified in the deed of appointment as “*joint receivers*” were not required to act jointly but could act severally. At the risk of unnecessary repetition, I consider that no other reasonable interpretation is open having regard to the sentence:-

“If the Bank appoints more than one person as Receiver of any of the Secured Assets, each such person shall be entitled ... to exercise all the powers and discretions [conferred on them] individually and to the exclusion of the other or others of them.”

THE NOVATION ISSUE

43. At the hearing of this application, Mr. O’Connor raised a subsidiary argument about the asserted effects of certain deeds of novation. This was not a matter that had been raised in the draft Statement of Claim. Despite that, and the legitimate objections raised on behalf of Mr. Charleton, I will address the argument briefly as I consider that it is capable of a straightforward

resolution. The argument flows from the fact that the underlying debts, securities and associated causes of action have been the subject of a series of transfers, a situation that has become increasingly familiar in Irish commercial life in recent years. The current position being that those choses in action are held by Everyday Finance DAC on foot of a global deed of transfer from May 2023. In his affidavit of the 24 November 2023, Mr. O'Connor argues that Mr. Charleton is relying on deeds of novation that were executed as part of the earlier overall transfer transactions. He argues that the deeds are ineffective because he was not a party to them and his agreement was not sought.

44. This argument is erroneous. In *O&E Telephones Ltd v. Alcatel Business Systems* 1995 WJSC-HC 2936, McCracken J. adopted the following definition of novation in *Scarf v. Jardine* (1882) 7 App. Cas. 345:

“That there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract.”

45. The purpose and effect of the deeds in this case are to affect the obligation between the parties to the receiver agreements. The receiver agreements are the deeds of appointment and letters of engagement entered into between the receivers and the parties that appointed them. The effect of the particular novations in this case is to ensure that the transferees under the deeds of transfer step into the shoes of the transferor insofar as the obligations under the receiver agreements are concerned. Put simply, the transferor had agreed to pay the receivers, and the transferee agreed to take on that obligation; and the receivers were provided with clarity on to whom they were to remit sums they recovered. The novation had no effect on the underlying appointment of the receivers or to the continued existence of the receivership. The observations of Irvine J. in the Court of Appeal, in *Healy & Anor v. McGreal, Healy v. McGreal and Healy & Anor v. McGreal* [2018] IECA 78 at para. 35 are apposite in this regard:

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

46. Mr. O’Connor is not a necessary party to the deeds of novation, and the nature and effect of the deeds of novation are not matters that can be prayed in aid by him for the purposes of this application.

CONCLUSION

47. In all circumstances and having carefully considered the arguments made by Mr. O’Connor both in writing and in his oral submissions, I have come to the conclusion that the proceedings which he seeks permission to bring are vexatious. That conclusion is fortified by the fact that not only is Mr. O’Connor seeking to reopen aspects of a dispute that has consumed an extraordinary amount of court time in recent years, but also that the proposed draft statement of claim manifestly fails to comply with the long established practice and requirement, reflected in the rules of court, that detailed particulars must be set out in the pleadings in all cases alleging misrepresentation, fraud, breach of trust, wilful or undue influence. In this case,

Mr. O'Connor wishes to level serious allegations of wrongdoing against Mr. Charleton. It is not a case where he alleges that due to some technical infirmity Mr. Charleton's actions are liable to be set aside. Instead, the allegation is that Mr. Charleton acted deliberately, knowingly and dishonestly in continuing receivership after August 2020. On the basis of the voluminous papers considered by the court, that is an unsustainable claim. It is clear that the powers used to appoint Mr. Charleton – set out in a legal document executed by Mr. O'Connor – contemplated expressly that he was entitled to exercise those powers individually.

48. In all the premises, I will refuse the application. As this judgment is being delivered electronically, I will list the matter for final hearing on the 15 March 2024 at 10.30 am when I will hear arguments on the final form of orders and the issue of costs.