

**BETWEEN**

**RICHARD DUGGAN**

**PLAINTIFF**

**AND**

**SUPERMACS IRELAND LIMITED**

**DEFENDANT**

**JUDGMENT of Ms. Justice Bolger delivered on the 10th day of November , 2022**

1. This is the plaintiff's application to enter summary judgment against the defendant in the amount of €135,412.69 for unpaid rent over the plaintiff's property from March 2020 until April 2021. For the reasons set out below, I refuse the application.

**Background**

2. The plaintiff was the registered owner of the property over the time for which unpaid rent is claimed. The defendant had been a tenant there for many years. In February 2020 the plaintiff had fallen into arrears in his loan repayments and Everyday Finance DAC appointed a receiver over the property. Thereafter the defendant either did not pay the rent or made partial payments to the receiver or directly to the plaintiff who forwarded the money to the receiver. In March 2021 the plaintiff sold the property and paid the proceeds of sale to Everyday Finance in discharge of his liability to them and the plaintiff was relieved from his security pursuant to a settlement agreement that also provided for the plaintiff's entitlement to pursue the defendant for the arrears of rent that had accumulated subsequent to the appointment of the receiver and up to the date of sale of the property. The defendant was not a party to this agreement.

**Submissions**

3. Counsel for the plaintiff relies on what he describes as well settled law that a receiver is an agent of the mortgagor and on s. 109 of the Land and Conveyancing Law Reform Act 2009, which entitles the receiver to demand and receive moneys in relation to the demised property. The plaintiff argues that the appointment of the receiver did not alter the defendant's liability to pay the rent due thereunder. He relies on the decision of Baker J. in *An Post v. Harrington* [2019] IEHC 438 where a receiver, who had been discharged from her position as receiver, argued that she was entitled to the benefit of any rights that had accrued up until she was formally discharged by the deed of discharge. Laffoy J. found that the words of the deed of discharge confirmed that the receiver's duties and responsibilities as receiver were removed but this did not remove the powers deriving from the receivership. The plaintiff argues that this decision allows him to rely on the settlement agreement in which the receiver disclaimed any rights acquired to arrears of

rent. He also relies on the UK decision of *Newhart Development Ltd v. Cooperative Commercial Bank Ltd* [1978] BQ 814 where the Court of Appeal held that the appointment of a receiver did not divest the company directors' power to institute proceedings that did not prejudice the debenture holder by threatening the assets subject to the charge. Here, the plaintiff argues that the appointment of a receiver did not displace his entitlement to the benefit of the rent during the receivership albeit it may have supplanted his entitlement to collect the rent during that time. Once the receivership was determined in circumstances where the rights accruing to the receiver and/or mortgagee were expressly disclaimed, he was entitled to recover monies due and owing to him.

4. The defendant disputes the debt and challenges the plaintiff's *locus standi* because the arrears of rent relate to when the property was under receivership. They argue that the receiver's failure to recover any rent due is solely a matter between the plaintiff and the receiver and that the rent payable to the receiver during the receivership constituted a new agreement with the receiver to which the plaintiff was not a party and therefore any arrears are a matter for the receiver. The plaintiff extinguished any legal entitlement to claim arrears when he sold the property. The defendant cites the decision of Laffoy J. in *Re: National Asset Management Act 2009: Ronan & ors - Taite applicant* [2013] IEHC 386 for the proposition that the receiver is entitled to any arrears of rent. In addition the defendant contends that its case may be improved by discovery and oral evidence. The defendant's counsel identified some of the documents they would intend seeking including the deed of discharge (they placed particular emphasis on this document not being before this Court), the original mortgage under which the receiver was appointed and documentation, and possibly oral evidence, relating to the determination of the receivership and to the new landlord's acquisition of the premises, all of which may improve their defence. They rely on the decision of this Court in *Bank of Ireland v. O'Connor* [2022] IEHC 410 as an example of where this Court refused to enter summary judgement as discovery and oral evidence could potentially improve the defendant's position.

