APPROVED **[2024] IEHC 697**

THE HIGH COURT

2013 5493 P

BETWEEN

JOHN COULSTON, ACC BANK PLC, DECLAN TAITE AND PEPPER FINANCE CORPORATION (IRELAND) DAC AND BY ORDER EVERYDAY FINANCE DAC

PLAINTIFFS

AND

ANTHONY ELLIOTT AND ANNE ELLIOTT

DEFENDANTS

JUDGEMENT of Mr Justice Nolan delivered on the 10th day of December 2024

Introduction

1. This case raises two important questions. The first is can a bank retrospectively ratify the appointment of a receiver many years after the receiver has carried out his duties, whilst the second is whether the breaking of a lock to a premises can be regarded as peaceable re-entry? These two questions form the centerpiece of this case.

2. The Plaintiffs seek possession of 59 Griffith Place, Waterford, which includes a shop and a separate dwelling ("the shop and house") and is registered on the Register of Freeholders for County Waterford 24030F.

3. The Defendants have counterclaimed for damages on foot of various complaints relating to the manner in which a receiver, the First Named Defendant, ("Mr Coulston") appointed by the Second Named Defendant, ACC Bank plc ("ACC") carried out his duties. These allegations include the mismanagement of the receivership including an early sale of a second property at 1.8 De Bruin Court, Poleberry, County Waterford ("the apartment") and the allegation that by breaking the lock to gain entry to the shop in the early morning, the Defendants were trespassing.

The Chronology

4. Mr Coulston is an insolvency practitioner who was appointed receiver and agent by ACC over the two properties owned by the Defendants, pursuant to a Deed of Appointment executed on the 31st of July 2012.

5. The properties were mortgaged to ACC by the Defendants pursuant to mortgages executed on the 14th of June 2002 and the 26th of February 2004 ("mortgages") which secured all indebtedness owed by the Defendants to ACC.

6. Shortly prior to Mr Coulston's appointment, ACC had formally demanded the repayment of €590,065.43 owed on foot of two facility letters dated the 28th of May 2003 and the 13th of September 2004.

7. Following the Defendants' failure to satisfy the demand and the consequent appointment of Mr Coulston, the Plaintiffs say that both ACC and the receiver became entitled to enter into possession of the properties and to collect the income deriving therefrom.

8. Mr Coulston's agents sought to take possession of the shop in the early morning of the 27th of September 2012, but were met with stern resistance. Solicitors on behalf of Mr Coulston and ACC wrote a letter before action to the Defendants' then solicitors, dated the 22nd of November 2012, which requested the Defendants to relinquish possession of the properties and not to interfere with the receiver in the exercise of his functions, in default of which proceedings would issue without further notice. No such confirmation was provided.

9. These proceedings, seeking interlocutory relief only, were issued in May 2013. The Defendants, who act as litigants in person for most of this case, opposed the interlocutory application and filed a replying affidavit in which they relied, *inter alia*, on alleged mis-selling of endowment policies to them by ACC or its agents.

10. On the 14th of August 2013, the High Court (Kearns P.) granted the interlocutory reliefs sought, restraining the Defendants from preventing, impeding or obstructing Mr. Coulston from taking possession of the properties or collecting rents or other payments in respect of them. That, of course, was nearly a year after he had attempted to take possession.

11. Kearns P. clearly had much sympathy with the Defendants since in his extempore judgement he said that this was yet another one of those cases, which he described as tragic, where a decent man and his wife had for many years operated a small corner shop business, had become victims of the recession. He put a stay on the execution of the reliefs granted for three months, on condition that all rents deriving from the properties be paid to the receiver during the currency of the stay.

12. The Defendants appealed the High Court order to the Supreme Court, details of which I shall set out below.

13. On the 10th of March 2014, in separate summary judgment proceedings commenced by ACC, the High Court granted judgment against the Defendant in the sum of €600,715.

14. On the 24th of July 2013, the Defendants issued their own proceedings, *Anthony Elliott & Anne Elliott v ACC Bank Plc, Patrick Condon & James J Halley*, record number 2013 7703 P, against ACC, their former solicitors and their former accountants, based on the alleged mis-selling of endowment policies which formed the subject matter of their defence to the interlocutory injunction application. That claim was dismissed as against ACC on the 1st of February 2016 on the ground that it disclosed no reasonable cause of action.

15. The apartment was subsequently sold by ACC in November 2016.

16. Meanwhile, the mortgages (and the liabilities secured thereunder) were transferred, first, from ACC to its parent, Cooperatieve Rabobank U.A. ("Rabobank") in December 2018 and then from Rabobank to Pepper Finance Corporation (Ireland) DAC ("Pepper") in August 2019.

17. Pepper discharged Mr Coulston as receiver and appointed the Third Named Plaintiff, Mr Taite, in his place. Pepper and Mr Taite were then added to the proceedings by Order dated the 15th of March 2022.

