UNAPPROVED
THE COURT OF APPEAL

[2023] IECA 312
Appeal Number: 2022/219

Whelan J.
Faherty J.
Haughton J.

BETWEEN/

KEN TYRRELL AND EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY

PLAINTIFFS/ RESPONDENTS

- AND -

ANNE GOVAN

DEFENDANT/ APPELLANT

JUDGMENT of Ms. Justice Faherty dated the 12th day of December 2023

1. This is Ms. Govan's (hereinafter "the applicant") application to this Court to extend the time for her to appeal against the Order of the High Court (Meenan J.) (hereinafter "the Judge") made on 7 July 2022 (and perfected on 22 July 2022) by which the High Court acceded to the plaintiffs' application for interlocutory relief restraining the applicant from interfering with the functions and office of the first plaintiff over property at 1 Castle Falls, Ross Road, Killarney, County Kerry ("the "Castle Falls Property") and 38 New Street, Killarney, County Kerry ("38 New Street") (together "the Properties"). Pursuant to the

relevant rules, the applicant had 28 days from the date of the perfection of the Order to appeal which meant that the time within which to appeal expired at the close of business on 19 August 2022. The applicant who was legally represented at the time the Order was made and perfected did not appeal within the requisite time frame.

2. For the purposes of the application, it is helpful to set out the background to the within proceedings and the circumstances which gave rise to the plaintiffs' application for interlocutory relief the Order in respect of which the applicant now wants to challenge if granted the requisite extension of time in which to do so.

Background and relevant chronology

3. Pursuant to a facility letter dated 14 March 2001, TSB Bank advanced the applicant and her son, Mr. John Govan, a loan facility in the sum of £100,000 for the purpose of purchasing the Castle Falls Property.

4. With effect from 20 April 2001, the business, property, rights and liabilities and obligations of TSB Bank became vested in Irish Life and Permanent plc. On 29 June 2012, Irish Life and Permanent plc changed its name to Permanent TSB ("PTSB") (where necessary, all references hereinafter will be to PTSB).

5. On 18 September 2002, as security for the monies lent pursuant to the facility letter of 14 March 2001, the applicant executed a mortgage over the Castle Falls Property in favour of PTSB in her own right, and on behalf of Mr. John Govan pursuant to a power of attorney ("the 2002 Mortgage").

6. Pursuant to a facility letter dated 12 March 2007, PTSB advanced the applicant and John Govan a loan facility of €800,000 for the purchase of 38 New Street. The 12 March 2007 loan facility was secured by a mortgage executed by the applicant and John Govan

over the 38 New Street and the Castle Falls Property ("the 2007 Mortgage"). This mortgage incorporated "the [PTSB] Mortgage Conditions 2002".

7. It should be said that 38 New Street is an investment property comprising a commercial unit and three residential units. The Castle Falls property comprises a residential investment property.

8. Pursuant to an Irish Law Deed of Conveyance and Assignment, dated 14 October 2015, PTSB assigned to Cheldon Property Finance DAC ("Cheldon") its interest in certain assets including the mortgages referred to above.

9. Consequent on the loans advanced to the applicant and John Govan having fallen into default, by letters dated 19 October 2018, Cheldon demanded repayment of €781,785.05 together with ongoing interest from the applicant.

10. Pursuant to the 2007 Mortgage, by Deeds of Appointment both dated 14 November 2018, the first plaintiff was appointed as "receiver" over, respectively, 38 New Street and the Castle Falls Property.

11. Pursuant to the powers contained in the 2002 Mortgage, by a third Deed of Appointment dated 14 November 2018, Cheldon appointed the first plaintiff as "receiver and manager" over the Castle Falls Property.

12. By a Deed of Transfer and a Deed of Conveyance and Assignment, both dated 19 July 2019, Cheldon assigned to Everyday Finance Designated Activity Company (the second plaintiff herein) ("Everyday") certain assets including the aforementioned loan facilities and mortgages. By Deed of Novation dated 24 July 2019 and a subsequent Deed of Rectification dated 25 February 2021, Everyday was substituted in place of Cheldon as a party to the Deeds of Appointment of the first plaintiff as receiver and receiver and manager.

13. In his affidavit sworn 23 April 2021 grounding the plaintiffs' application for interlocutory relief, the first plaintiff avers that following his appointment as receiver on 14 November 2018, he engaged estate agents to manage the Properties on his behalf following which the estate agents wrote to the various tenants of the Properties requesting proof of tenancy and asking them to remit the full rental payments to the estate agents. The first plaintiff avers that this was met with a letter from the applicant in which, *inter alia*, she denied the validity of his appointment as receiver.

14. On 18 December 2018, the applicant commenced plenary proceedings (hereinafter the "2018 Proceedings") against a number of parties (including Cheldon and the first plaintiff) in which she sought damages for loss and damage said to be occasioned to her by the "egregious acts by [the first plaintiff] relating to [the Properties]." She also sought a declaration that the first plaintiff's appointment as receiver over the Properties was null and void. At the time of the commencement of the 2018 proceedings the applicant was not legally represented.

15. Over the following months the applicant wrote to the various tenants of the Properties, demanding in respect of the commercial unit within 38 New Street that the tenant quit for alleged non-payment of rent and, in respect of other tenants, advising that they not engage with and ignore all correspondence from the first plaintiff.

16. On 2 April 2019, solicitors for the tenants at Apartments 1 and 2 located in 38 New Street wrote to Beauchamps, the solicitors for the first plaintiff, advising that the tenants suspected that the applicant had interfered with their post boxes and requesting that the locks to their properties be changed. By letter dated 4 April 2019, Beauchamps formally requested that the applicant undertake, *inter alia*, to cease interfering with the receivership. The

applicant did not respond to this letter. According to the plaintiffs, correspondence at this time from solicitors (hereinafter "the first solicitors") on behalf of the applicant intimated that they intended to challenge the first plaintiff's appointment as receiver. They did not however come on record in the 2018 proceedings.

17. On 6 June 2019, the applicant delivered a statement of claim in the 2018 proceedings. The principal complaints identified therein were as follows:

- The applicant's signature on a solicitor's undertaking dated 1 June 2007 was forged.
- The relevant mortgages did not confer a power to appoint a receiver on the mortgagee.
- The applicant received correspondence from PTSB on 30 October 2016 and 6 November 2015 confirming that all outstanding balances had been paid; there was therefore no loan capable of being sold by PTSB to Cheldon.
- On 22 November 2019, the estate agents (the fourth named defendants in the 2018 proceedings) acting on the instructions of, *inter alia*, the first plaintiff had acted in an aggressive manner while trespassing on and maliciously damaging the property at 38 New Street.

18. On 16 July 2019, Beauchamps raised a notice for particulars to which the applicant responded on 30 July 2019.

19. At para. 27 of his affidavit grounding the application for interlocutory relief, the first plaintiff avers that there followed a course of "without prejudice" discussions between advisors acting on behalf of the applicant and Beauchamps (the plaintiffs' solicitors) but that these discussions did not bear fruit. At paras. 28-33, he attests to certain actions on the part of the applicant (including in relation to the apartments at 38 New Street and the Castle Falls Property and in respect of which it was suspected the applicant was intent on letting out or had let out) said to constitute ongoing interference by the applicant with the first plaintiff's

receivership such that by 19 August 2020, Beauchamps had again written to the applicant calling on her to arrange vacant possession of the Properties and not to interfere further with the receivership. At para. 34 of his affidavit, the first plaintiff avers that on 24 August 2020, Beauchamps received a Notice of Discontinuance pursuant to which the applicant "wholly discontinues" the 2018 proceedings against all of the defendants thereto.

