APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2024/1

Neutral Citation Number [2024] IECA 141

Binchy J.

Pilkington J.

Allen J.

BETWEEN/

M & J DUDDY DEVELOPMENTS LIMITED

PLAINTIFF/APPELLANT

- AND –

EVERYDAY FINANCE DAC, ANDREW DOLLIVER AND WILSONS AUCTIONS

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 12th day of June, 2024

Introduction

1. This is an appeal against the judgment of the High Court (Stack J.) delivered on 4th August, 2023 ([2023] IEHC 510) and consequent order made on 10th October, 2023, refusing an application by the plaintiff for a series of interlocutory orders *"in the nature of an injunction"* prohibiting the defendants from offering for sale by way of an internet auction three properties in Donegal.

2. The High Court judge held that the appellant had not established a *bona fide* issue to be tried. The appellant contends that she erred in so finding. The respondents contend that the judge was correct in her conclusion that there was no fair question to be tried. Alternatively – against the eventuality that this court might find otherwise – the respondents argue that the decision of the High Court ought to be upheld on the ground that the balance of convenience is overwhelmingly against the granting of the orders sought and that the undertaking as to damages offered by the appellant is worthless.

3. The notice of appeal as originally filed set out 63 grounds of appeal. In the directions list, these were whittled down to 25; but in truth the appeal raises a single issue of law as to whether an insolvency practitioner who had previously been appointed as a receiver over a mortgaged property – without a power of sale – may later lawfully act as the agent of the mortgagee in offering the property for sale. The appeal is said to raise an issue as to whether a previous decision of this court in *Vitgeson Ltd. v. O'Brien* [2019] IECA 184 was correctly decided.

The facts

4. The facts are not in dispute.

5. By two deeds of mortgage and charge dated 19th January, 2006 and 21st April, 2006 made between the appellant and Allied Irish Banks p.l.c. *("AIB")* the appellant mortgaged an unregistered property at Ray, Kilmacrennan, County Donegal *("the Ray property")* and charged two registered properties, one at Ballymagowan Lower, Kerrykeel, County Donegal, *("the Ballymagowan property")* and the other at Knockbrack, Kerrykeel, County Donegal *("the Kerrykeel property")* as security for the payment of all sums then due or which might thereafter become due by the appellant to AIB.

6. The deeds of mortgage and charge were in the standard AIB printed form which provided for the appointment of a receiver over the properties who would be entitled to collect the rents and profits but would not have a power of sale.

7. On 22nd November, 2017 AIB appointed Mr. Patrick Horkan as receiver over the properties. There is no evidence that anything was ever done on foot of that appointment and Mr. Horkan was eventually discharged.

8. By divers mesne assurances acts in the law and events, the appellant's liabilities to AIB and the security held in respect of those liabilities were transferred to Everyday Finance DAC *("Everyday")* on 2nd August, 2018; and on 11th December, 2018 the two folios were updated to show Everyday as the owner of the charges.

9. The Knockbrack property is a detached dormer bungalow on about 0.59 acres. The Ray property is a detached house on about 0.6 acres. The Ballymagowan property is a large, detached house on a site of about 1.45 acres. All three are described as being finished to a builder's finish: that is to say, they are weathertight but there is no kitchen, bathroom, or flooring.

10. It is not clear precisely when work on the houses stopped, but counsel for the appellant accepted in argument that it is reasonable to infer that it must have been no later than 22nd November, 2017 when – following a demand made by AIB on a previous unspecified date – Mr. Horkan was appointed as receiver. Since then, the houses have been vacant.

11. The appellant implicitly acknowledges that it is indebted to Everyday. Ms. Margaret Hartigan, a senior asset manager with a company which provides loan administration and asset management services to Everyday, deposed that the appellant's liabilities to Everyday amounted in total to €2,274,384.75. Mr. Duddy objected that all that Ms. Hartigan would have said and some of what Mr. Andrew Dolliver would have said was inadmissible on the

ground that it was hearsay but he did not contest Mr. Dolliver's evidence that the appellant's most recent abridged accounts filed with the CRO – for the year ended 31st December, 2017 – show liabilities to *"a Bank"* of €2,098,521 and overall net liabilities of €2,110,886. The only assets shown are development land – at €125,000 – and work in progress – valued at €210,000.

12. By two deeds dated 28th July, 2022 – one under each of the deeds of mortgage and charge – Everyday appointed Mr. Dolliver as receiver over the three properties. On the same day, Mr. Horkan was discharged. By letter of the same date the appellant was notified of Mr. Dolliver's appointment as receiver and asked to complete a form and to provide various documents and information. If the appellant did anything other than ignore that correspondence, I expect that someone would have said so. As I have said, the deeds of mortgage and charge provided for the appointment of a receiver but not that any receiver who might be appointed would have a power of sale. The houses are unfinished and incapable of being let. There was no suggestion that Mr. Dolliver had done anything, or might do anything, or could do anything in his capacity as receiver.

13. By two deeds dated 23rd September, 2022 – one in respect of the Kerrykeel property and the other in respect of the Ballymagowan property and the Ray property – Everyday appointed Mr. Dolliver as its agent, and Mr. Dolliver agreed to act as Everyday's agent, to provide the *"Services"* as therein defined, being:-

> *"(i) the services relating to the maintenance and marketing and contracting to sell the [appellant's] Assets (which excludes the Excluded Services); and*
>
> *(ii) any additional services requested by [Everyday] and agreed in writing to be undertaken by the Agent in respect of the Project provided such services do not include any of the Excluded Services performed Qua Receiver."*

14. The deeds defined *"Excluded Services"* as meaning:-

"... the services and/or functions that are or should be undertaken by the Receiver pursuant to the Receiver's appointment under the Mortgage and the relevant provisions of the [Conveyancing Act 1881]."