18. On the 20th of November 2019, the Defendants' appeal against the interlocutory injunction to the Supreme Court was heard and by order dated the 29th of November 2019, the judgment of the High Court was affirmed, albeit subject to an undertaking provided by Pepper and Mr. Taite that they would not sell the shop and house pending the conclusion of these proceedings.

19. On the 30th of May 2024, Everyday Finance DAC ("Everyday") acquired the mortgages. As an initial application, Mr. Ó hUiginn B.L. on behalf of the Plaintiffs, (excluding the Second Named Defendant who had ceased to exist) applied to join Everyday as a Defendant to these proceedings. Since there was no objection on behalf of the Defendants, I made the order, and they are now part of these proceedings. The Order for Possession is therefore sought in the name of Everyday.

20. Following the Order of the 15th of March 2022, joining Pepper and Mr. Taite to the proceedings, an amended Plenary Summons and Statement of Claim were served. This permitted the Defendants to file an amended Defence and counterclaim. It is in the counterclaim that the Defendants have raised their various complaints in relation to the receivership. It also raises issues in relation to the transfer of ownership of the debt.

21. It seems to me that the counterclaim is, in many ways, the key to the Defendants' case. Since they are now defending this the case as litigants in person, it is necessary to clearly identify the issues.

The Counterclaim

22. It has been implicitly agreed between the parties that the core issues in the counterclaim are: -

a. The validity of the appointment of Mr. Coulston as receiver following the decision of Cregan J. in *McCleary v McPhillips* [2015] IEHC 591 ("*McPhillips*");
b. The events of the 27th of September 2012 and the actions of the receiver;
c. The management of the receivership;
d. The ownership of the mortgages.

The Evidence

23. The first witness to give evidence on behalf of the Plaintiffs was David Nolan, Portfolio Manager at Pepper, who confirmed his witness statement. He brought the court through the key documents and since there was no objection by the Defendants, and the documents and communications were made in the ordinary course of business, I admitted the evidence. He gave evidence of the letters of offer, the deeds of mortgage and charge on both

properties, the registration of that charge with the Land Registry, the appointment of a first receiver, Mr. Kennedy and his replacement within a month by Mr. Coulston.

24. He went through Mr. Coulston's Deed of Appointment, a document which is very relevant. He confirmed that summary judgment had been obtained in the sum of €600,715. He gave evidence that the person who had executed the Deed of Appointment, Loretta McAuley, had no express authority to appoint a receiver in writing on behalf of ACC following the *McPhillips* decision, and therefore on the 19th of August 2015, the directors of ACC expressly ratified her by confirming that she had authority to do so throughout the period when she had authority to witness the bank's seal. He opened to the court the minutes of the 19th of August 2015 which recorded this fact.

25. Thereafter, he brought the court through the chain of title including the mortgages from ACC to Rabobank and then by way of Global Deed of Transfer to Pepper and then to Everyday.

26. In cross examination he was asked how much Pepper had bought the loans for, but he did not know. He was challenged in regard to the redaction of information contained in the relevant paperwork, but the shop and house and the apartment can be found on page 84 of the redacted documents. He was asked who Otterham Property Finance DAC and Newgrange Loan Acquisitions DAC were, the two companies whose names appear on the Land Registry. He did not know.

27. Sometime in cross examination and sometime in submission, the First Named Defendant made the point that he was not at all clear who had acquired the mortgage.

28. Declan Taite, the Third Named Defendant, gave evidence and was brought through his witness statement. He has been an insolvency practitioner for over 30 years having been intimately involved in over 2,000 cases. He is very experienced. He was appointed as

receiver by Pepper on the 23rd of October 2019 and was joined as a Co-Plaintiff in March of 2022.

29. He said that he had arranged insurance in respect of the shop and house which is still occupied by the Defendants' son and that no rental income had been received. Whilst the shop had deteriorated, he believed that that was as a result of the actions of the Defendants themselves in interfering with the receivership.

30. He accepted that he had a duty of care to the borrower and was satisfied that his Deed of Appointment was valid, but there was no working capital and the cost of trading would have been very difficult. It did not make any business sense to trade, particularly in circumstances where the Defendants lived across the road from the shop and did not accept the validity of the receiver's appointment.

31. Mr. Coulston then gave evidence. He too is a very experienced receiver having been involved as a receiver for many years. He had a team of twelve who reported directly to him and was dealing at any one time between 300 and 400 properties. He confirmed that he was appointed receiver by Deed of Appointment dated the 31st of July 2012, following the discharge of Mr. Kennedy, his predecessor.

32. He went through the events which led up to the 27th of September 2012 and confirmed that on three occasions he had sought possession, the first on the 28th of June 2012, the second on the 27th of September 2012 and again on the 27th of June 2013. On each occasion his servants or agents were unsuccessful.

33. He said that there was significant opposition to any attempt to take peaceable possession from the First Named Defendant and others. This led him to seek a court order on the 14th of August 2013. He was brought through a number of memos of those who attempted to gain possession of the premises on the various occasions. When his agents tried to gain

entry on the 27th of September 2012, they brought a locksmith with them, who changed the locks.