20. The first plaintiff goes on to aver that on 11 March 2021, Beauchamps wrote one final time to the applicant threatening to issue the within proceedings if she did not deliver vacant possession of the Properties.

21. The within proceedings issued on 23 April 2021. The notice of motion for interlocutory relief issued on 19 July 2021, grounded on the affidavit of the first plaintiff as already referred to and supported by the affidavit of Andrew McCrudden, Head of Compliance with Everyday, sworn 21 May 2021. The relief sought in the notice of motion was as follows:

> "1. An order by way of interlocutory injunction restraining the Defendant, her servants and/or agents, and any other person having notice of the said Order, from interfering with the functions and office of the First Named Defendant as receiver and receiver and manager over …[the Properties]".
>
> 2. An order by way of interlocutory injunction restraining the Defendant, her servants and/or agents, and any other person having notice of the said Order, from trespassing on the Properties.
>
> 3. An order by way of interlocutory injunction restraining the Defendant, her servants and/or agents, from contacting any tenants occupying the Properties.
>
> 4. An order by way of interlocutory injunction restraining the Defendant, her servants and/or agents to forthwith deliver up to the First Named Defendant herein, all keys, fobs, magnetically readable cards, RFID devices, other electronic access devices,

access codes and alarm codes in their possession, power and/or procurement to the Properties."

22. The applicant swore a replying affidavit on 14 December 2021, by which time she was legally represented by a firm of solicitors (hereinafter "the second solicitors"). Therein, the applicant took issue with her alleged indebtedness to the second plaintiff (Everyday) and denied that she entered into any valid mortgage agreement with Everyday's predecessor-in-title (Cheldon). She further asserted that there was no valid basis for the appointment of a receiver in the purported mortgage agreements relied on by the plaintiffs. In summary (and without necessarily being exhaustive), her further averments disputing her indebtedness were to the following effect:

- Insofar as there was indebtedness to Everyday, this was due to overcharging.
- A number of conditions in the letter of offer of 14 March 2001 were never complied with.
- The limited power of attorney granted to her in respect of John Govan was never extended or renewed. Thus, at the time of the execution of the 2002 mortgage, there was no valid or existing power of attorney.
- The Castle Falls mortgage related to a principal private residence (for John Govan) and accordingly, the first plaintiff should not have been appointed receiver over that property.
- The full amount of the 2001 facility was never drawn down.
- The applicant was not offered a tracker rate to which she was entitled.
- At the time of the transfer by PTSB to Cheldon the 2001 loan was a performing loan.

- There was no valid mortgage executed in respect of the 2007 loan as on the relevant date John Govan was not in the country. Without prejudice to that, the 2007 mortgage deed did not contain any power to appoint a receiver.
- The full amount of the 2007 facility was not drawn down.
- In 2008 a new lending product was introduced to which the applicant and John Govan never consented.
- There was significant overcharging of interest in respect of the mortgages.

23. At para.45 of her affidavit, the applicant averred that a letter received by her on 30 October 2015 from PTSB "clearly and unambiguously" stated that her mortgages and the 2001 and 2007 agreements "currently holds an outstanding balance of zero…'" She further asserted that on 6 November 2015, PTSB confirmed that the mortgage accounts had been paid in full on 19 October 2015, from which the applicant understood that there were no outstanding balances in her mortgages.

24. At para. 47, she attested to her shock, concern and confusion on receipt of a letter from Everyday demanding repayment of €781, 785.05.

25. At paras. 49-79, the applicant took issue with the appointment of the first plaintiff as receiver, asserting, *inter alia*, that the 2007 mortgage did not provide for the appointment of a receiver. With prejudice to her challenge to the validity of the first plaintiff's appointment, the applicant denied that she ever frustrated or impeded the orderly conduct of the receiverships. At para. 71, she averred that as a result of the refusal of the first plaintiff to engage with her, she had no option but to commence the 2018 proceedings in order to contest the first plaintiff's appointment.

26. At para. 75, she averred to having received non-legal advice (it appears in or about 2020, of which more later). She took issue with the first plaintiff's reference, in his affidavit,

to "without prejudice" conversations, asserting that it was "unconscionable" for the plaintiffs to rely on such conversations "in an effort to excuse their delay" in seeking relief.

27. At para. 76, the applicant averred that she had no memory of changing the locks of 38 New Street.

28. At para. 77, she addressed the Notice of Discontinuance of the 2018 proceedings which was filed in the Central Office on 7 September 2020, stating that she did not recall signing the Notice and that on the date the Notice was stamped (20 August 2020) she was in Kerry and could not have had the document stamped. Further, the address given on the Notice was not that of the applicant. She goes on to state that she did receive advice from a non-lawyer to serve a Notice of Discontinuance and she recognised that it was possible that her advisor lodged the document in the Central Office.

29. At paras. 80-86, the applicant averred to the fact that she was 61 and 67 years of age, respectively, when the 2002 and 2007 mortgages were entered into and that she was 78 years of age when the first plaintiff was appointed as receiver. She averred to an almost three- year delay from that appointment to the issuing of the within proceedings, a delay, she said, which was not consistent with urgency. At para. 86, she averred to the stress and anxiety she is suffering as a result and in this regard, she exhibited a letter from her General Practitioner.

30. At para. 87, under the heading "Balance of Justice", the applicant averred that the plaintiffs had not established a "strong case to be tried" and that the effect of granting an injunction would "effectively end the proceedings", and were an injunction to be granted, she would suffer irreparable damage for which damages would not be an adequate remedy.

31. On 18 February 2022, Mr. McCrudden swore an affidavit in reply to the applicant's affidavit averring, *inter alia*, to a letter of undertaking written by the applicant on 19 October 2019 whereby she agreed to strike out various notices of motion for judgment in default of defence she had issued in the 2018 proceedings and undertook not to interfere with the

receivership process any further. He referred to the 2018 proceedings having been ultimately discontinued on 24 August 2020. Thereafter, Mr. McCrudden took issue with the applicant's claims regarding the loan facilities and the mortgages, and he reiterated his earlier contention that the first plaintiff was validly appointed as receiver.

32. The first plaintiff swore a supplemental affidavit on 22 February 2022 in specific reply to the applicant. With regard to the claim of unconscionable behaviour on his part, he stated that he had not disclosed the contents of any "without prejudice" communications in his earlier affidavit. Further, he took issue with the applicant's complaint of delay on his part, asserting that the applicant had instituted the 2018 proceedings challenging the validity of his appointment and had not delivered a statement of claim until June 2018. He goes on to aver that on 29 April 2019, Beauchamps had received correspondence from solicitors then acting for the applicant (the first solicitors) who advised that they were instructed to challenge the first plaintiff's appointment as receiver and requested undertakings from him not to take possession of the Properties. Beauchamps had responded on behalf of the plaintiffs on 3 May 2019 inquiring whether the first solicitors would be coming on record for the applicant in the within proceedings, the response to which was that the first solicitors would not be filing an appearance on her behalf. With reference to the applicant's letter of undertaking of 19 October 2019 agreeing to strike out the 2018 proceedings, the first plaintiff reiterated that those proceedings were not discontinued until August 2020. He goes on to rehearse certain events that occurred in July and August 2020 and the correspondence that passed between Beauchamps and the applicant over the course of August 2020 and March 2021 ultimately culminating in the commencement on 23 April 2021 of the within proceedings.

