

**THE HIGH COURT  
COMMERCIAL**

[2022] IEHC 605

[2017 11335 P]

[2018 17 COM]

**BETWEEN**

**THOMAS KEARNEY**

**PLAINTIFF**

**AND**

**BANK OF SCOTLAND PLC AND PATRICK HORKAN**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 4<sup>th</sup> day of November, 2022**

1. This judgment will be arranged under the following headings: -
  - (i) Background
  - (ii) The question remitted to this Court by the Court of Appeal
  - (iii) The further question raised on behalf of the plaintiff
  - (iv) Conclusion.

**Background**

2. The background to the hearing before me is, in large measure, set out in one of the judgments of Whelan J. in the Court of Appeal in these proceedings. The judgment bears the neutral citation [2020] IECA 92. It is dated the 8<sup>th</sup> April 2020. As the procedural history of

the various actions taken by the plaintiff, Mr. Kearney, is of importance (particularly in respect of the fresh issue raised by Mr. Kearney), I will set it out in some detail. In large measure, I will be paraphrasing the summary contained in the judgment of Whelan J. to which I have just referred.

3. Mr. Kearney was advanced a number of loan facilities by Bank of Scotland (Ireland) Ltd. between June 2003 and November 2006. These loans were secured by way of a deed of mortgage and charge dated the 14<sup>th</sup> January 2004. While Mr. Kearney repaid some of these loans, he defaulted in relation to a number of them.

4. On the 31<sup>st</sup> of December 2010, all of the assets and liabilities of Bank of Scotland (Ireland) Ltd. (“BOSI”) were transferred to Bank of Scotland plc. (“BOS”). The mortgage of the 14<sup>th</sup> of January 2004 (“the mortgage”) was eventually registered in the Land Registry on the 20<sup>th</sup> of August 2013. At that time, the mortgage was registered in the name of BOS, given the transfer of BOSI’s interests in the facilities and the securities to that entity.

5. On the 5<sup>th</sup> of July 2012, the second defendant, Mr. Horkan, was appointed receiver by BOS.

6. I now summarise the numerous proceedings taken by either Mr. Kearney or his wife in respect of these facilities.

7. The first set of proceedings commenced in 2012. In them, Mr. Kearney challenged the validity of the charges registered against the secured property, and the validity of the appointment of Mr. Horkan. By order made on the 18<sup>th</sup> of November 2014, Kearns P.

dismissed these proceedings on foot of a motion taken by BOS and Mr. Horkan. This motion sought the dismissal of Mr. Kearney's 2012 proceedings on the grounds that the claim was frivolous, vexatious, disclosed no cause of action or is otherwise bound to fail. Mr. Kearney applied for an extension of time within which to lodge an appeal against the order of Kearns P., but this was refused by the Court of Appeal on the 23<sup>rd</sup> of February 2015. The ground for this refusal was that Mr. Kearney had not established any arguable grounds. Mr. Kearney then applied to the Supreme Court for leave to appeal against this refusal, but the application to the Supreme Court was itself refused on the 3<sup>rd</sup> of November 2015.

8. Before moving on to the subsequent actions taken in respect of these facilities, I should note that on the 29<sup>th</sup> November 2014, BOS assigned the security CarVal Investors UK Limited, who subsequently transferred the interest to Pentire Property Finance Limited ("Pentire") on the 20<sup>th</sup> of April 2015.

9. The second relevant proceedings were taken by Mr. Kearney's wife in September 2017. Mr. Horkan had placed the secured property for sale on the open market on the 7<sup>th</sup> of September 2017. Eight days later, on the 15<sup>th</sup> of September 2017, Mrs. Fidelma Kearney issued proceedings against BOS, Mr. Horkan and (ultimately) Pentire. These proceedings were discontinued on the 16<sup>th</sup> of November 2017. In respect of Mrs. Kearney's action, Whelan J.'s commented: -

"There is no evidence that (Mrs. Kearney) [acted as agent or proxy for Mr. Kearney] in this regard". (Para. 9 of the judgment).

In her proceedings, Mrs. Kearney asserted an interest in the secured property as against BOS.

**10.** On the 29<sup>th</sup> of November 2017 Mr. Kearney instituted further proceedings against Mr. Horkan relating to the secured property. These proceedings were discontinued.

**11.** The current proceedings were instituted by plenary summons dated the 13<sup>th</sup> of December 2017. BOS and Mr. Horkan issued motions seeking the dismissal of Mr. Kearney's claim, again on the grounds that it was frivolous, vexatious, disclosed no cause of action or was otherwise bound to fail. At para. 12 of her judgment, Whelan J. summarised the claims made in Mr. Kearney's statement of claim. She does so by reducing them to three main arguments: -

“i. The Registration Claim – that the charge was not registered in the name of BOSI in the Land Registry. and such registration was required before the charge could be transferred to BOS....

ii. The Indebtedness Claim – that the sums claimed on foot of the mortgage are not lawfully due and owing to any person or entity ....

iii. The Receiver Claim – the appointment of the receiver was invalid due to BOS not having registered itself as the owner of the charge. The deed of appointment of 5th July, 2012 failed to comply with clause 8.1 of the mortgage and was invalid, void and ‘a false instrument’ .....”

**12.** It is the last of these arguments that ultimately finds its way to me for determination. However, before considering the issue referred to this Court by the Court of Appeal, it is necessary to complete the history of the proceedings.

**13.** The High Court dismissed the proceedings on the grounds they disclosed no reasonable course of action, were unsustainable, frivolous and vexatious, and constituted an

abuse of process. It also found that much if not all of the claims made in the current proceedings were taken in violation of the ruling in *Henderson v. Henderson* [1843] 3 Hare 100, as they could and should have been made in the 2012 proceedings. Notably, this Court came to the view that the claim in respect of the validity of the appointment of the receiver could not be maintained given the ruling in *Henderson v. Henderson*. This Court further directed the vacation of lites pendentes registered in these proceedings, found the proceedings were brought for the improper purpose of facilitating the registration of these instruments, and went on to impose an Isaac Wunder order restraining Mr. Kearney from bringing proceedings against BOS or Mr. Horkan or, indeed, any other party (without leave of the court) challenging the receivership or the right of the receiver to act on foot of his authority as receiver over the secured property.