34. Due to the lack of working capital and the high risk of trading and the bad relations with the Defendants, it was not feasible to run the shop. Whilst an offer was made by the Defendants to pay rent in relation to the house beside the shop and a copy of an unwitnessed lease was furnished, no rent was received.

35. He collected a gross rent of €23,019 from the apartment. Ultimately it was sold for €55,000 on the 9th of December 2016, having received two valuations of €50,000 and €55,000 respectively. He was discharged as receiver in October 2019. It was at this point that Mr. Taite took over the receivership.

36. In cross examination it was put to him that he never contacted the First Named Defendant or spoke to him. In response he said that he had written letters to the Defendants then solicitors but since they would not acknowledge the appointment, he did not think there was much point in proceeding. He was asked whether he had caused any harm to the Defendants, which he denied. It was then put to him that he had offered the premises for sale. An e-mail of the 26th of June 2012 was put to him, saying that the property would be put up for sale. But that came from Mr. Kennedy, the previous receiver, not from him.

37. He was asked who gave him the power to take possession and he pointed to the mortgage deeds.

38. It was put to him that in fact the apartment was now worth €180,000 and that it generated a rent roll of €18,600 per annum and that this was evidence of his negligent mishandling of the receivership. He disagreed. He said that he got two different independent valuations which showed that he had got the best price available at the time.

39. He was asked what had happened to the Section 50 tax break for renting to students**,** but he did not know. He then went through the various attempts to seek possession. It was put

to him that the Deed only authorised him to get peaceful possession. In a memorable phrase, the First Named Defendant said that breaking a lock is not peaceable possession and doors don't open themselves. He disagreed. He was asked had he arranged for two trucks to appear at 10:00am, but he knew nothing about that, but it seems to me nothing turns on this.

40. He was asked when he discovered that ratification of the Deed had taken place. He said that was only when he was preparing the papers for the trial. It was put to him that everybody knew about the *Mc Phillips* decision and he confirmed that while he knew about it in a general way, he was not misleading the court when he said that he did not know that this precise Deed had been ratified.

41. Mr. Elliott then gave evidence. For many years he lived across the road from the shop and the house. He had been a long-distance truck driver and when the shop came up for sale in 2002, he and his wife saw an opportunity to change their lifestyle. He would open the shop at 5:30AM and his wife would join at 7:00AM and they worked every single day of the year including Christmas Day.

42. He had to borrow a sum of €388,000 from ACC to purchase the property and then borrowed further sums in relation to the purchase of the apartment and the development of the shop. It was a hard life, but it was a rewarding one, and he was able to bring up his two sons, one of whom has special needs. In 2008 things started to go very wrong. His accountant had advised him to enter into an endowment mortgage which would assist in paying off the debt.

43. It transpired that that was a very bad move and that unbeknownst to himself, his accountant received a percentage of the payments made. When the crash occurred, whatever monies had been in the endowment policy were lost. To use his own words, he was "*sold a pup*". He was left carrying the debt.

44. He issued proceedings against his accountant, his first firm of solicitors and the Land Registry, but it would seem that those proceedings went nowhere and were struck out. It would seem he has other borrowings.

45. He believes that what happened to him was unjust and it is his fervent belief that the system has conspired in a malevolent way to cause him damage. He attempted to expand his business by importing candles from Germany, but sadly that did not stem the inevitable tide. He gave evidence of the events surrounding the various attempts to seek possession and including when representatives of the First Named Defendant arrived at his premises and demanded the keys causing his wife to collapse.

46. In relation to the events which took place on the 27th of September 2012, which was the flashpoint between the receivers and the Defendants, he gave evidence that his son was woken at 4:00AM and saw men breaking into the shop. He strongly believes that Mr. Coulston was not properly appointed following the decision in *Mc Phillips* and therefore everything that happened to him thereafter was illegal since Mr. Coulston's appointment was illegal. He believes this was the event which started matters to spiral out of control.

47. The Gardaí arrived but, having heard both sides, they were of the view that this was a civil matter since there was no court order and they then left at approximately 6AM.

48. He accepted in cross examination that the *lis pendence* registered on the shop and house was to stymie the Plaintiffs' attempt at selling it. He said that the injunction, which was granted against him, was procured on the basis of an invalid deed. Finally, he informed the court that his wife's health has never improved.