33. On 28 March 2022, the applicant swore a supplemental affidavit in response to the affidavits of Mr. McCrudden and the first plaintiff. At para. 6 thereof she avers as follows:

> "I do not recognise the letter dated 19 October, 2019 which purports to state that I would not take any steps to interfere with the receivership. Although the letter appears to be signed I have no memory or any record of writing this letter or signing any document containing the words in the letter. I say that the language therein is not mine. I did not have the benefit of legal advice at this time."

34. On 7 April 2022, the first plaintiff swore his third affidavit, in part by way of reply to the applicant's 21 March 2022 affidavit. As to the applicant's claim not to recognise the 19 October 2019 letter of undertaking, the first plaintiff averred as follows:

> "This letter was furnished to Beauchamps LLP by Daniel Lannon of Amicable Mediation Solutions, who was a financial advisor retained by the Defendant. The undertaking was given in the context of the Defendant's previous proceedings and Beauchamps specifically advised Mr. Lannon that the undertaking was being sought 'as supporting evidence to the court if required'…"

35. The first plaintiff duly exhibited an exchange of emails between Mr. Lannon and Beauchamps, including the letter of undertaking dated 19 October 2019.

The High Court judgment

36. The application for injunctive relief came on for hearing before the High Court on 7 July 2022. Judgment was given *ex tempore* on the same date. As referred to earlier, at the hearing the applicant was represented by a solicitor (the second solicitors) and counsel. The Judge commenced his ruling by reference to the test for interlocutory relief as articulated by the Supreme Court in *Merck Sharpe & Dohme v. Clonmel Health Care* [2019] IESC 65, noting that he had to be satisfied that there was a fair issue to be tried, that damages would not be an adequate remedy and that he had to consider the balance of convenience. While observing that it was not unusual for a person such as the applicant to contest the validity of the receiver's appointment, he considered that the matter before him was unusual in that the

applicant had previously instituted the 2018 proceedings contesting the lawfulness of the first plaintiff's appointment but had brought those proceedings to a halt by a signed undertaking that she would not impede the work of the first plaintiff. The Judge did not find merit in the applicant's argument that she was not represented at the time the undertaking was given, stating that absent any evidence of disability (of which there was none), the applicant was a person who was fully entitled to bring and conduct proceedings herself and indeed sign the aforementioned undertaking and a Notice of Discontinuance as regards the 2018 proceedings.

37. Furthermore, the Judge did not find merit in the applicant's counsel's argument as to the applicant's age and state of health at the relevant times. The height of the medical evidence was that the applicant was under stress due to her financial difficulties. While accepting that to be the case, he stated that "stress did not amount to a lack of mental capacity". There was not a "scintilla" of evidence before the court that the applicant lacked capacity when signing the letter of undertaking and serving the Notice of Discontinuance. The fact that the applicant was a person of advanced years did not equate to a lack of capacity. The Judge was "perfectly satisfied" that the applicant had instituted proceedings but then did not proceed with those proceedings on the basis of firstly, signing a letter of undertaking that she would not interfere with the appointment of the first plaintiff as receiver and, secondly, serving a Notice of Discontinuance of the 2018 proceedings.

38. Having regard to the sworn evidence on the part of the plaintiffs, the Judge went on to find that notwithstanding the undertaking given and the filing of a Notice of Discontinuance of the 2018 proceedings, thereafter the applicant had changed locks on premises, received rent from tenants and generally interfered with the work of the first plaintiff, matters which effectively were not contested by the applicant. While the applicant in her affidavits had sought to contest the validity of the first plaintiff's appointment and had identified certain

defects pertaining to same and had said that she had instructed solicitors effectively to contest the letter of undertaking and the first plaintiff's appointment, the Judge noted that "nothing had been heard concerning those issues". He found, effectively, that by virtue of the letter of undertaking and the Notice of Discontinuance, the applicant was estopped from raising the issue of the first plaintiff's appointment as receiver.

39. Insofar as the applicant had raised issues concerning the transfer of the loans, the Judge considered that while there may or may not be validity in that argument, it was not a matter that prevented him from granting the orders sought by the plaintiffs. In the view of the Judge, while it may transpire at the hearing of the action that there is some validity in those points, "it may also be the case that given the earlier proceedings and how those proceedings were actually brought to a halt that in fact this matter is now effectively *res judicata* and/or the defendant is now estopped."

40. Ultimately, the Judge was satisfied that there was a fair issue to be tried. He was satisfied that "effectively on the uncontested evidence of the receiver" the applicant had interfered with the work of the receiver/first plaintiff. He was also satisfied that the balance of convenience did not lie in favour of not granting the orders sought. He noted the commercial nature of the transactions in question and that it was not a case of the applicant being put out of her residential premises. He found that damages would not be an effective remedy given that the proceedings related to the recovery of monies and charges over property. Accordingly, he was satisfied to grant orders in terms of paras. 1-4 of the notice of motion and to make an order for the plaintiffs' costs of the motion.

The motion to extend time

41. It is common case that the applicant did not appeal the High Court Order within the requisite time. The within motion seeking an extension of time issued on 30 August 2022. In her grounding affidavit, the applicant says that in the course of settlement negotiations,

which she says continued after the making of the High Court Order, she had indicated her intention to appeal. She avers that at the time she was in regular contact with her then solicitor (the second solicitors). She says that on 19 August 2022 she discovered that the High Court Order had been perfected on 22 July 2002 which meant that 19 August 2022 was the final day by which to lodge the appeal. She avers to having instructed the second solicitors to seek an extension of time from Beauchamps (the plaintiffs' solicitors) to Monday 22 August 2022 in order for her to appeal. She avers that she is unaware as to whether the email making that request was ever sent by the second solicitors to Beauchamps. At para. 7, she says that she instructed counsel to draft a notice of appeal. In her supplemental affidavit of 15 November 2022, she says that the draft notice of appeal was given to her on 22 August 2022.

42. Before turning to the grounds of appeal upon which the applicant seeks to rely if granted an extension of time, it is helpful to have regard to the applicable legal principles in applications for leave to extend the time within which to appeal which are by now well-rehearsed in case law.

43. As first stated by Lavery J. in *Éire Continental Trading Co. v. Clonmel Foods Ltd.* [1955] IR 170, there are three questions that guide the exercise of the discretion of the Court:

> *"1. The applicant must show that he has a bona fide intention to appeal formed within the permitted time.*
>
> *2. He must show the existence of something like mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient.*
>
> *3. He must establish that an arguable ground of appeal exists."*

44. For good measure, it should also be noted, as *Brewer v. Commissioners of Public Works* [2003] 3 IR 539 makes clear, that if the conditions in *Éire Continental* are satisfied,

it does not necessarily follow that time will be extended. Equally, if they are not satisfied it does not mean that an application to extend time will be refused.

45. The requisite principles were reiterated by the Supreme Court in *Seniors Money Mortgages Ireland DAC v. Gately and McGovern* [2020] IESC 3, [2020] 2 IR 441, where O'Malley J. emphasised that while the starting point for the determination of any application for an extension of time is *Eire Continental*, the court nevertheless retains a discretion in determining whether or not to grant an extension of time for an appeal having regard to the totality of the particular circumstances of the case before it, the critical inquiry (as per Clarke J. (as he then was) in *Goode Concrete v. CRH plc & Ors* [2013] IESC 39) being directed to the balance of justice, which requires that the discretion must be exercised having regard to where that balance lies in all the circumstances of a particular case. As said by Clarke J.:

> *"4.3.3…The underlying obligation of the court (as identified in many other relevant judgments) is to balance justice on all sides."*

46. As to how justice is to be balanced, Clarke J. considered the followings factors of relevance:

> "*Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice. Prejudice to successful parties who have operated on the basis that, once the time for appeal is expired, the proceedings (or any relevant aspect of the proceedings) are at an end, must also be a significant factor. The proper administration of justice in an orderly fashion is also of high weight. Precisely how all those matters will interact on any individual case may well require careful analysis. However, the specific Eire Continental …criteria will meet those requirements in the vast majority of cases."*

Thus, as *Goode Concrete* shows, the focus must be on the particular facts and circumstances attending each application.