**14.** At para. 25 of her judgment, Whelan J. describes the three “key grounds” of appeal from the judgment of McGovern J. It is unnecessary to set out all of these, even as summarised by Whelan J. However, it is worth noting that the Isaac Wunder order is appealed, and that Mr. Kearney challenged the decision of McGovern J. on the validity of the appointment of the receiver by reference to a subsequent High Court decision of McDonald J. in *McCarthy v. Moroney* [2018] IEHC 379. As summarised by Whelan J. (at para. 25 (ii) of her judgment), Mr. Kearney contended that the judgment of McDonald J. to which I have referred: -

“ . . . confirmed that the deed of appointment ought to have referred to the receiver as a “receiver and manager”.

15. On the validity of the appointment of the receiver, Whelan J. concluded (at paras 117 to 119 of her judgment) as follows: -

“117. Mindful of the principles enunciated by Clarke J. in the case-law outlined above regarding the ambit of the inherent jurisdiction, on the specific issue as to whether the receiver was validly appointed as receiver and manager pursuant to the mortgage instrument I am satisfied that it cannot be said that there is no credible basis for suggesting that, on the facts as asserted in the proceedings and directed to this net point, the appellant's claim is bound to fail on the merits. Indeed it is clear that the specific point has never been definitively determined in this jurisdiction. It was not therefore open to the High Court to dismiss the claim regarding the validity of the appointment of the second named respondent as receiver and manager pursuant to the inherent jurisdiction.

118. I am satisfied that whilst there were some delays on the part of the appellant in seeking to impugn the validity of the instrument of appointment the issue is of such fundamental importance and goes to the heart of the constitutionally protected fundamental right to hold and enjoy private property, a right also recognised by Article 1 of the First Protocol to the European Convention on Human Rights, a convention to which this court has regard in accordance with the European Convention on Human Rights Act 2003, that it would operate a disproportionate hardship upon the appellant to shut out his right of access to the courts to have this issue determined.

119. Apart from the issue of the validity of the appointment of the receiver, the trial judge was entitled to dismiss the balance of the claims pursuant to *Henderson v. Henderson*”.

**16.** Whelan J. went on to find that the Isaac Wunder order was “arguably somewhat excessive” (para. 143). Notwithstanding this, an Isaac Wunder order (of a slightly adjusted scope) was made by the Court of Appeal in the following terms: -

“An order. . . restraining the appellant, his servants, agents or proxies, from instituting any proceedings, which seek to impugn the validity of the cross-border merger; the title of BOS to the said charges registered on Part 3 of the said Folios; the validity of the disposition of the said charges by BOS or any successor in title including, but not limited to. Pentire; the right of BOS to appoint the receiver, without the prior leave of the President of the High Court, or some other judge nominated by him...”.

**17.** It is of some interest that the judgment records (at para. 148) that a “last minute application” was made by Mr. Kearney on the morning of the hearing. This sought to adjourn the hearing of the appeal in order to enable some separate application before the Supreme Court to be pursued by Mr. Kearney. Whelan J. records that: -

“The application lacked any cogent or coherent basis and was refused”.

**18.** The last minute application to the Court of Appeal has some resemblance (albeit not a complete one) to the effort by Mr. Kearney, in the hearing before me, to argue a completely fresh point. That application also is made late in the day and likewise lacked any merit.

**19.** Baker and Collins JJ. agreed with the judgment of Whelan J. As I have said, that judgment was delivered on the 8<sup>th</sup> of April 2020. However, Mr. Kearney then sought a review of that judgment. Once again, it is unnecessary to recite the detail of the review sought by Mr. Kearney or the decision of the Court of Appeal on that application. The judgment of Whelan

J. (with which, again, Baker and Collins JJ agreed) bears the neutral citation [2020] IECA 224, and was delivered on the 5<sup>th</sup> of August 2020. Whelan J. concluded (at para. 18 of the judgment) that: -

“The application in substance seeks to revisit the merits of the decision of this court in the substantive judgment with regard to each of the points identified. On these issues it is clear the appellant seeks to reopen and reargue the grounds of appeal in respect of which he was not successful with a view to having the court reach a different conclusion. Such an approach is impermissible. If the appellant disagrees with this view or any conclusion reached it is open to him to seek leave to appeal to the Supreme Court”.

**20.** The judgment sets out the one issue to be remitted to this Court for determination. The relevant order (dealing both with the issue to be remitted to this Court and the scope of the Isaac Wunder order as varied by the Court of Appeal) reads: -

“IT IS ORDERED that the within proceedings be remitted to the High Court for determination of the sole question whether the appointment of Patrick Horkan as “Receiver” by deed of appointment dated 5 July 2012 was valid pursuant to clause 8.1 of the Charge (as defined in the Part 1 of the Schedule hereto) conferring on the mortgagee the power to appoint a “receiver and manager” over the Secured Property (as defined in Part 2 of the Schedule hereto); AND IT IS ORDERED that, in lieu of the Isaac Wunder order of the High Court, the Appellant, his servants, agents and/or proxies be, and hereby are, restrained from instituting any proceedings that seek to impugn any or all of: (i) the validity of the cross-border merger of Bank of Scotland



Limited with Bank of Scotland plc; (ii) the title of Bank of Scotland plc or of any lawful assignee (including Pentire Property Finance DAC) to the Charge; (iii) the validity of the assignment of the said Charge by Bank of Scotland plc to Pentire Property Finance DAC; (iv) save on the sole ground hereby remitted to the High Court for determination in the within proceedings, the right of Bank of Scotland plc to appoint the receiver or the validity of the appointment of the Receiver and all acts done by him without prior leave of the President of the High Court, or some other judge nominated by the said President, such leave to be sought by an application in writing addressed to the Chief Registrar for the time being of the High Court ”.

**21.** The review judgment of the Court of Appeal having been delivered in early August 2020, BOS then framed a Special Case pursuant to O. 34 of the Rules of the Superior Courts. The Special Case was dated the 7<sup>th</sup> of July 2021. The body of the Special Case recites the relevant facts, and exhibits the Mortgage and the deed of appointment of the receiver (Mr. Horkan) of the 5<sup>th</sup> July 2012.