The Appointment of Mr. Coulston

49. The appointment of Mr. Coulston is one of the major issues in these proceedings. The Defendants' case is relatively simple. They argue that following the decision in *McPhillips*,

that the requirement that a receiver be appointed by writing under hand was not complied with. In that case, Cregan J., following the decision of Gilligan J. in *Merrow Ltd v. Bank of Scotland Plc & Anor* [2013] IEHC 130, set out a very careful analysis of the applicable case law principles and set out eight principles which are:-

> *"1. The receiver's authority to act is derived from the contracts, or mortgages, or deeds of charge, entered into between the Bank and the borrower.*
>
> *2. The receiver is to be appointed according to the terms of the contract between the parties.*
>
> *3. Because a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument.*
>
> *4. The consequence of non- compliance with the formalities for the appointment of a receiver, in accordance with the terms of the instrument, is that the appointment is void.*
>
> *5. If the instrument provides that the appointment is required to be by deed, or under seal, that formality must be observed.*
>
> *6. If the instrument requires that the appointment is to be made in writing under hand, that formality must also be observed.*
>
> *7. An invalidly appointed receiver may be a trespasser on company property.*
>
> *8. Considerations of basic fairness and contractual interpretation mean that the Bank should be obliged to comply with the terms it chooses to impose in the instrument involved."*

50. In this case the Deed of Appointment is identical to that in *McPhillips* since it was the standard ACC Deed of Appointment of a receiver. The Deed required that the receiver and/or the bank must establish that the receiver had been appointed in exact compliance with the

terms of the mortgage or charge. It must establish that the receiver had been appointed by the bank in writing under its hand. He said as follows:-

> *"This phrase - "by writing under its hand" - has, in my view, three constituent elements. These are (i) that the appointment of the receiver is "by writing"; (ii) that it is "under its hand" and (iii) the use of the pronoun "its" means that it must be the signature of a person duly authorised by the Bank to sign such documents, under hand, on behalf of the Bank.*
>
> *It is also clear from the authorities that "under hand" or "under the hand of" or "under its hand" means "with the signature of". See Trustee Solutions v Dubery [2006] EWHC 1426; Watersons Trustees v St. Giles Boys Club 1943 SC 369; Electronic Rentals v Anderson [1971] 124 CLR 27."*

51. The person who signed the Deed of Appointment in this case, on behalf of ACC, was Loretta McCawley. She had express authority to witness ACC's seal, but had no express authority to appoint a receiver in writing on behalf of ACC**.** Had matters stopped at that point, the Plaintiffs would have had great difficulty in proceeding with their case. However, the Plaintiffs say that by resolution passed on the 19th of August 2015, the directors of ACC expressly ratified Ms. McCauley's prior signing of instruments of appointment of receivers on behalf of it, by confirming that she had had authority to do so throughout the period that she had witnessed the bank's seal.

52. Therefore, the issue which this court has to address is whether or not the steps taken by the bank in August of 2015 did indeed rectify, or to use of the language of the board resolution, ratify, the situation and retrospectively give authority for an act which, on its face, it had not given authority to do so.

53. In *Brennan v O'Connell* [1980] IR 13, the issue of retrospective ratification arose in the context of a contract for sale entered into by an agent appointed by the Defendants. The

Defendants had not given the agent authority to enter into the contract, only simply to bid for the land. When the agent informed his principal that he had purchased the land, they were satisfied with it. The Supreme Court found that the Defendants' subsequent approval of the act of their agent constituted a ratification by them of the contract, provided that at the time of their approval, the Defendants knew of all facts which were known to their agent, enough so that it was objectively necessary for them to be aware in order to be able to decide whether or not to give their approval.

54. Henchy J., held that ratification operates retroactively so as to render the transaction valid *ab initio*, stating:

> *"... the contract could not become enforceable against the Defendants unless they subsequently ratified it and that, if ratification took place, it would operate retroactively so that the contract would then become the Defendants' contract just as if they had authorised it when Mr. Byrne entered into it: see Sheridan v. Higgins [1971] I.R. 291."*

55. In *Farrell v Petrosyan*, [2016] IEHC 522. O'Connor J. found that the Plaintiff mortgagor had not raised a serious issue to be tried as to the validity of the appointment of a receiver, holding that ACC's board resolution of the 19th of August 2015, which is the same resolution as is this case, had remedied any defect in the Deed of Appointment of the receiver:

> *"... if this Court accepted that there is some omission on the part of ACC in these proceedings to have authorised the signatories to the deeds which appointed the Receivers here, that has been remedied by the resolution of the Board of ACC on 19th August 2015. That resolution ratified the appointment of receivers which may have been invalidated by reason of any interpretation of the judgment delivered by Cregan J. in the McCleary case.*"

56. In *Fennell v Gilroy*, [2022] IECA 258 the Court of Appeal implicitly approved the decision in *Petroyan* saying:

> "*The execution of a deed by an agent without authority can generally only be ratified by deed, by part performance, where a mortgagor by conduct becomes estopped from challenging the appointment (such as occurred in Farrell v Petrosyan [2015] IEHC 522) or by a matter of record.*"

It seems to me that ACC are in a similar position to the Defendant in the *Brennan* case. Further, the views of O'Connor J. are particularly relevant bearing in mind that it is precisely the same resolution of the bank. That resolution ratified the appointment of receivers which had been invalidated by reason of the judgment delivered by Cregan J. in *McPhillips.*

57. Therefore, it seems to me that the steps taken by the bank on the 19th of August 2015, have retroactively ratified or rectified their position, or in other words, the steps taken by the bank since *McPhillips* has changed the consequences and notwithstanding that it may seem illogical and even at times unfair, I am bound by the case law.