47. I turn first to the *Eire Continental* principles. As to the first *Eire Continental* criterion, the plaintiffs do not dispute that the applicant formed the requisite intention to appeal within the requisite time period. However, both in their written and oral submissions, they contend that there is no comprehensive or adequate explanation forthcoming from the applicant as to why the notice of appeal was not lodged within time. They say that it is not clear whether in fact the applicant instructed her then solicitor to *lodge* the requisite notice of appeal within the requisite time. Similarly, while they emphasise that the applicant has not elaborated on the nature of the instruction she says was given to her then solicitor regarding her wish to appeal, the plaintiffs do not really dispute that the applicant meets the second *Eire Continental* criterion.

48. In short, albeit expressing some reservations about the "threadbare" allegations which the applicant lays at the feet of her former solicitors, and the vague nature of the instructions she maintains were given to those solicitors at some unspecified time prior to 22 August 2022, the plaintiffs are not seriously disputing that the applicant satisfies the first and second limbs of the *Eire Continental* test. The gravamen of the plaintiffs' opposition is that the applicant has no arguable grounds of appeal and that the application should be refused on that basis.

49. In her affidavit grounding the within application, the applicant has exhibited a draft notice of appeal outlining the grounds upon which she intends to rely if an extension of time is granted for her to appeal. Each of these grounds will now be addressed for the purposes of determining whether the applicant has established that an arguable ground of appeal exists, as required by the third limb of the *Eire Continental* test.

Ground 1: The Judge erred in law and in fact in failing to take into consideration the applicant's age, ill-health and lack of legal advice at the time the letter apparently undertaking not to interfere with the receiver was signed.

50. It will be recalled that the Judge made a finding that the 2018 proceedings instituted by the applicant, and in which she sought, *inter alia,* a declaration that the appointment of the first plaintiff was unlawful, were effectively brought to a halt by dint of the letter of undertaking dated 19 October 2019 wherein it was stated that the applicant would not impede the work of the first plaintiff (thereby implicitly accepting the validity of his appointment). As also can be seen, some ten months or so later, the applicant served a Notice of Discontinuance of the 2018 proceedings.

51. Addressing the applicant's argument in the court below that she was not legally represented at the time the letter of undertaking was signed, the Judge accepted that to be correct *"to a point" "insofar as there was undoubtedly some correspondence emanating from a solicitor who appears to have been instructed by [the applicant] in the course of those proceedings but … never came on record…".* In the view of the Judge, however, the applicant was a person who was fully entitled to bring proceedings and was under no duty to instruct a solicitor. Thus, in the absence of any evidence that she was under a disability, the judge found that the applicant was *"perfectly free… to conduct those proceedings herself".* In so far as her counsel had alluded to the applicant's age and state of health, the Judge found that the height of that evidence was a certificate from a General Practitioner to the effect that the applicant was under stress from financial difficulties. Albeit finding that was undoubtedly the case, the Judge considered that neither stress nor the applicant's age amounted to a lack of capacity.

52. In his oral submissions to this Court, counsel for the applicant did not press the arguments relating to the applicant's age or state of health. He did however contend that in

the particular factual matrix that arose in this case, namely the fact that the applicant was without legal representation when the letter of undertaking was signed and the later Notice of Discontinuance filed, the fact that the applicant was without legal representation at those times ought to have resonated with the Judge.

53. It is in the context of the applicant being without legal representation from in or about June 2018 until she secured the services of the second solicitors prior to the hearing of the injunction application that it is argued on her behalf that insofar as the letter of undertaking of 19 October 2019 and the Notice of Discontinuance filed 24 August 2020 is concerned, Beauchamps, the plaintiffs' solicitors, were obliged to advise the applicant to seek legal advice prior to her signing the letter of undertaking and filing the Notice of Discontinuance of the 2018 proceedings.

54. By way of an aside, I note that at para. 18 of the affidavit she swore on 15 November 2022 for the purposes of this application, the applicant avers that having dispensed with the second solicitors for failing to act on her instructions to appeal the Order of the High Court, she was without again legal representation until she instructed her present solicitors. However, it is in respect of the period October 2019 to August 2020 (when the applicant had dispensed with the first solicitors) that she maintains the onus was on the plaintiffs to advise her to obtain legal representation before signing the letter of undertaking on 19 October 2019 and filing the Notice of Discontinuance in August 2020.

55. It will be recalled that in her second affidavit sworn in response to the first plaintiff's injunction application, the applicant averred that she did not recognise the letter of 19 October 2019 in which an undertaking was given not to interfere with the receivership. She also stated that she had no memory of signing the letter and that the language used in the letter was not hers. I would observe at this stage that, noticeably, the applicant had not adverted to the letter of undertaking in the affidavit she swore on 14 December 2021. As the

applicant herself later averred, and as stated before this Court by counsel on her behalf, her explanation for her failure to do so was that the first plaintiff had not adverted to the letter of undertaking in his grounding affidavit. The explanation put forward by the applicant for not adverting to it, to my mind, rings somewhat hollow in circumstances where she undoubtedly had dealings at the relevant time with the individual (a Mr. Lannon) who furnished the letter of undertaking to the plaintiffs' solicitors.

56. In the affidavit he swore on 5 April 2022 in response to the applicant's claim that she did not recognise the letter of undertaking, the first plaintiff exhibited a chain of emails that passed between Mr. Daniel Lannon of Amicable Mediation Solutions (on behalf of the applicant) and Ms. Orla Fitzpatrick of Beauchamps (the plaintiffs' solicitors) between 18 and 20 October 2019.

57. At 10.55 on Friday 18 October 2019, Mr. Lannon wrote to Mr. Fitzpatrick referring to their telephone conversation earlier that morning and advising, *inter alia "regarding our mutual client"* that in respect of a motion for judgment in default of defence that was scheduled for hearing in the High Court on 21 October 2019 (in connection with the applicant's 2018 proceedings) *"[the applicant] would like to strike out these motions on consent with no order for costs".* Mr. Lannon continued:

> *"I cannot nor would I give [the applicant] legal advice, our company has been retained to facilitate negotiation and mediation purposes only. I am trying to secure a legal team for [the applicant] before Monday which I feel may be a lost cause given the short time frame and as I have said above [the applicant] is asking for your consent to the strike out with (sic) order for costs."*

58. Ms. Fitzpatrick replied on the same day at 17.43 stating that further to her and Mr. Lannon's telephone conversation, she required confirmation that the applicant was agreeable *"to striking out the matters on consent".* She also required an undertaking from the applicant

that she *"would not interfere with the receivership process any further".* Both of those requirements were to be received before 9.30am on Monday 21 October 2019 *"to be provided as supporting evidence to the court if required".* She went on to state:

> *"I note that you are coming on record for [the applicant] in relation to any potential settlement. Please note that any proposal in relation to the purchase and/or sale of the property must be in writing for my clients."*

59. That Mr. Lannon was coming on record for the applicant was obviously an erroneous assumption on the part of Ms. Fitzpatrick given that he was not a solicitor and in circumstances where Mr. Lannon had recently advised Ms. Fitzpatrick that he could not and would not give legal advice to the applicant.