**22.** The Special Case was listed for hearing in December 2021. At that hearing, Mr. Kearney (previously unrepresented) was represented by solicitors and counsel. However, while still unrepresented, Mr. Kearney issued a motion seeking the following substantive reliefs: -

“An order, varying the Isaac Wunder order as is placed on the plaintiff, thus permitting the said plaintiff to be heard on a narrow point of contractual relevance opposing the receivership of the second named defendant under his deed of novation as entered into in August 2020”.

23. The motion was grounded on an affidavit sworn by Mr. Kearney on the 1<sup>st</sup> of December 2021. The two – day hearing of the special case was due to commence (and did commence) on the 9<sup>th</sup> of December 2021. This motion was foreshadowed by an application Mr. Kearney had made to the Court of Appeal seeking to vary the Isaac Wunder order imposed by it on him. However, on the 2<sup>nd</sup> of November 2021 the Court of Appeal stated that it was “functus officio” in respect of the appeal to it by Mr. Kearney, that the court would not “entertain any further correspondence in relation to it”, and that leave be sought from the High Court were Mr. Kearney wish to challenge the appointment of the receiver, or the validity of that appointment or any acts done by him. The application to vary the Isaac Wunder order, therefore, was returnable before me on the 9<sup>th</sup> of December 2021, to be heard in conjunction with the Special Case. As a Special Case was (at least initially) the more substantial matter for me to decide at the hearing, I turn to that first. I will then deal with the fresh point raised by Mr. Kearney in the period just prior to the hearing of the Special Case. When I do so, I will describe in greater detail the issue which Mr. Kearney sought to agitate before me, and indeed which his counsel did argue at some length before the question posed in the Special Case could be addressed.

#### **The question remitted to this Court by the Court of Appeal**

24. The question remitted by the Court by the Court of Appeal is a very simple one. It is, as Whelan J. commented in her substantive judgment, a point which had not been conclusively determined by the Irish courts. However, between the two judgments of the

Court of Appeal in these proceedings and the hearing in December 2021, the point was addressed extensively and in my respectful view, conclusively and authoritatively by Murray J. in *Fennell v. Corrigan* [2021] IECA 248. In his judgment, with which Whelan and Haughton JJ agreed, Murray J. found valid and effective the deed appointing Mr. Fennell as receiver over properties secured by a mortgage in circumstances where the relevant provision of the mortgage permitted the appointment of a person “to be receiver and manager or receivers and managers. . .” of secured assets. While obviously the terms of individual deeds of appointment and individual instruments of security have to be considered in every case, the general principle determined by the Court of Appeal in *Fennell v. Corrigan* is exactly the one that presents itself in these proceedings.

**25.** The judgment of Murray J. was delivered between the filing of written submissions on the Special Case and the hearing. Notwithstanding that, the judgment in *Fennell v. Corrigan* understandably dominated the oral submissions before me.

**26.** Given the significance of the decision in *Fennell v. Corrigan*, the approach taken towards it by counsel for Mr. Kearney is instructive.

**27.** The first reference on the Kearney side to the judgment in *Fennell v. Corrigan* is a rather Delphic one, contained at para. 21 of Mr. Kearney’s affidavit grounding his application to vary the Isaac Wunder order. In that affidavit, Mr. Kearney swears: -

“I say, as averred previously the Court of Appeal affirmed most of the orders of McGovern J., save on the receiver and manager point which I can argue in the special case. I say recent decisions on the point in the Court of Appeal suggest I have an

onerous task premised on that specific argument, however, coupled with the support of the novation argument I believe a viable case may be put before Mr. Justice McDonald”.

**28.** The reference to McDonald J. is easily explained. At that time, McDonald J. was case managing the Special Case and representations had been made to him in that capacity by Mr. Kearney on what Mr. Kearney describes in his affidavit as “the novation point. . .”.

**29.** It appears to be the case that Mr. Kearney himself acknowledged (before he was represented by his current solicitors and counsel) that the judgment in Fennell and Corrigan presented a real obstacle to him succeeding in the Special Case. Of course, precisely because that judgment constituted such an obstacle is exactly why it should have been comprehensively addressed in the argument at the hearing.

**30.** At the hearing, and in order to provide Mr. Kearney’s counsel with the last word in submissions, counsel for Mr. Kearney went first. This is despite the fact that BOS was the party which had initiated the Special Case procedure. In her submissions, counsel for Mr. Kearney acknowledged that “at first sight” it may appear that the decision in Fennell v. Corrigan was binding on this court. However, it was argued that the Fennell v. Corrigan judgment was “of no assistance whatsoever to the outcome of this Special Case”. The basis for this submission was that the mortgage deeds in the Fennell v. Corrigan case and in the McCarthy v. Moroney proceedings differed materially. In her initial oral submissions, counsel also based her arguments on the judgment of Laffoy J. in Kavanagh v. Lynch [2011] IEHC 348. However, in these initial submissions there was no engagement whatsoever with

the substance of the judgment of Murray J. in *Fennell v. Corrigan*. I will obviously return to that latter judgment in due course.

**31.** Counsel for Mr. Horkan and counsel for BOS placed great reliance on *Fennell v. Corrigan*. In effect, and to use the language actually employed by counsel for BOS, they submitted to me that this was “definitive” of the issues before me on the Special Case.

**32.** In her responding and concluding submission, counsel for Mr. Kearney increasingly relied upon the judgment of McDonald J. in *McCarthy v. Moroney*. Counsel also relied once again on the judgment of Laffoy J. in *Kavanagh v. Lynch* and relied extensively on the judgment of the Supreme Court in *Charleton v. Scriven* (Clarke C.J., 8 May 2019). The emphasis in her closing submission by counsel for Mr. Kearney on *Charleton* and *Scriven* was unexpected, given that in the written submission filed on behalf of Mr. Kearney, *Charlton* and *Scriven* was described in this way: -

“This case left much ambiguity in its wake. It created more questions than answers...”