Events of the 27th of September 2012

58. The Defendants complain that the First Named Plaintiff did not have the authority to break into the shop of the 27th of September 2012. The Plaintiffs say that they were entitled, pursuant to the Deed of Appointment, to take possession at any time, including when the shop was closed, and change the locks. In fact, they were only in possession for some two hours. The Defendants say however that this had a catastrophic impact upon their lives and in particular the Second Named Defendant.

59. Whilst the amended Defence pleads that the reciever can only enter the property in daylight hours, it is clear from the mortgage deed and in particular para. 9A, that the bank can at any time after demand has been made, enter into possession of the mortgage premises or

any part thereof. Therefore, I find that there was nothing unlawful *per se* in attempting to gain access to the premises at 4:00AM.

60. However, the real issue in this case is the manner in which Mr. Coulston, through his agents, attempted to take possession. The Defendants say he acted in breach of the Forcible Entry Act of 1381, a statute which is still on the statute books. They argue that the manner of entry was not peaceable but forcible.

61. In response, Mr. Ó hUiginn BL on behalf of the Plaintiffs, relies upon *Hafeez v CPM Consulting Limited* [2020] IEHC 536, a decision of Keane J. where a landlord effected a re-entry and took possession of a restaurant premises by changing the locks. An argument was made on behalf of the tenant that the re-entry was not peaceable because the lock on the door of the restaurant was forced. Keane J. rejected that argument in the following terms at para. 36.

> "*While I do not doubt that, in that limited sense, CPM's re-entry may have been forcible, it is difficult to see how it was not peaceable. In the edition of his Landlord and Tenant already cited, Professor Wylie suggests (at para. 24.18) that, for the purpose of the Forcible Entry Acts, 'forcible entry' entails entry that is effected against physical resistance or that causes minimal damage to the property, or both. I know of no contrary authority and none was cited. There is no evidence before me of anything more than minimal damage to the restaurant premises by, at most, breaking – and, presumably, immediately afterwards repairing – a lock.*"

62. In a similar vein, 'Hill and Redman's Law of Landlord and Tenant' comment as follows at paras. 4866-4867.

> "*It is sometimes asserted that the use of force negates a forfeiture, as there has been no peaceable re-entry. This is incorrect: peaceable re-entry includes a re-entry using reasonable force or even unreasonable force, such as breaking into locked premises.*

Even use of excess force does not negate the forfeiture, but simply exposes those involved to risk of civil or criminal proceedings. In the past, reasonable force has included taking the roof off, and carrying the tenant's wife across the threshold whilst she remains seated in her armchair. This approach to peaceable re-entry has little to recommend it and the removal of the tenant's wife, with or without her armchair, would now be unlawful."

63. However, in the best traditions of the Bar, he has also put before the court the views of three of my colleagues. In *ILG limited and others v Aprilane Limited* [2024] IEHC 420**,** Allen J. says as follows in the context of striking out the Plaintiff's action:

"The second issue identified as being relevant to the costs of this motion is the question of peaceable re-entry. This issue also arose in the course of the hearing in May 2019 but was elaborated upon in the argument on this motion. It is submitted that the Plaintiffs, or perhaps the first Plaintiff, apprehended a physical re-entry and was justified in seeking first an interim injunction and then an interlocutory injunction to prevent it. Mr. Fennelly submits that the degree of force which a landlord may use when effecting a re-entry is not entirely settled. He refers to the decision of Carroll J. in Sweeney Ltd. v. Powerscourt Shopping Centre Ltd. [1984] I.R.501 and a suggestion made repeatedly in articles published in the Conveyancing and Property Law Journal and the textbooks that a landlord is entitled to take such steps to effect a re-entry as would cause no more than minimal damage to the property. This proposition appears to have originated in the first edition of Wylie Landlord and Tenant Law (1990) and to have been taken up by Ms. Ruth Cannon (2007) 12(1) C.P.L.J. 7, Mr. Martin Canny (2007) 12(4) C.P.L.J. 94 and Ms. Mema Byrne Landlord and Tenant Law: The Commercial Sector (2013) but appears to me to be unsupported by any judicial authority. In support of the proposition that a

landlord may do minimal damage, Professor Wylie cites Sweeney Ltd. v. Powerscourt Shopping Centre Ltd. [1984] I.R.501, 504 but I see nothing there to suggest that the landlord is entitled to cause damage, so long as it is no more than minimal. What Carroll J. said, approving the statement in Deale, The Law of Landlord and Tenant in the Republic of Ireland (1968) is that the landlord may not use force, for that is a criminal offence. Without finally deciding the point, I am extremely sceptical of the argument that whether an entry is forcible or not might turn on the degree of force used, or the extent of damage done to the property – whether by the drilling, forcing or cutting of locks or whatever".