60. On 20 October 2019 (at 20:30), (the eve of the court hearing), Mr. Lannon emailed Ms. Fitzpatrick advising that the applicant was agreeable *"to striking out matters on consent and [to] an undertaking not to interfere with the receivership as requested. [The applicant] will not be in attendance tomorrow due to ill health, I will however try to get a solicitor on record to finish out matters."*

61. Under cover of this email, Mr. Lannon furnished Ms. Fitzpatrick with the letter of undertaking dated 19 October 2019, on its face bearing the signature of the applicant. The letter reads as follows:

> *"Dear Ms. Fitzpatrick,*
>
> *I confirm that I am agreeing to strike out the matters on consent.*
>
> *I undertake not to interfere with the receivership process any further."*

62. As already referred to, some ten months after this email chain and the aforesaid letter of undertaking, a Notice of Discontinuance stamped 12 August 2020 was filed in the Central Office on 7 September 2020.

63. In contrast to the position set out in her 14 March 2022 affidavit that she did not recognise the letter of undertaking and had no memory of signing it, in her affidavit sworn on 15 November 2022 for the purposes of the present application, the applicant's position is that the signature on the letter of undertaking is not hers and that she did not sign the letter of undertaking (see paras. 4,5,6 and 18). At para. 77, she avers that she did not stamp the Notice of Discontinuance on 12 August 2020 and that she did not file the Notice of Discontinuance as she was not in Dublin on that date. She further avers that the address on the Notice of Discontinuance is not her address.

64. In the course of his submissions to this Court, counsel for the applicant contended that given that as of 19 October 2019 the applicant was without legal representation, it behoved the plaintiffs to advise her to get legal advice. When queried by the Court as to why it would fall to the plaintiffs to do so, counsel accepted that litigants were free to proceed with legal proceedings without the benefit of legal advice. Counsel also agreed that it was only in the affidavit she swore on 15 November 2022 that the applicant claimed that she did not sign the letter of undertaking. He conceded that her assertion in this regard was a mere assertion in the absence of any evidence from a handwriting expert, or indeed any other cogent evidence that the signature was not hers. The claim that she did not sign the letter of undertaking was not made by the applicant in the court below (where the applicant had full legal representation). Her counsel very fairly conceded that even if such a claim had been advanced in the court below, absent any cogent evidence that the signature on the letter of undertaking was not hers, her assertion in that regard would have been a mere assertion.

65. In his submissions, counsel for the plaintiffs pointed to the applicant's inconsistent position as regards the letter of undertaking of 19 October 2019. Fundamentally, counsel submitted that the Judge was correct in rejecting the applicant's contention that her age and state of health amounted to an incapacity such that it ought to have undermined the plaintiffs'

reliance on the letter of undertaking. It was also pointed out that the applicant, notwithstanding her age and ill-health, was able to institute the 2018 proceedings and motions for judgment in default of defence in respect of the 2018 proceedings.

66. Asked by the Court as to whether Ms. Fitzpatrick of Beauchamps ought to have been on inquiry in October 2019 as to the necessity for the applicant to have legal advice in advance of signing the letter of undertaking (and when the Notice of Discontinuance was filed in August 2020) given that Mr. Lannon in his email on 19 October 2019 had stated that he could not advise the applicant and alluded to getting legal representation for the applicant, the plaintiffs' counsel's position was that the Court should be slow to impose any obligation in that regard on Ms. Fitzpatrick absent any specific circumstances warranting such a course of action. Counsel pointed to the fact that the letter of undertaking in question was not a complicated matter (as evidenced by its contents). Reliance was also placed on the fact that the applicant herself had been able to issue the 2018 proceedings and issue motions for judgment in connection therewith without legal input, all of which, it was said, evidenced that the applicant was not unfamiliar with legal processes.

67. I note that while, wisely, counsel for the applicant in oral submissions steered away from the argument that the applicant's age and ill-health were such as to vitiate the letter of undertaking he persisted in the argument that it was arguable that the applicant's lack of legal representation at the time the letter of undertaking was signed vitiated it. In that context, the case is made that it is arguable that there was an onus on the plaintiffs' solicitors to advise the applicant to seek legal representation before signing the letter of undertaking and later filing the Notice of Discontinuance. However, I accept entirely the plaintiffs' submission that ground 1 is not arguable on any level. Absent any evidence that the applicant lacked capacity at the relevant times or was otherwise under a disability (of which there was none), there was no obligation on the plaintiffs' solicitors at any relevant time to advise the

applicant to seek legal advice. More than that, the applicant has amply demonstrated that she was more than capable of dealing with her affairs. In the first instance, the applicant's acquisition of properties for commercial purposes lends itself to the conclusion that she was a person with business experience. Secondly, she was certainly capable in 2018 of engaging with solicitors (the first solicitors) in order that her interests would be pursued, albeit I accept those solicitors never came on record for her. Thirdly, that she did not lack capacity is amply demonstrated by the fact that she herself instituted the 2018 proceedings and maintained those proceedings to the extent of issuing motions against the named defendants for judgment in default. Fourthly, it would appear that in the period October 2019 to September 2020, the applicant was able to engage with non-legal personnel to aid her in the progression (whatever it may be) of her 2018 proceedings.

68. Furthermore, notwithstanding the applicant's initially somewhat vague and, latterly, more definite attempts to retreat from the events of October 2019 and August/September 2020 (respectively, the furnishing of a letter of undertaking to the plaintiffs on 19 October 2019 and serving and filing a Notice of Discontinuance of the 2018 proceedings in August/September 2020), what is immediately apparent from the applicant's affidavit evidence, both in this Court and in the court below, is that she does not expressly deny dealing with Mr. Lannon for the purposes of reaching an accommodation with the plaintiffs here in the context of the 2018 proceedings, or say that the actions of Mr. Lannon were not at her behest.

69. For the reasons set out above, Ground 1 does not meet the requisite "arguable" threshold, in my view.

Ground 2: The Judge attached undue weight to the fact that new proceedings challenging the appointment of the receiver had not been taken by the applicant.

70. By ground 2 the applicant contends that the Judge attached undue weight to the discontinuance of the 2018 proceedings challenging the appointment of the first plaintiff as receiver. It is again rehearsed in ground 2 that that the 2018 proceedings were discontinued at a time when the applicant did not have legal advice and was suffering stress due to her financial situation and the ongoing litigation. It is also said that the Judge erred in disregarding the averments to the effect that the applicant did not recall signing the Notice of Discontinuance or lodging same and that he attached undue weight to the fact that new proceedings were not taken to challenge the receiver in circumstances where, it is said, the applicant was not unreasonably focused on defending the application for an injunction.

71. It will be recalled that by her 2018 proceedings, the applicant challenged the validity of the first plaintiff's appointment. It is common case that the challenge maintained by those proceedings ceased once the Notice of Discontinuance was filed in September 2020.

72. In her affidavit sworn of 14 December 2021, in response to the first plaintiff's affidavit grounding the application for injunctive relief, the applicant averred that she had instructed her *"new solicitor"* to take steps either to set aside the Notice of Discontinuance or to issue new proceedings on her behalf challenging the appointment of the first plaintiff as receiver over the Properties. The applicant's reference to her *"new solicitor"* can be read as the applicant's second solicitors. The applicant says that notwithstanding the instruction given to her second solicitors, that instruction was not carried out. She contends that the Judge wrongfully failed to consider the implications that arose from the fact that the second solicitors had either refused and/or failed to follow her clear instructions.