**33.** The extent of reliance on the part of counsel for Mr. Kearney on the comments by McDonald J. in *McCarthy v. Moroney* can be seen from this section of the transcript, towards the end of counsel’s submission: -

“It is difficult to argue that Justice McDonald did not carry out an extensive examination of the mortgage deed and the deed of appointment. What is clear from the extract is that Justice McDonald delivered his decision on the basis of sound reasoning, on the basis of a neutral mind, on the basis of compassion. Each clause is

examined thoroughly and an actual meaning was taken into full account by the judge.

Both defendants in the case attempted to rubbish the decision of Justice McDonald”.

**34.** I have no difficulty in accepting that, in the relevant judgment, and in his other judgments, McDonald J. displays the qualities described by counsel in this excerpt. However, when one looks at the relevant portion of his judgment in *McCarthy v. Moroney*, it is obvious that McDonald J. is not purporting either to decide the relevant issue or even to indicate how it is likely to be decided. That much is clear not only from the wording used by McDonald J. himself, but also from the analysis in *Fennell v. Corrigan* by Murray J. of the relevant passage in *McCarthy*.

**35.** Counsel for Mr. Kearney concluded her submission by commenting on the difference between the mortgage deed in *McCarthy* and the mortgage deed in *Fennell*; the deed in one of the cases had a lower case “r” in receiver, while the deed in the other proceedings had the word “receiver” spelled with an uppercase “R”. It was submitted that “this alone shows the mortgage deeds are at variant”.

**36.** This was the only difference identified between the IIB deed (which featured in *Fennell*) and the BOSI deed (which featured in this case and in *McCarthy*).

**37.** As with her initial submission, counsel for Mr. Kearney, in her closing speech, did not open any section of the judgment of Murray J. in *Fennell*. With the exception of the distinction between the two mortgage deeds (which I have just described) no effort was made to explain why the judgment of the Court of Appeal in *Fennell* did not decide the issue remitted in these proceedings by the Court of Appeal. No meaningful effort was made to

explain to me why the careful, persuasive (and binding) analysis of Murray J. does not provide the answer to the Special Case.

**38.** Before considering the judgment in Fennell, I will describe briefly the issue before McDonald J. in McCarthy.

**39.** McCarthy was an application for what was, in reality, a mandatory interlocutory injunction requiring the defendants to vacate lands charged in favour of a lending institution. The order was sought by a plaintiff appointed by the lending institution as “receiver” although the relevant mortgage and charge permitted the appointment of a “receiver and manager”. It was argued on behalf of the defendants that, as he was not appointed as “receiver and manager” the plaintiff’s appointment was invalid. On the facts of the case, and in light of the submissions made to him, McDonald J refused the injunction sought. In the course of his judgment, McDonald J commented that the receiver seeking the interlocutory order would “have an uphill struggle in persuading the court at trial that he has been validly appointed.”

**40.** In Corrigan, Murray J made four observations about the judgment in McCarthy. Firstly, McDonald J made it clear that “no final conclusion can be reached in relation to [the relevant] issue at this interlocutory stage.” Secondly, counsel for the plaintiff receiver did not make extensive submissions on the issue. Thirdly, echoing the first point, the judgment of McDonald J was “not deciding whether the receiver had in fact been validly appointed. It was concerned exclusively with whether the plaintiff had established a strong case that he has been validly appointed.” Fourthly, what McDonald J actually decided was that “the defendant had a sufficiently strong argument that a deed of appointment which did not expressly nominate the plaintiff as receiver and manager was ineffective – having regard to the

mortgage agreement at issue in that case – to defeat the application for...a mandatory injunction.”

**41.** I respectfully agree with these observations, which put in proper context the comments by McDonald J upon which Mr. Kearney so heavily relies. It is quite clear that McCarthy does not purport to decide the issue which has been remitted by the Court of Appeal in this action.

**42.** In Corrigan, Murray J went on to decide the question of the validity of the appointment as receiver of the plaintiff in that case. The facts in Corrigan are very fully set out in the judgment of the Court of Appeal, and need not be repeated here. The conclusion of Murray J was that (on the documents at issue in that case) the appointment of the plaintiff was valid and effective, notwithstanding that the mortgage permitted the appointment of a “receiver and manager” and the plaintiff was merely appointed to act as “receiver”. The central portion of the judgment is paragraph 43, which reads;

“Nonetheless and however the argument is expressed, I do not agree that, properly construed, the mortgage required the description in the deed of appointment of the receiver as ‘receiver and manager’ so that a failure to so designate the appointee invalidated the appointment. What clause 9.1 says is that the Bank could ‘appoint ... any person ... to be receiver and manager.’ This could have been done by a deed which described the appointee in precisely those terms and, undoubtedly, it would have been prudent to so identify him. But given that a receiver and manager is a receiver who has powers of management, and given that the term ‘receiver and manager’ is not one of art, an appointment of a person qua receiver by an instrument



which properly construed has the effect of conferring upon him or her powers of management, achieves the same end. The consequence is the appointment is of a receiver and manager. Clause 9.1 describes what is being appointed (a receiver and manager) but does not prescribe the language that must be used to achieve that objective.”

**43.** The mortgage in McCarthy was not the same security document that applies in this case, a point stressed by counsel for Mr. Kearney. However, Murray J describes the mortgage in Corrigan as “very similar” to the form of mortgage in McCarthy; it follows that it is very similar to the mortgage in this case. As already described in this judgment, I am not impressed by the distinction between the mortgage in this case and the form of mortgage in Corrigan advocated for by counsel for Mr. Kearney. This difference (which I have set out at paragraph 35) is not a material one.

**44.** As was the case in Corrigan, the mortgage here permits the appointment of a “receiver and manager”. As in Corrigan, the term “receiver and manager” is not a term of art; the appointment of Mr. Horkan as receiver confers upon him powers of management. Therefore, despite the fact that he has been appointed as “receiver”, the legal reality is that he has been appointed as receiver and manager. This is entirely consistent with the terms of the mortgage.