64. In *Charleton v. Hassett* [2021] IEHC 746, Allen J. repeated his observations. In *Wallace v O'Connor* [2022] IEHC 120, Stack J. noted that the right to enter must be either asserted on foot of a court order or exercised peaceably, citing *Charlton* where she said it was held that the breaking of locks did not constitute peaceable re-entry.

65. In *Emerald Sky 2 DAC & Ors -v- Victoria Homes Ltd &* Ors [2023] IEHC 446, Egan J. accepted the argument that notwithstanding a property was incomplete and unoccupied block of apartments rather than a residential property, that removing and changing the locks did not represent obtaining peaceable possession.

66. Section 14 of the Conveyancing Act 1881 clearly contemplates re-entry or forfeiture by means other than by action. However, this is not re-entry under the Conveyancing Act.

67. In *Sweeney v Powerscourt Shopping Centre* Carroll J. noted:

"Sub-section (1) mentions that a right of re-entry or forfeiture shall not be enforceable "by action or otherwise" unless or until... etc. Sub-section (2) refers to where a lessor is proceeding "by action or otherwise" to enforce such a right etc. and, again in the same sub-section, that the lessee may, in the lessor's action "if any" or in

any action brought by himself, apply to the Court… etc. It was held in Re Riggs (1901 2 K.B. 16) that the phrase "or otherwise" means "peaceable entry". Judge Deale in his book "The Law of Landlord and Tenant in the Republic of Ireland" at page 261 puts it as follows:-

"If the lessee does not give up possession peaceably, the lessor may re-enter. He may not use force, for this is a criminal offence. What is required is an unequivocal act showing the lessor's intention to re-enter for the breach of covenant and to determine the lease by forfeiture: Sergeant .v. Nashfield and Co. 1903 2 K.B. at 310".

I am satisfied that what was done by the Defendants in regaining possession was peaceable entry. They had served a notice under section 14 of the Conveyancing Act 1881 which appears to me to be sufficient. The Plaintiffs made no move to claim relief against forfeiture. The Defendants then chose to re-enter peaceably instead of suing for possession in the Circuit Court."

68. It should be noted that in that case the Defendants re-entered the premises by using a master key which opened several similar locks in the shopping centre. There was no question of breaking locks or damaging property.

69. A helpful memo introduced into evidence from Antony O'Toole, an employee of Mr. Coulston, noted that at 4:15AM, he and five associates entered the premises causing minor damage noting that while changing the locks, there was no sign of an alarm. The lock belonged to the Defendants and formed part of their property. In those circumstances, I prefer the argument put forward by Allen J. and accepted by Stack J. and Egan J.

70. Therefore, I have come to the view that what occurred was not peaceable re-entry but was forcible.

71. I shall leave over the implications of this finding to the conclusion of the judgment.

Management of the Receivership

72. The Defendants have alleged mismanagement of the receivership. In essence they make two complaints. In relation to the apartment, they say that there was a failure to take account of rent collected prior to the sale of the property and secondly that the apartment was sold at undervalue.

73. The evidence however is to the contrary. Mr. Coulston showed a final outcome statement which confirmed that the apartment raised the sum of €55,000 whilst the rent collected was €23,019. That made a total of €78,019. However, the expenses incurred which included insurance, management company charges, receiver charges, legal conveyancing fees and other miscellaneous matters, came to the sum of €26,264 leaving a balance of €51,750.

74. Of that sum €35,032 went to set off the indebtedness of the Defendants, whilst the sum of €16,723 went to the overall receivership costs. It should be noted that other than the sale of the apartment, there was no other form of income which the receivership obtained. This could not have been said to have been a successful outcome for the receiver.

75. In their written submissions, the Defendants allege that Mr. Coulston had no authority to misappropriate funds by using at least €10,000 to pay for security staff in relation to the shop and house. I reject the categorisation of Mr. Coulston's actions as being a misappropriation of funds. There is no evidence whatsoever for that assertion, and whilst it is within the parameters of the pleadings, the Defendants have put forward no evidence to support this submission . An allegation of misappropriation is very serious, and it is a great pity that it appears in the written submissions, which have a tone which are at odds to the courteous manner the Defendants adopted during the trial of the action.

76. Under the heading of "*clean hands rule*", the Defendants make a case that Mr. Coulston's actions prohibit him from seeking reliefs from the court. This is yet another argument which appears in the written submissions, but not argued in court, contrary to the

directions which I gave. However, for sake of completeness, I reject it since there is nothing in his actions which I can see which prohibit him from seeking the reliefs from the court. He has not acted in any way, which could give rise to any suggestion that he has failed to make proper disclosure or not come to court with clean hands.

77. In regard to the argument that the apartment was sold at under value, Mr. Coulston said that he got two independent valuations and that ACC sold at the higher value. Whilst it was put to him that had he maintained the property and kept it, it would now have a value of three times that achieved and would have had the benefit of a rental income, that is to ignore the purpose of a receivership. It is well settled law that the role of the receiver is to collect rents and profits on behalf of the mortgage holder.