73. On the other hand, counsel for the plaintiffs says that it is not clear from the judgment given in the court below just how much weight the Judge placed on this issue. In any event, he contends that the High Court did not grant an injunction against the applicant on account of her failure to bring new proceedings challenging the appointment of the receiver. The

injunction, he says, was granted because the applicant had failed to identify any valid basis for her continued interference with the receivership.

74. Overall, I am not satisfied that the matters relied on by the applicant for this ground constitutes an arguable ground of appeal**.** I agree with the plaintiffs that there is nothing in the Judge's assessment to suggest that it is arguable that the Judge placed undue weight on the absence of new proceedings or that that was the primary factor underpinning the grant of interlocutory relief. Nor, for the reasons set out at paras. 67 and 68 above, do I find arguable the complaint that the Judge applied undue weight to the discontinuance of the 2018 proceedings.

75. The interlocutory relief was granted by the Judge because he determined that the applicant had failed to identify any valid basis for her continuing interference with the receivership. Of course, in respect of the interlocutory relief granted, the applicant is seeking to challenge the Judge's determination that she had no valid basis to take the actions she did, as evidenced in particular by grounds 3-5 of the draft grounds of appeal. I will address whether these grounds are arguable in due course.

76. All that having been said, in my view, nothing much turns on either the fact that the applicant having instituted the 2018 proceedings challenging the validity of the first plaintiff's appointment later discontinued those proceedings, or that she failed to institute new proceedings having intimated that she was going to do so. In the present proceedings, the plaintiffs themselves have put in issue the validity of the first plaintiff's appointment as receiver by seeking, as they do, at para. 1 of the general endorsement of claim to the plenary summons and paras. 1 and 2 of the relief claimed in the statement of claim, declaratory orders to the effect that the first plaintiff stands validly appointed as receiver over the Properties. Thus, in circumstances where, as referred to already, the validity of the first plaintiff's appointment as receiver has been put in issue in the proceedings instituted by the plaintiffs,

in my view, it may be open to the applicant in her defence and /or any counterclaim lodged in relation to those proceedings to raise the issue of the validity of the appointment of the first plaintiff. Indeed, it is clear from the draft defence that the applicant has in fact exhibited that she intends at trial to maintain a challenge to the validity of the first plaintiff's appointment.

77. Ground 2 is not arguable.

Ground 3: The Judge erred in finding that there was compliance with s.28(6) of the Supreme Court of Judicature (Ireland) Act 1877.

78. Section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 ("the 1877 Act") provides:

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

he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

79. While the Judge noted that the applicant had "raised certain issues concerning notification of the transfer of the loans", he did not consider that that prevented him from making the orders sought by the plaintiffs. The applicant contends that the Judge erred in disregarding the fact that the plaintiffs failed to satisfy the statutory requirements to provide her with express written notice of the assignment of her debt to Cheldon, as required by s.28(6) of the 1877 Act. She contends that the plaintiffs, having failed to adduce the requisite proofs, therefore failed to establish either that they had a strong case or that there was a fair issue to be tried (whatever the requisite test (an issue raised in ground 4 of the draft grounds) may be). It is thus submitted that the Judge was incorrect in holding that the plaintiffs had met the threshold test for the grant of injunctive relief.

80. The plaintiffs fairly concede that evidence of the assignment of the debt and security from PTSB to Cheldon was not before the High Court. They say however that the argument that the applicant now raises was never adverted to any point in the applicant's affidavits prior to the hearing in the High Court when, it is contended, the applicant opportunistically raised at the hearing of the interlocutory injunction application a complaint that the plaintiffs had not exhibited any notification previously given to the applicant for the purposes of the 1877 Act of the initial assignment of the loans and security by PTSB to Cheldon. The plaintiffs contend that, in fact, they had exhibited the relevant Deed of Conveyance and Assignment by which Cheldon acquired its interest in the mortgages from PTSB and the letter of demand from Cheldon to the applicant dated 19 October 2018 (and which referred to the loan facilities provided by PTSB to the applicant) which, they say, provided the applicant with notice of the assignment. In relevant part, the letter of 19 October 2018 stated as follows:

"We refer to the Facilities and the Security (the Security) provided to the Bank as security for the repayment of the Facilities.

Cheldon Property Finance ignited Activity Company has acquired all rights title and interest in the Bank in the Facilities and Security.

The Facilities advanced pursuant to the Facility Letters remain outstanding and are in arrears.

At the close of business on 18 October 2018, the aggregate sum of €781,785.05 was owing by you under the Facilities.

We demand payment from you in the sum of €781,785.05…"

81. The plaintiffs also contend that, for her part, the applicant never denied receiving notice of the assignment. In those circumstances, they say that the Judge was correct to hold that notwithstanding the fact that the notice to the applicant of the assignment from PTSB to Cheldon was not in evidence in the High Court, the plaintiffs had nevertheless met the requisite threshold test for the grant of an interlocutory injunction. They also say that in any event, the first plaintiff has now exhibited the relevant letters dated 16 October 2015 in his replying affidavit for the purposes of this application to show that there is simply no substance to the applicant's point. The plaintiffs accept, however, that the fact that this letter is now before this Court cannot be dispositive of the argument the applicant wishes to pursue in the appeal, namely that the plaintiffs in the court below failed to establish the requisite proofs and so, their application for interlocutory injunctive relief should have been refused. Nevertheless, the plaintiffs maintain that to permit the applicant to appeal on this point would be to waste the time of the litigants and the Court. Citing the *dictum* of Allen J. in *Taite v. Molloy* [2022] IEHC 308, counsel argues that even if *"every i has not been dotted and every t not crossed*", the plaintiffs have established "*a strong case which is likely to succeed as to the formal validity of the appointment of the [the first plaintiff]"*.

82. The first thing to be observed is that, as conceded by the plaintiffs, the 19 October 2018 letter does not identify the assignment in issue here (i.e. PTSB to Cheldon) or the date of that assignment. Furthermore, I note that in his affidavit of 21 May 2021, Mr. McCrudden adverts only to the letters sent to the applicant by Cheldon and Everyday on 22 July 2019 and 26 July 2019, respectively, (so-called "Goodbye" and "Hello" letters). In the circumstances, and given that I accept that the applicant *qua* debtor is entitled to have the powers of appointment and the instruments of appointment pertaining to the first plaintiff's receivership rigorously construed, it is, I am satisfied, arguable that the absence of an "express notice in writing" to the applicant of the assignment by PTSB to Cheldon (as required by s.28(6) of the 1877 Act) vitiates the validity of first plaintiff's appointment as receiver, and the consequent application for interlocutory relief. Indeed, it bears repeating that the plaintiffs themselves, in these proceedings, have put the validity of the first plaintiff's appointment as receiver to the forefront by dint of the declaratory orders sought at paras. 1 and 2 of the general endorsement of claim on the plenary summons and para. 1 of the reliefs claimed in their statement of claim.

83. The applicant has made out her case that she has an arguable ground of appeal by reference to s.28(6) of the 1877 Act.

Ground 4: The Judge erred in law and in fact in determining that the criteria for an interlocutory injunction had been met by the plaintiffs.