**45.** I should deal with one further submission made on behalf of Mr. Kearney. It is this. *Kavanagh v Lynch* [2011] IEHC 348 is a decision of Laffoy J. This was described as a case where there had been strict compliance with the terms of the relevant mortgage, and where the terms of appointment of Mr. Kavanagh as receiver admitted of no ambiguity. However, I do not think that these general propositions assist Mr. Kearney. The real question is whether,

employing the well established rules of construction, the bank in appointing Mr. Horkan has acted in accordance with the terms of its agreement with Mr. Kearney. Following the decision and analysis in Corrigan, and having considered the very similar mortgage and deed of appointment in this case, I have decided that the appointment of Mr. Horkan has been done within the terms of the mortgage and charge. Whether or not one calls it “strict compliance”, the appointment is in accordance with the agreements entered into between Mr. Kearney and his financiers. Equally, there is simply no ambiguity about the situation. The submission to this effect bears a striking resemblance to the practices disapproved of in the authorities set out at paragraph 49 of the judgment in Corrigan; looking for “doubtful alternative meanings”, creating ambiguities, and seeking ambiguities “in the abstract”.

**46.** I will therefore answer the Special Case with a finding that the appointment of Mr. Horkan is valid and effective.

#### **The Further Question Raised by the Plaintiff**

**47.** By Notice of Motion returnable to the 9th of December 2021 Mr. Kearney sought;

"An Order, varying the Isaac Wunder Order as was placed on the Plaintiff, thus permitting the said Plaintiff to be heard on a narrow point of contractual relevance opposing the receivership of the Second Named Defendant under his Deed of Novation as entered into in August 2020."

**48.** At paragraph 18 of his grounding affidavit, Mr. Kearney defines the issue as "the validity of a Deed of Novation which has subsequently taken place on the 7th of August 2020." The relevant deed was subsequent to the substantive judgments of the Court of Appeal to which I have already referred. At paragraph 19 of the same affidavit, Mr. Kearney says;

"I say, the Defendants state correctly, I did not argue the validity of the First Deed of Novation of Patrick Horgan between the Bank of Scotland plc and Pentire. I say, that it was my right to do so or not do so. I say, equally it is my right to argue the validity of the Deed of Novation of Patrick Horkan as constructed between Pentire and Pepper."

**49.** As I have described in paragraph 8, Pentire acquired Mr. Kearney's debts (and associated securities) in 2015. I have not previously referred to the fact that, at that time, BOS, Pentire and Mr. Horkan entered into a Deed of Novation by which BOS agreed to novate to Pentire the Deeds of Appointment of Mr. Horkan as receiver; this was done with Mr. Horkan's consent. On the 7th of August 2020 Pentire entered into a further Novation Deed whereby Pentire novated to Pepper Finance Corporation (Ireland) DAC ("Pepper") the Deeds of Appointment of Mr. Horkan as receiver; again, Mr. Horkan consented to this and was a party to the Novation Deed. Also on the 7th of August 2020, Pepper acquired Mr. Kearney's debts (and associated securities).

**50.** Despite the fact the Isaac Wunder Order was not varied at the time, in his written submissions on the Special Case Mr. Kearney made a full argument on this new point which he wished to raise. I set out this section of his written submission in full;

“13. There have been two novations of the Deed of Appointment since this receivership was initiated as between Bank of Scotland plc and Ennis Property Finance in 2015 and Ennis to Pepper in 2020. It is submitted that this is blatant breach of Mortgage Deed for reasons as submitted hereunder.

14. In making this submission in relation not the Deeds of Novation reliance is placed upon the entirety of Clause 8 the “Powers and Appointment of Receiver” Clause 10 the “Delegation of Powers of the Bank, Clause 13 the “Power of Attorney” and Clause 24.4 of the Mortgage Deed.

15. Clause 8 of the Mortgage Deed contains many sub clauses, none of which indicate any reference to the novation of the Deed of Appointment. There is no declaration whatsoever of novation been part of the right of a receiver and manager or right to partake in same through the mortgage contract.

16. Clause 10 which shows the powers of the Bank is instructive to the making of this submission. This clause permits the Bank to delegate “to any person by the Power of Attorney to any person or persons all or any of the powers exercisable under this deed”. This extract confirms the powers are confined to the Powers in the Mortgage Deed. No further powers are referenced by the Bank.

17. Clause 24.4 states; “Any provision of this deed may be amended, supplemented or novated only if the Mortgagor and the Bank so agree in writing”.

18. At no time, has this Mortgagor or the Bank agreed to an amendment, supplement, or novation of “Any provision” of the Deed or moreover Clause 8 of the Mortgage

Deed which is the basis of the Powers and Appointment of the Receiver. The construction of clause 24.4 is clear in its natural meaning. There must be agreement between the Mortgagor and the Bank in writing. None exist here.

19. It is respectfully submitted that the Deeds of Novation are in breach of the powers of the Bank under the express terms of its own contract which it drafted and presented. It would be grossly unjust for this court to legitimise such breaches which the Bank as the dominant party was at all material times in a position to prevent.”

**51.** This submission was supplemented by the oral submissions of his counsel at the hearing. Having gone through the grounding affidavit of Mr. Kearney (which I have considered in detail), counsel went on to address the separate written submissions of BOS and Mr. Horkan on this application. Counsel described the written submissions of Mr. Horkan as "insistent or, so to speak, fanatical on ensuring that the Isaac Wunder Order relief is refused." This is not a fair characterisation of the written submissions. Counsel went on to argue that the receiver's submissions did not address complaints made by Mr. Kearney about his right to pay off his debts. The right of redemption is, of course, a fundamental one. However, Mr. Kearney was not attempting to litigate a frustration of this right; instead, he was trying to raise a point about the validity of receiver's appointment.

**52.** Counsel for Mr. Kearney then submitted that the 2015 Deed of Novation differed from the 2020 Deed. To do this argument justice, I will set out the relevant portion of the transcript;

“Further, the affidavit also exhibits the 2015 Deed of Novation as between Bank of Scotland PLC and Pentire with the receiver as the continuing party. The 2015 Deed of Novation is before the Court for its perusal. There is a significant difference in its construction compared to the later 2020 Deed of Novation, the subject of this application before the Court. At no point in the 2015 deed is there any reference to the mortgage deed. The 2015 deed refers to a purchase deed between Bank of Scotland PLC and Pentire. The result of the purchase was grounded or premised on the Deed of Novation of Bank of Scotland PLC to Pentire with the receiver as continuing party.