78. This particular receivership has gone on for many years. I think it would be to impose too high a burden upon a receiver to direct that he must hold out for the highest price, in what is by definition, a volatile market. In those circumstances it seems to me that Mr. Coulston cannot be criticised for acting on foot of the mortgage deed and ultimately for facilitating ACC's sale of the property. I find that he has accounted for what he received, as he is obliged to do, both under the deed and at law.

79. In relation to the shop, the Defendants criticised the receiver for failing to keep the shop open and maintaining it. For the last number of years, it has been boarded up. That was done by the local authority, it was not done by the receiver. Whilst this must have been very distressing for the Defendants, the fact is that the receiver is not obliged to keep a business open if there is no working capital, and the receiver must be free to be able to take what steps are appropriate in each given circumstances.

80. I accept the submissions of Plaintiffs that the case law is clear and that there is no obligation upon the receiver to continue to carry on a business in a premises previously carried out by the mortgagor (see *Medforth v Blake* [2000] Ch 86, *Re B. Johnson & Co*

(Builders) Limited [1955] Ch. 634 and *Downsview Nominees Limited v First City Corporation Limited* [1993] A.C. 295 at 313).

Ownership of the Mortgages

81. I accept the evidence of Mr. Nolan, Mr. Taite and Mr. Coulston concerning the ownership of the mortgages. The transactional documents have been opened in front of me and they are in order. An issue arose in relation to the role of Otterham Property Finance DAC and Newgrange Loan Acquisitions. I accept the evidence that these companies held at different times, the beneficial interest in the mortgage but that the legal title always rested with Pepper, the Third Named Defendant. That interest has now been transferred to the Fifth Named Defendant, Everyday.

82. Their interest is also recorded on the Land Registry and applying the law as I must pursuant to Section 31 of The Registration of Title Act 1964, their interest is conclusive.

83. One further argument appears in the Defendants' submissions which was not canvassed during the trial. At para. 36 they say that the receiver, if validly appointed, had already been granted authority under the Deed of Appointment to enter upon and take possession of the property. As such the Plaintiffs pursuit of possession is redundant, improper and inconsistent with legal principles. The argument seems to be based on the premise that the bank cannot pursue possession proceedings and at the same time pursue receivership proceedings. They allege that it is legally unsound for ACC and other holders of the mortgage, to exercise direct control over the property while its own appointed receiver is already in place, since to do so would be both redundant and inconsistent with the receivership.

84. This submission seems to make some distinction between ACC and holders of the mortgage on the one hand and the receiver on the other. I am afraid this is not an argument with which I can agree. If that were the case, then no bank could ever act on foot of a deed of

mortgage to seek return of monies lent if a receiver had been put in place but had been unable to affect a sale of the property. That is to totally misunderstand the purpose of a receivership. Therefore, I have to reject this submission.

85. One final issue was introduced for the first time in these submissions and that was an assertion that there was no statutory or contractual power to appoint a receiver on the basis that the Land and Conveyancing Law Reform Act 2009 had repealed Section 19 of the Conveyancing Act 1881, which contained the statutory power to appoint receivers for mortgages executed before the commencement of the 2009 Act on 1 December 2009.

86. When I asked the First Named Defendant where this argument came from, he confirmed that he had asked a friend to prepare the submissions. This has caused the court significant disruption, since I made it clear that no new issue should be raised in his submissions. When I asked him to explain the submissions, he said that he could not. It seems to me therefore that it is highly likely that one of two things happened, either the Defendants went to somebody who purported to be a lawyer or they used a generative AI program to generate the submissions.

87. If the Defendants went to somebody purporting to hold themselves out as being a solicitor or barrister and they were not, that person is committing a criminal offence (see Section 136 and Section 137 of the Legal Services Regulation Act 2015 and Section 56 of the Solicitors Act 1954). On the other hand, if they used a generative AI program, they have been fooled. Such programs often sound persuasive but can be fatally flawed. Sadly, in this case the argument was indeed fatally flawed. The general public should be warned against the use of generative AI devices and programs in matters of law.

88. If this case does nothing more than to highlight this illegal activity, then something will be achieved. However, it is disheartening to say the least that good people such as the Defendants have fallen into the clutches of such charlatans.

89. Getting back to the submissions, I permitted the Plaintiffs to furnish a one-page rebuttal. Defendants were satisfied with this since it means that extra costs would not be incurred. A copy of that rebuttal has been furnished to them.

90. It is clear from the case law (see *Kavanagh v Lynch* [2013] IEHC 275, *McEnery v Sheahan* [2012] IEHC 331, *Dowdall v O'Connor* [2013] IEHC 423 and *Woods v Ulster Bank* [2017] IEHC 155) and the mortgage conditions agreed and acknowledged between the parties, that rights, remedies and powers were given to ACC by reference to the provision of the Conveyancing Act 1881 ("1881 Act") at a time when the Act was in full force and had effect.