### **Decision**

5. The court must be satisfied that it is very clear that there is no defence. The court accepts the principles espoused by McKechnie J. in *Harrisrange Ltd v. Duncan* [2003] 4 IR 1. The court has also had regard to the analysis of the Supreme Court of what is meant by the credibility of a defence, as set out by Clarke J. in *IBRC v. McCaughey* [2014] IR 749; [2014] IESC 44.
6. The relevant legal principles include (xi) of McKechnie J.'s synopsis but this is not the only factor and is, in any event, subject to the overriding consideration McKechnie J. identified at (xii), namely to achieve a just result while taking account of a person's right of access to justice:

"the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the

achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be”.

7. The court must be satisfied that the defendants have no defence before a summary judgment can be entered. The possibility of the defendants’ position being improved by discovery and/or oral testimony (including from a reluctant witness who may be subpoenaed) must be considered, albeit that there must be a reasonable and viable prospect of such an improvement rather than merely a speculative or optimistic expectation.
8. I have had particular regard to the decision of Laffoy J. in *Harrington* in attempting to determine whether the defendant’s belief that their case may be improved by discovery of documents (including the deed of discharge) and oral testimony is speculative optimism or an objectively realistic prospect. Laffoy J. emphasised the wording of the deed of discharge in *Harrington* where she stated:
  - “21. In principle, therefore, it seems to me that the right to be paid or to receive remuneration or expenses is of a different nature or quality from the right to collect rents, which is a right vested in a receiver by a deed of appointment, and which may be, and is in the present case, removed from the receiver by deed of discharge.
  22. It seems to me, however, that the question may more readily be answered by the words of the Deed of Discharge of 31 July 2018 itself. The receiver is not, by the Deed, expressly divested of any rights that had accrued at the date of her discharge. What is removed expressly are the duties and responsibilities of Ms O’Dwyer as receiver, not any powers that derive from the receivership. There is no assignment by her of any accrued rights, and the deed expressly identifies a time and date from which the powers, duties, and responsibilities cease to have force”.
9. In *Harrington* the particular right vested in the receiver by the deed of appointment was removed from them by the deed of discharge. The wording was very specific in removing the duties and responsibilities of the receiver as receiver but not removing any powers arising from the receivership. The *Harrington* decision lends credence to the defendant’s contention that the terms of the deed of discharge in this case could improve their defence. I consider it more than mere speculation. The fact that the defendant’s belief may only just get beyond the level of speculation still means the matter should go to plenary hearing.
10. I must also take account of the shortfalls, identified by the defendant, of the plaintiff’s proof. These alone would not necessarily be sufficient to require the matter to proceed to plenary hearing but are relevant when combined with the fact that the defendant says that discovery and oral evidence may improve their defence

11. I consider the defendant has just about done enough to merit the matter going to plenary hearing. I therefore refuse the plaintiff's application and direct that the matter should be referred to plenary hearing.

**Indicative view on costs**

12. Clarke J. in *ACC Bank Plc v. Hanrahan* [2014] 1 IR 1 observed that where the court remitted the matter to plenary hearing and was satisfied that a plaintiff had acted in a particularly reasonable manner in not agreeing to that course of action, the court should consider whether the justice of the case required that some or all of costs of the summary judgment motion should be borne by the plaintiff. He also said that in the majority of these cases "the costs of a summary judgment motion as result of the proceedings are remitted to plenary hearing should either be reserved or become costs in the cause".
13. In the circumstances of this case the plaintiff believed that the defendant had no defence to its claim. Ultimately this will be a matter for the trial judge and if the plaintiff is correct, he may be entitled to costs of this application as well as to his substantive costs depending on the views of the trial judge. In those circumstances my indicative view on costs is that the costs of this motion should be treated as costs in the cause.
14. I will list the matter for mention before me at 10.30 am on 17 November to allow the parties to make whatever submissions on costs as they may wish to make. I do not require written submissions but if the parties do wish to make them, those submissions should be lodged with the court at least 24 hours before the matter is back in before me.