84. The Judge granted the plaintiffs the reliefs sought at paras. 1 – 4 of the notice of motion. As can be seen, para. 4 sought an order by way of interlocutory injunction compelling the applicant, her servants and /or agents to forthwith deliver up to the first plaintiff all keys, fobs, magnetically readable cards, RFID devices, other electronic devices, access codes and alarm codes in their possession power and/or procurement in relation to the Properties. The applicant contends that the Judge, and the High Court Order duly made,

ought to have characterised the reliefs being sought by the plaintiffs as mandatory in nature. It is submitted that in the absence of so doing, the plaintiffs' application for injunctive relief did not meet the requisite *"strong case"* threshold for relief as established in *Maha Lingam v. Health Service Executive* [2005] IESC 89. There, Fennelly J. stated:

> *"…it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action."*

85. *Maha Lingam* is authority for the proposition that the assessment of whether an injunction can properly be said to be mandatory for those purposes is a matter of substance rather than one of form. As Fennelly J. stated:

> *"… the implication of an application of the present sort is that in substance what the plaintiff/appellant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory."*

86. The applicant says that she has an arguable ground of appeal that the Judge erred in applying only the fair case to be tried test and that he should have applied the *"strong case"* test in light of the mandatory nature of the reliefs being sought by the first plaintiff. The argument is also advanced in ground 4 that not only did the plaintiffs fail to meet the *"strong case"* test but that they also failed to reach the fair issue to be tried test in circumstances where there was non-compliance with s.28(6) of the 1877 Act.

87. It is further contended in the applicant's written and oral submissions that the applicant has an arguable ground upon which to challenge the interlocutory relief granted by reference

to s.24(2) of the Conveyancing Act 1881 ("the 1881 Act"). I will deal with the arguments the applicant raises with regard to s.24(2) of the 1881 Act, and the plaintiffs' response thereto, when addressing ground 5 of the draft grounds of appeal.

88. Turning then to the applicant's claim that the Judge applied the wrong test when granting relief, the plaintiffs assert that the applicant has no arguable ground of appeal in respect of the threshold test for the grant of interlocutory relief. They point to para. 25 of the first plaintiff's affidavit sworn 13 October 2022 opposing the application for leave to appeal, where he asserts as follows in respect of Ground 4:

> *"25. Under this heading, [the applicant] seeks to argue that the learned High Court Judge should have characterised the reliefs sought as mandatory in nature, thus requiring the Plaintiffs to demonstrate a strong case likely to succeed at trial, as distinct from a fair issue to be tried. However, [the applicant] was not in occupation of either of the Properties at the time of the application. As appears from the evidence, her interference was in the nature of contacting tenants, collecting rents, changing locks and so forth. The relief sought in this application was prohibitory insofar as it required her to desist from that interference and to cease trespassing on the Properties which she had no entitlement to occupy.*

89. Counsel for the plaintiffs further contends that even if the Judge ought to have applied the *Maha Lingam* test, the plaintiffs have clearly made out a strong case which is likely to succeed at trial. He says that the fact remains that the applicant has not identified a valid basis for disputing the receivership.

90. As regards the applicant's *"strong case"* argument, I am satisfied that she has raised an arguable ground in this regard. In my view, having regard to the *dictum* of Fennelly J. in *Maha Lingam* that determining whether a mandatory injunction is being sought is a question of substance over form, it cannot, in my view, be said that para. 4 of the notice of motion

falls to be regarded as only ancillary to the prohibitory reliefs sought at 1-3 of the notice of motion. It is arguable that the relief sought at para. 4 is equivalent almost to an order for possession to the first plaintiff/receiver and that therefore, the Judge was obliged in law to apply the *"strong case"* test when determining whether to grant the interlocutory relief sought.

Ground 5: The Judge erred in law and in fact in determining that the receiver was lawfully appointed.

91. Ground 5 of the draft notice of appeal reads as follows:

> "The Learned Trial Judge erred in finding that the receiver had been validly appointed. The relevant mortgages did not contain a valid power to appoint a receiver. [The plaintiffs] failed to make any lawful demand of the debt. [The applicant] was not informed of the assignment of her debt as required by statute."

92. In her written and oral submissions to this Court, the applicant clarifies that part of the argument she wishes to advance pursuant to ground 5 is that the first plaintiff was not lawfully appointed as receiver since he claims to have been appointed as the agent of the second plaintiff, contrary to the provisions of s.24 of the 1881 Act which provides that a receiver is appointed as agent of the mortgagor. (As already referred to, the applicant's arguments in this regard are set out in her written submissions with reference to ground 4).

93. The first plaintiff averred as follows at para. 26 of his affidavit sworn 13 October 2022:

> " *In any event, even if the learned High Court judge ought to have characterised the relief as mandatory in nature, I say, believe and am advised that this application would have met the "strong case" threshold. [The applicant] never articulated any cogent basis on which she should be permitted to interfere with the Properties in defiance of the rights and powers of both the receiver and Everyday. In this regard, it should also be highlighted – as stated in Mr. McCudden's affidavit of 18 February 2022 and in my*

own affidavit of 22 February 2022 – that I have been appointed as Everyday's agent to exercise its powers as mortgagee."

94. The applicant's contention is that the claim that the first plaintiff is the agent of Everyday for the purposes of exercising its powers as mortgagee is wrong in law. It is submitted that the first plaintiff, once appointed, was/is the agent of the mortgagor/applicant, as provided for by s. 24(2) of the 1881 Act which provides:

"The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides."

95. The position of a receiver as agent of the mortgager was considered by Whelan J. in *Fennell v. Gilroy & Ors.* [2022] IECA 258, where the nature of the receiver's relationship with the mortgagee was clarified as follows, at para. 127:

"The receiver was validly appointed. Mr. Gilroy is not an agent for Mr. Noone. Although appointed by the bank AIB as mortgagee in carrying out his functions, the respondent receiver is deemed to be the agent of the mortgagor, Mr. Noone. This is a clear statutory provision — s.24(2) of the Conveyancing Act, 1881 — and it is further replicated in the mortgage instrument itself the subsection provides:- 'The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.'"

96. Thus, the applicant contends that, as a matter of law, the first plaintiff cannot be the agent of both the mortgagor and the mortgagee. It is thus submitted that the applicant is fully within her rights to advance a ground of appeal against the Judge's determination that the first plaintiff was validly appointed as receiver over the Properties. In effect, the applicant

intends to argue on appeal that insofar as the first plaintiff has been appointed as agent of the second plaintiff/mortgagee, this affects the validity of his appointment.

97. Insofar as the applicant takes issues with the first plaintiff's contention that he was appointed as Everyday's agent to exercise its powers as mortgagee, the plaintiffs point out that this argument arises only in the applicant's written submissions and that it is not a ground of appeal put forward in the draft notice of appeal.

98. The plaintiffs' substantive position is that ground 5, as it presently stands, constitutes an assertion only and the applicant has not identified any arguable basis to suggest that the first plaintiff was not lawfully appointed. It is further submitted that in consequence of the applicant's default on her loan obligations, the mortgagee (which, at the time, was Cheldon) became entitled to appoint a receiver both under statute (s.19(1)(iii) of the 1881 Act) and under contract (by reference to the 2002 mortgage and the 2007 mortgage).

99. With regard to ground 5, I would observe in the first instance that notwithstanding the bald contentions set out in the second sentence of ground 5, clause 10 of the 2002 Mortgage provides for a power to appoint a receiver. Moreover, clause 6 of the 2007 Mortgage incorporates clause 10 of the 2002 Mortgage. However, that is not dispositive of the applicant's argument and the fact remains that in grounds 3 of her draft grounds, she has already put in issue the validity of the first plaintiff's appointment as receiver by reference to the s.28(6) of the 1877 Act. In the course of his oral submissions in aid of ground 5, counsel for the applicant pointed to the last sentence of ground 5 where the applicant reiterated her contention that she was not informed of the assignment of her debts, as she ought to have been pursuant to s.28(6) of the 1877 Act. As we have seen, in response to that argument, the plaintiffs, while not conceding that there is any frailty attaching to the first plaintiff's appointment, fairly acknowledged that there was no evidence before the court below of notice to the applicant of the assignment between PTSB and Cheldon for the

purposes of the 1877 Act. I have already accepted that the applicant has raised an arguable ground of appeal in ground 3. To that extent, therefore, the last sentence of ground 5 dovetails with ground 3. In short, ground 5 puts in issue the validity of the first plaintiff's appointment, and hence his entitlement to apply for interlocutory injunctive relief, by calling in aid two statutory provisions.