91. I am satisfied that while Section 19 of the 1881 Act was repealed by the 2009 Act, that provision was subsequently reinstated by Section 1 of the Land and Conveyancing Law Reform Act 2013.

92. Even if I am incorrect in relation to this, it is clear from the mortgage, which is a contract, that there exists a contractual power of sale. In those circumstances, it is clear to me that this argument is fallacious and does not provide any assistance to the Defendants in their present predicament.

Decision

93. The first issue which I must address is the claim brought by the Plaintiffs. This is a claim for possession. It is now being moved by the Fifth Named Defendant, Everyday. As I said on a number of occasions throughout the trial, the law in relation to the conclusive nature of the Land Registry is well settled.

94. Section 31 of The Registration of Title Act 1964 reads as follows:-

> ***"****The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any*

way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just".

95. In *Tanager DAC v Kane* [2018] IECA 352 Baker J. said

"*The first observation to be made with regard to the power of rectification is that the jurisdiction is limited to rectification in the case of actual fraud or mistake, and s. 31(1) of the 1964 Act expressly excludes from the power of rectification any argument that might derive from the knowledge of the registered owner of any "deed, document, or matter relating to the land". The purpose of that restrictive power is to remove from registered title the vexed question of express or implied notice of any equities that might affect the ownership of land, precisely the type of issue that made and continues to make the conveyancing of unregistered land complex and, at times, uncertain*".

96. In those circumstances it is clear to me that I have no choice but to accept the registration of the interest of Everyday as a holder of the charge on the Land Registry. Therefore, I must make an order for possession in favour of the Fifth Named Plaintiff.

97. I now turn to the counterclaim. As I have set out above, I am satisfied that the appointment of Mr. Coulston was ratified by the resolution passed on the 19th of August 2015 by ACC. That being the case, it seems to me that the actions of Mr. Coulston in the manner in which he acted as receiver, were not unlawful.

98. I am also satisfied as a matter of law that Mr. Coulston acted in the best interest of the party who appointed him whilst he was a receiver. He was entitled to put the apartment up for sale and achieved the best price achievable at that time. Hindsight is a wonderful thing and

naturally, if he could have guaranteed that by keeping the apartment, it would have tripled in value and that he could have generated a rental income, I believe he would have done so.

99. However, one cannot act with the benefit of hindsight. I am satisfied that he did what was correct at the time and that he achieved the best possible price. It should be noted, that in relation to that property and indeed the shop premises, that the receiver will discharge any tax or other charges that have arisen in the meantime since he was appointed. There will be no further liability imposed upon the Defendants.

100. I am also satisfied that there is no legal obligation placed upon him to keep the shop open. The reality is that the Defendants were set against his appointment, not accepting it up to this very day. In those circumstances it seems to me that it would have been unrealistic for him, even if he had the capital, to try to run the shop when they lived across the road.

101. I am also satisfied that is all material times the mortgage was transferred and indeed registered on the Land Registry by the party who is entitled to the legal ownership. Other companies had the benefit of the beneficial ownership but that does not entitle the Defendants to challenge the lawfulness of the actions of Pepper and indeed Everyday, since they are the parties who now have the legal entitlement.

102. I have left for last, the second important issue which has been raised in these proceedings, namely the events which surrounded the attempted taking of possession of the shop on the 27th of September 2012. It seems to me, again with the benefit of hindsight, that to attempt to seek possession of a property at 4:00AM was unwise in this case. I have little doubt that the servants or agents of Mr. Coulston acted as they were instructed, and without malice.

103. However, having considered the case law, and particularly the persuasive comments of Allen J., it seems to me that in fact by breaking the lock, peaceable entry was not obtained. The breaking of a lock, which is what happened here, is in my view, forcible.

104. Therefore, I have come to the view that I cannot follow the decision in *Hafeez.* It must be noted that Keane J. accepted that in a limited sense that the entry in that case had been forceable. But he came to the view that it was difficult to see how it was not peaceable. He added that he knew no contrary authority, and none was sighted. However, the position is different now, there is authority, with which I concur.

105. In those circumstances, I find that there was an unintentional, but clear trespass of the Defendants' property. I appreciate the argument put forward by the Defendants that this had a knock-on catastrophic effect, both to the health of the Second Named Defendant and to their ability to continue to trade. But I cannot ignore the fact that the trespass took place in the middle of the night and lasted for two hours, with the premises being handed back at 6:00AM.

106. Therefore, whilst I find that there has been a trespass, it seems to me that it only be described as technical in nature and that it would be practically impossible to put a compensation value on that trespass and that justice will be done between the parties by an appropriate order for costs.

107. To that extent the Defendants have been successful in relation to the counterclaim, but the fact remains that for reasons which I have set out above, the Plaintiffs are entitled to possession of the property.

108. I will hear the parties as to what orders I should make.