The 2015 Deed, it was submitted by the second-named defendant that it wasn't challenged or argued by the plaintiff. It appears from those suggestions that, since the 2000 Deed of Novation was uncontested, that it must follow that there exists a bar on the plaintiff from contesting the 2020 Deed of Novation. This was the argument submitted by the receiver – obviously Mr Horkan the second-named defendant. In my respectful submission, this argument is misconceived. The 2020 Deed of Novation is drafted upon a different construction in this respect. Reference is made to page two of the heading of recitals. In particular, recital B, where it states: “The transferee entered into a mortgage sale and purchase deed dated the 7<sup>th</sup> of August 2020. At no point in the Deed of Novation of 2015 is there any reference to a mortgage sale.”

Turning again to the recitals in the 2020 Deed of Novation, at A it states: “The transferor and the continuing party entered into a receiver/agency agreement.

Recital C states that the continuing party consents to the substitution as a party of the transferee for the transferor under the receiver/agency/agreements.” The recitals in the 2020 Deed of Novation entirely undermine the submissions of the receiver in opposition to the reliefs sought. There is clear evidence of a mortgage sale to Pepper, who is now the charge holder. It is clear the Deed of Novation is founded or premised upon, in part, the mortgage sale. Absent such sale, no Deed of Novation was required”

**53.** The fact that the 2020 Novation Deed shows on its face "clear evidence of a mortgage sale to Pepper..." does not in any way distinguish it from the 2015 Deed. Both deeds inevitably involve the acquisition or purported acquisition (by the respective transferee) of an interest in the securities granted by Mr. Kearney to his original lender. If that was not the case, the involvement of Mr. Horkan would make no sense. The two deeds have as their main (or sole) purpose the replacement of the respective transferor with the respective transferee as the party appointing Mr. Horkan as receiver to the assets secured by Mr. Kearney in favour of his lenders. Both deeds are premised on an acquisition of Mr. Kearney's debts and associated securities, including the mortgage on foot of which Mr. Horkan was appointed. In any event, this submission is designed solely to attempt to explain why the 2015 Deed may not have been challenged by Mr. Kearney. It is completely at odds with Mr. Kearney's own evidence, in his grounding affidavit, which is to the effect that "neither the parties of Mr. Horkan and Pepper made any effort to be reasonable to supply receipts showing both debits and credits to my account." This averment, at paragraph 6, appears to be made in order to explain why the 2020 Deed is being challenged while the 2015 Deed was not. Again, at paragraph 19 (which I have already quoted) Mr. Kearney falls back on the proposition that it is entirely a matter for himself which Deed of Novation he seeks to challenge, and which he will not challenge.

**54.** Counsel then placed heavy reliance on Clause 24.4 of the Mortgage. I agree that this is the central provision. However, it simply does not bear the meaning for which Mr. Kearney contends. I will now explain why this is so.

**55.** Clause 24 consists of general provisions agreed between the parties. Clause 24.4 reads;

“Any provision of this Deed may be amended, supplemented or novated only if the Mortgagor and the Bank so agree in writing. Any waiver of, and any consent or approval by the Bank under, any provision of this Deed shall not be effective unless it is in writing, and may be given subject to any conditions thought fit by the Bank, may be withdrawn or modified at any time and shall be effective only in the instance and for the purpose for which it is given.”

**56.** For the sake of completeness, I should refer to Clause 8 and Clause 26 of the Mortgage. Clause 8, as already mentioned in this judgment, provides for the Appointment and Powers of a Receiver. Clause 26 provides (at 26.2);

“The Bank may assign or transfer all or any of its rights or obligations hereunder. Any assignee, transferee or successor of the Bank shall be entitled to enforce and proceed with this security in the same manner as if named herein.”

**57.** The argument made on behalf of Mr. Kearney is that, as I have described at paragraphs 48 to 50 of this judgment, the Deed of Novation of the 7<sup>th</sup> of August 2020 is invalid. That is the deed between Pentire, Pepper and Mr. Horkan. It is submitted that the novation described in that deed violates Clause 24.2.



**58.** There are two immediate problems with this argument.

**59.** Firstly, it seeks to impugn a deed involving two non-parties (Pentire and Pepper).

One result of the August 2020 Deed of Novation is that Mr. Horkan is treated as though he were appointed by Pepper. Clause 2.1 of the Deed provides;

“The Parties hereby agree...that [Pepper] shall be and is hereby substituted in place of [Pentire] as a party to the Receiver/Agency Agreements and that the Receiver/Agency Agreements shall be treated in all respects as if [Pepper] were the original party to the Receiver/Agency Agreements instead of [Pentire].”

**60.** Clause 3.1 of the impugned Deed releases Mr. Horkan and Pentire from all further obligations towards each other under the Receiver/Agency Agreements.

**61.** In challenging the validity of the Deed of Novation of August 2020, Mr. Kearney is calling into question the legal effectiveness of an instrument which either confers rights on Pentire and/or Pepper or, equally importantly, releases them from obligations. At its narrowest, Mr. Kearney seeks to have the continuing receivership of Mr. Horkan set aside; this would be singularly damaging to Pepper, which (on the basis of the 2020 Deed) is now the entity to which the proceeds of receivership must be remitted. No attempt was made to join Pentire or Pepper to this application. No effort was made to adjourn the application in order to put Pentire or Pepper on notice of a motion which (if successful) could materially affect their interests. There is no suggestion whatsoever that Mr. Kearney will seek to amend these proceedings (or issue fresh proceedings) so as to include Pentire or Pepper. These failures occurred despite submissions by Mr. Horkan’s counsel (in their written submissions

at paragraph 4) and by BOS's counsel (in his oral submissions) that the interests of Pepper, at least are involved. As counsel for BOS put it;

“[Mr. Kearney] now seeks to challenge a novation that involves a party who isn't a party to the proceedings, and that creates its own further complications and underscores what appears, in my respectful submission, to be an attempt to misuse the process of the Court by getting this further point into the proceedings.”