100. The plaintiffs contend that the argument the applicant now makes pursuant to s. 24 of the 1881 Act does not appear in her draft grounds of appeal. While that may be the case, given that the validity of the first plaintiff's appointment has otherwise been put in issue in the draft grounds by reliance on the provisions of s.28(6) of the 1877 Act, I perceive no basis why the applicant should be precluded from raising s. 24(2) of 1881 Act if the Court decides to grant an extension of time in which to appeal. This is particularly so in light of the first plaintiff's own averments (both in the court below and in this Court) that his appointment as receiver was as agent of the mortgagee, a position echoed by Mr. McCrudden in his affidavit evidence. Furthermore, I perceive no great prejudice to the plaintiffs by the applicant putting in issue the first plaintiff's validity by reference to s.24(2) of the 1881 Act. In all those circumstances, I agree with the applicant that it is arguable that the Judge was wrong to have, effectively, made a finding that the first plaintiff was validly appointed (which is in any event more properly for the trial of the action given the nature of the declaratory reliefs sought by the plaintiffs) in circumstances where, at the very least, the applicant was squarely asserting in the court below that the provisions of s.28(6) of the 1877 Act were not complied with.

Ground 6: The Judge erred in not finding that the plaintiffs were not entitled to relief due to delay in progressing their proceedings.

101. The first plaintiff was appointed receiver on 18 November 2018. The 2018 proceedings were issued by the applicant on 18 December 2018. The plaintiffs only filed an appearance in those proceedings on 14 April 2019, which the applicant says was well in excess of the

timeframe provided for in Order 12 of the Rules of the Superior Courts. A Notice of Discontinuance (which the applicant denies she filed) was filed on 7 September 2020 in the Central Office. The within proceedings issued on 23 April 2021. The applicant submits that the first plaintiff has not provided an explanation in his replying affidavit for why the within proceedings were only issued some seven months after the applicant's 2018 proceedings were discontinued particularly in circumstances where the first plaintiff contends that during the ensuing months after the Notice of Discontinuance was filed, the applicant continued to interfere with his receivership.

102. On the other hand, counsel for the applicant asserts that neither the applicant's 2018 proceedings nor the events following the discontinuance of those proceedings can be said to have acted as a bar to the first plaintiff seeking the injunctive relief he only sought in April 2021.

103. However, the plaintiffs say that the applicant's claim that they delayed in seeking injunctive relief is particularly difficult to credit in circumstances where the applicant had initiated her own proceedings almost immediately following the first plaintiff's appointment which proceedings were not discontinued until September 2020. Thereafter, even after their discontinuance, the applicant continued to interfere with the receivership. It is submitted that the plaintiffs moved with expedition in issuing the within proceedings in April 2021 and that there was no delay such as ought to preclude the plaintiffs from being granted the equitable relief to which they are entitled. Essentially, the plaintiffs contend that the 2018 proceedings were a good reason for the first plaintiff not to seek injunctive relief sooner than he did. It is further submitted that even if there was delay, same was not egregious and so should be given little weight, in the absence of any prejudice shown by the applicant. Counsel for the plaintiffs also points out that the evidence of the first plaintiff was that he

was engaging with the tenants of the Properties during the relevant time period, therefore, any delay should not defeat equity.

104. In the circumstances of this case, I am prepared to find that the applicant has raised an arguable ground on the basis of the alleged delay on the part of the first plaintiff in seeking interlocutory relief. No doubt, the issue of alleged delay on the part of the first plaintiff can be fully articulated in the appeal, if the Court decides to exercise its discretion and extend the time for the bringing of the appeal, the matter to which I now turn.

Overview

105. The applicant has succeeded in demonstrating that 4 of the 6 grounds in the draft notice of appeal are arguable. However, as the case law (most recently *Murphy v. The Law Society* [2023] IESC 28**)** demonstrates, the prospect of potential success is only one of the factors and arguments that must weigh in determining where the balance of justice lies for the purposes of the exercise of the Court's discretion. That being said, I am satisfied, having regard to all the circumstances of *this* case, as outlined above, that the balance of justice weighs in favour of extending time to the applicant to appeal against the interlocutory order. The established four arguable grounds, together with the fact that there is essentially no dispute between the parties that the applicant has surmounted the first two limbs of the *Eire Continental* principles, all tip the balance in favour of the Court exercising its discretion to extend time to the applicant. This is also in circumstances where the applicant's application to extend time was made within a short time after the expiry of the requisite time period for appeals of this nature, and where the Court perceives no undue prejudice to the plaintiffs in respect of the extension of time.

106. I consider it a further weighty factor in favour of extending the time the fact that the interlocutory order is likely to be determinative of the within proceedings as a whole, an assessment with which, in fairness, the plaintiffs do not take issue. The salient aspect of this

factor is that absent the applicant being permitted to appeal, that would leave the first plaintiff's appointment as receiver cloaked with validity and the first plaintiff effectively in lawful possession and entitled to receive the rents and profits of the Properties pending trial of the action, by virtue of the terms of the High Court Order. All of this would be in circumstances where a power of sale is not provided for in the 2007 Mortgage (a power of sale is provided for in the 2002 Mortgage). Such a scenario would be in the face of an arguable ground of appeal having been established by the applicant that the receivership should not stand by reference to the provisions of s.28(6) of the 1877 Act, and given the first plaintiff's own averment to having been appointed as agent of the *mortgagee* which, as the applicant also contends, is not in compliance with the provisions of s.24(2) of the 1881 Act, thus rendering the receivership invalid, which I have also deemed arguable.

107. These factors, together with the fact (albeit not in itself necessarily determinative) that the applicant has surmounted the *Eire Continental* threshold, point inexorably to the Court exercising its discretion and extending the time for the applicant to appeal.

108. Accordingly, for the reasons set out above, I would extend time (three weeks from the perfection of the order of this Court) to the applicant to lodge her notice of appeal in respect of those grounds (namely grounds 3-6 inclusive) which the Court has deemed arguable. Grounds 1 and 2 should be excised from the exhibited draft Notice of Appeal. Ground 5 of the draft requires to be refined to adequately reflect the applicant's reliance on s.24(2) of the 1881 Act.

109. In his oral submissions, in response to questions from the Court, counsel for the applicant argued that if the Court were minded to extend the time for lodging the appeal, then all 6 grounds of appeal, as advocated by the applicant, ought to be permitted to proceed. I find no merit in this submission in circumstances where only grounds 3-6 inclusive have

been deemed to be arguable. Accordingly, these are the only grounds upon which the applicant may advance in the appeal.

Costs

110. As the applicant has succeeded in her application, presumptively, she should be entitled to her costs of the application. I would further propose that there should be a stay on entry and execution in relation to such costs pending the determination of the appeal, and thereafter for such further period (if any) as the appellate court may decide. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 21 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 21-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

111. As this judgment is being delivered electronically, Whelan J. and Haughton J. have indicated their agreement therewith and with the orders I have proposed.