**62.** The response of Counsel for Mr. Kearney to the potential effect on Pepper was;

“And it was fairly argued by {Mr. Kearney} that it is...a matter for Pepper; however, if this is a matter for Pepper, how would a plaintiff who has an Isaac Wunder looming over his head join Pepper; isn't it for Pepper, then, that should come on board and join the proceedings. The proceedings in this case, Mr. Kearney cannot bring Pepper on board. He has an Isaac Wunder on him and that's why we're seeking a variation. It was extensively argued by the first and second named defendant, however, this is a catch 22 because his hands are tied.”

This response is misplaced. It was always open to Mr. Kearney to seek a variation of the Isaac Wunder order so that he could agitate an issue. At the risk of stating the obvious, he made such an application to vary. In applying to vary the order, Mr. Kearney could and should have placed the appropriate interested parties on notice. He did not do so. Instead, he sought to agitate the issue in the current proceedings and therefore merely put the existing defendants on notice of his application to vary the Isaac Wunder order imposed by the Court of Appeal. He did not seek to notify Pentire or Pepper of his application either as intended

additional defendants to the existing action or as proposed defendants in fresh proceedings. These entities have therefore not been informed of an application to vary an Isaac Wunder order despite the fact that the ensuing claim would directly affect them. The argument that it is for Pepper to “come on board and join the proceedings” constitutes a reversal of reality; it is for Mr. Kearney to seek to involve Pepper.

**63.** Secondly, Clause 24.4 (at its height) prevents any amendment, supplementing or novation of a provision of the 2004 Mortgage. It does not prevent any novation of a provision of any other deed. Mr. Kearney has sought to invalidate the Deed of Novation of August 2020, and that deed alone – the contents of paragraph 19 of his grounding affidavit put this beyond doubt. However, Clause 24.4 of the 2004 deed does not purport to prevent the novation effected by the 2020 deed. The 2020 deed itself expressly effects the novation of interests in “the Receiver/Agency Agreements”. The latter are defined as;

“...all deeds of appointment, letters of agency appointment and related letters of engagement entered into by [Pentire] and [Mr. Horkan] appointing [Mr. Horkan] as receiver, receiver and manager or agent in relation to assets the subject of the [portfolio of loan facilities], including, but not limited to, those listed in the Schedule to this Deed;”

**64.** Mr. Kearney expressly does not challenge (and has never challenged) “the validity of the First Deed of Novation of Patrick Horkan between [BOS] and Pentire”; paragraph 19 of his grounding affidavit. Even if he had, this would not change the analysis of this point. Put simply, Clause 24.4 does not extend in its reach to prohibiting the novation of any provision in what Mr. Kearney calls the “First Deed of Novation”. The novation of interests in that

“First Deed” is all that the impugned deed purports to achieve. As the “First Deed” is not a provision of the Mortgage, any novation of interests created by that deed is not invalidated by Clause 24.4. It is particularly striking that Mr. Kearney, having failed in his challenge to the appointment of Mr. Horkan by BOS and (despite the construction he puts on Clause 24.4) not having objected to the novation of Mr. Horkan’s appointment by BOS to Pentire, now asserts that the further novation from Pentire to Pepper falls foul of a prohibition of novation of provisions in the Mortgage, a completely different instrument. It is also worth noting that, even if the second deed of novation were to fall, this would not in itself lead to the removal of Mr. Horkan as receiver as his original appointment (and the novation to Pentire) would not be affected.

**65.** Despite the deliberately narrow terms in which it was couched in the motion, in Mr. Kearney’s affidavit and in his written submissions, this fresh argument developed into a somewhat broader one. It was put this way at the start of the oral submissions of his counsel; “...this application is grounded upon the right of the bank and its assignees to partake in a Deed of Novation of the receiver.” This argument was to the effect that the right to appoint a receiver was a provision of the Mortgage, and that this right could not be novated to a third party without Mr. Kearney’s consent (which was neither sought nor given). This submission is not well founded.

**66.** In particular, this approach ignores the contents of Clause 26.2. It will be recalled that this provision expressly permits the assignment of all or any of the Mortgagee’s rights or obligations. This is precisely what BOS did. It would be extraordinary if Clause 24.4 were to prohibit something expressly permitted by Clause 26.2, and indeed it does not do so. Clause

24.4 prevent any provision being “amended, supplemented or novated..” without the consent of the parties to the deed. “Novation” is defined in Merriam Webster (2021) as;

“The substitution of a new legal obligation for an old one.”

An alternative definition, again in Merriam Webster, describes this substitution in obligations as happening “with or without a change of parties.”

These definitions are representative of others appearing either in legal or general dictionaries

**67.** The proper reading of the relevant terms of the Mortgage is that Clause 24.4 prohibits any change (whether by amendment, supplementing or substitution) of any provision of the agreement. This term is, as already observed, of general application. However, the Bank (as defined) benefits from a specific express entitlement to assign any or all of its rights (or obligations) under the Mortgage. There is no inconsistency or ambiguity about what the Mortgage forbids and what it allows. The document is perfectly clear. Once such assignment took place, whether from BOS to Pentire or from Pentire to Pepper, the assignee was perfectly entitled to exercise all rights under the Mortgage. These included the appointment of a receiver or the joining in a deed of novation of an existing receiver’s initial appointment.

**68.** Mr. Kearney is mistaken in his submissions that Clause 24.4 invalidates the Deed of Novation to Pepper. He is also wrong in suggesting that Clause 24.4 prevents Pepper from joining in that deed. There is another reason why neither of these submissions are to be allowed at this time.

**69.** If these arguments by Mr. Kearney were well founded then, taken at their height, they would invalidate the first novation of Mr. Horkan’s appointment (from BOS to Pentire). That had occurred in 2015, some five years before the judgments of the Court of Appeal with which I began this decision. The current proceedings began in 2017. They included a challenge, on a number of grounds, to the validity of Mr. Horkan’s position as receiver. No good reason has been given by Mr. Kearney as to why he did not include a challenge grounded on Clause 24.4. The reasons that he has advanced (that Mr. Horkan and Pepper have not acted reasonably in a number of respects) are unconvincing. Pepper has, according to paragraph 8 of Mr. Kearney’s affidavit, been the asset manager (on behalf of Pentire) since 2015. If Pepper was acting unreasonably since then, it was all the more necessary for Mr. Kearney to challenge the appointment of Mr. Horkan. The fact that Pepper became the “owner of the facility” in 2020 appears to have changed nothing. At least in terms of the treatment of Mr. Kearney.

**70.** However, and taking Mr. Kearney’s evidence at its highest, the outstanding fact is that he has been challenging Mr. Horkan’s status as receiver since 2017 and has chosen not to deploy a submission which he now says would bring Mr. Horkan’s time as receiver to an end. For reasons already set out at paragraph 53 of this judgment, the submission that this particular case could not have been made before the August 2020 Deed of Novation just does not hang together.

**71.** Despite the way it is often described, the decision in *Henderson v Henderson* [1843-60] All ER Rep. 378 does not lay down a strict rule. It does guide the Court as to how to approach a situation such as the present one. In *A.A. v Medical Council* [2003] 4 I.R. 302 Hardiman J set out, in less than three pages, what he considered were the leading

characterisations of these principles. Towards the end of his summary, Hardiman J warned against the application of any such principles in “an automatic or unconsidered fashion.” He went on to stress the need for “sympathetic consideration [to] be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts for the determination of his civil rights or liabilities.” Even were I not bound by this approach, I would agree with it.

**72.** In his summary, Hardiman J quotes extensively from two judgments of Lord Bingham. In the first, *Johnson v Gore Wood & Co* [2002] 2 A.C. 1, Lord Bingham talks of an approach which should be “a broad merits-based judgment which takes account of the public and private interests involved and also takes account of the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.” The question therefore is not simply whether the argument could have been raised at an earlier stage in the relevant proceedings or in separate prior proceedings. The second excerpt describes the purpose of the principle, and is from Lord Bingham’s speech in *Gairy v Attorney General of Grenada* [2002] 1 A.C. 167;

“these are rules of justice, intended to protect a party (...not necessarily, a defendant) against oppressive and vexatious litigation.”

**73.** Applying these and the other iterations of the principle to be found in A.A. and the other authorities to which I have been referred, I would consider the following to be important. Mr. Kearney has, since 2012, sought to challenge the appointment of Mr. Horkan as receiver, which appointment was made in July of that year. Mr. Kearney’s challenges have

involved not one but three different suits (one in 2012 and two in 2017). The first of these was struck out by this Court, and further applications to the Court of Appeal and the Supreme Court failed as set out earlier in this judgment. The third of these is the current set of proceedings. This action has been subject to three different judgments (one by McGovern J in this court, and two in the Court of Appeal). In the course of the proceedings before the Court of Appeal, Mr. Kearney sought, on the morning of the hearing to adjourn the appeal for reasons which that court felt were without merit. There were numerous opportunities for Mr. Kearney to introduce the current argument not least in 2017 when these proceedings began, and during the strike out hearing before McGovern J (at which stage thought could and should have been given to any amendment to those proceedings which might have saved them). The other arguments advanced by Mr. Kearney (apart from that embodied in the Special Case, remitted to this court because it was at the time an undecided point) have all been found to be without any legal merit, and the history of litigation on his part has resulted in the imposition of an Isaac Wunder order on him both by the High Court and, in modified form, by the Court of Appeal. It is worth noting that such an order is made because of a concern that its subject will abuse the process of the court by launching groundless litigation. The litigation to date has constituted a lengthy campaign to challenge the receiver's position. It was thought to be close to finality, one way or the other, when the one question was remitted by the Court of Appeal in August 2020. Were Henderson v Henderson principles not to apply (and for the moment confining myself to the application of these principles), fresh litigation embroiling not only Mr. Horkan but also Pepper and Pentire will commence. This will involve not only hearings in this court but also, in all likelihood, appeals to the Court of Appeal or beyond. Mr. Kearney's evidence as to why the point was not raised earlier is unimpressive. It is to the effect that it was open to him to decide if and when he deployed the



argument about Clause 42.4. As I have already observed, the reason advanced by his counsel is not only at odds with Mr. Kearney's affidavit, but is also unconvincing in itself.

**74.** There is no doubt that Mr. Kearney has enjoyed full access to the courts to raise and argue whatever point he wished in order to undermine the receiver's position. The litigation he has launched and the arguments he has made have provided him with every opportunity to vindicate not only his entitlement to access to the courts but also his property rights as emphasised in the main judgment of Whelan J in these proceedings. Considering all the facts, I have decided that this is an argument which falls foul of the principle set out in *Henderson v Henderson*. It should not now be allowed to be advanced.

**75.** I have come to this view independently of any consideration of the strength of the case that Mr. Kearney wants to make. In her judgment, Whelan J considered (in the context of *Henderson v Henderson*) the novelty of the point ultimately remitted to this court, the fact that it had not previously been decided in this jurisdiction, and the confidence with which one could say it was bound to fail – [2020] IECA 90 at paragraphs 117 to 119. These factors, were I to take them into account in deciding on the application of *Henderson v Henderson*, do not assist Mr. Kearney. The case which he wishes to mount is not one which will succeed, applying the established principles of contractual construction.

CONCLUSION.

**76.** I have decided the question posed in the Special Case against Mr. Kearney, and in favour of BOS and Mr. Horkan.

77. I will refuse the relief sought by Mr. Kearney in his motion seeking to vary the existing Isaac Wunder order. The issue which Mr. Kearney wishes to agitate is bound to fail, is frivolous and vexatious, and would constitute an abuse of process. Requiring the existing Defendants (as well as others) to defend this claim would be oppressive. The proposed claim also offends against the principles set out in *Henderson v Henderson*, as elaborated upon in the subsequent caselaw to which I have been referred. While there was no dispute about the approach to take in deciding whether or not to vary the Isaac Wunder order, I should say that I have followed the principles set out by O’Caoimh J in *Riordan v Ireland (No 5)* [2001] I.R. 463 and *Kenny v Trinity College Dublin* [2008] IEHC 320.