15. Thus, Everyday, in appointing Mr. Dolliver as agent, and Mr. Dolliver, in accepting that appointment, were careful to draw a clear line between the two capacities and to forestall any overlap.

16. Mr. Dolliver's appointment as agent post-dated his appointment as receiver by two months. If in the interim any assessment was made as to what, if anything, he could do in his capacity as receiver, there was no evidence of that. If before Mr. Dolliver's appointment as receiver any consideration was given to what, if anything, he might be able to do in that capacity, there is no evidence of that either.

17. By letter dated 30th September, 2022 Mr. Dolliver notified Mr. Michael Duddy, as director and secretary of the appellant – as well as Mrs. Josie Duddy, the other director – of his appointment as agent. He wrote:-

"As a result of my appointment as Agent, I have been delegated certain powers by the charge holder in respect of the Properties to include readying the properties for sale, instructing an agent to commence marketing of the Properties and contracting to sell the Properties. In my instruction as Agent, I exercise the above certain delegated powers only to the extent that I cannot perform the powers pursuant to my appointment as a fixed charge receiver on 28 July 2022."

18. This reflected the delineation by the agency agreement of the separate capacities and powers.

19. Soon after his appointment as agent, Mr. Dolliver commissioned Wilsons Auctioneers Limited *("Wilsons")* to submit a sales and marketing strategy for each of the properties. Wilsons recommended that they be sold – or at least offered for sale – by public online

auction. They valued the Kerrykell property at between €80,000 and €130,000; the Ray property at between €100,000 and €150,000; and the Ballymagowan property at between €150,000 and €200,000: in each case *"subject to VP and contentious levels."* I understand *"VP"* to be vacant possession. I understand the reference to *"contentious levels"* to anticipate that the mortgagor might not be altogether enthusiastic at the prospect of a sale.

20. On 4th January, 2023 the properties were advertised for sale by online auction to be conducted by Wilsons on 22nd February, 2023 at 4:00 p.m. As Wilsons had previously recommended, the advised minimum values were stated to be €90,000, €110,000 and €160,000.

The High Court proceedings

21. By plenary summons issued on 17th February, 2023 the appellant issued proceedings claiming *"an order in the nature of an injunction"* prohibiting the respondents from offering each of the properties for sale by way of an internet auction on the platform of the website of Wilsons on 22nd February, 2023 at 4.00 p.m. *"and any such further offer for sale of the aforementioned property"* and damages for misrepresentation, slander of title, trespass, breach of constitutional rights, negligence and/or unlawful acts on the part of the respondents, their servants or agents, or any of them.

22. On 20th February, 2023 – by leave of the chancery list judge – the appellant issued a motion returnable for 22nd February, 2023 by which it sought interlocutory orders in the terms of the general indorsement of claim on the summons. The motion was grounded on a short affidavit of Mr. Michael Duddy who deposed that the appellant was the owner of the properties; that they had been mortgaged to AIB; that Mr. Dolliver had been appointed as receiver; that the receiver was the agent of the appellant; that the deeds of mortgage and charge did not permit the appointment of a receiver with a power of sale; and that Mr. Dolliver was seeking to sell the properties by online auction on 22nd February, 2023. He

skipped over the assignment of the debt and security to Everyday. Mr. Duddy deposed that it appeared that Mr. Dolliver had been appointed as agent to circumvent what he described as a statutory provision but did not identify the statutory provision or say how it so appeared and he did not refer to Mr. Dolliver's letter of 30th September, 2022. Mr. Duddy emphasised that Mr. Dolliver, *qua* receiver, did not have a power of sale and suggested that the properties were *"being wrongfully sold"* by Everyday and Mr. Dolliver.

23. I pause here to say that the absence of any reference to Mr. Dolliver's appointment as agent was a very significant omission. The impression created by the grounding affidavit was that Mr. Dolliver *qua* receiver was offering the properties for sale.

24. Along the way, Mr. Duddy referred to High Court proceedings which had been issued by him – personally – in 2020 against AIB and Everyday but did not say what his cause of action was or what – if anything – had become of the proceedings. It was evident from the copy folios that Mr. Duddy's action had been registered as a *lis pendens* against the registered properties and that on 10th February, 2020 the *lis pendens* was registered as a burden on each of the folios.

25. Mr. Duddy referred to – and exhibited – the mortgage deeds; copy folios; copies of the deeds dated 28th July, 2022 appointing Mr. Dolliver as receiver, and a copy letter of the same date by which Mr. Duddy – as director and secretary – was informed of that appointment; screenshots of the listing of the properties on Wilsons' website; and the particulars and conditions of sale, which were nominally in the form of the Law Society of Ireland General Conditions of Sale (2019 edition) but – as usual in cases such as this – emasculated by the special conditions.

26. Mr. Duddy deposed that he only became aware of the proposed sale on 15th February, 2023. He did not say how he had become aware of it.

27. Strikingly, Mr. Duddy's grounding affidavit did not suggest that the appellant would or might suffer loss or damage if the sales were to go ahead.

28. Moreover, absent any reference in the grounding affidavit to Mr. Dolliver's appointment as agent, the case being made appeared to be that Mr. Dolliver – who, *qua* receiver, had no power to do so – was offering the property for sale.

29. The particulars and conditions of sale were, at the same time, usual and odd. They were usual in the sense that they were in the form – more or less – commonly used in the case of so-called distressed properties offered for sale by receivers who have also been appointed as agent for the mortgagee. The properties were offered for sale without any warranties and without vacant possession.

30. They were odd in the sense that the vendor's status was by no means clear. The vendor was identified as *"Andrew Dolliver as Agent of Everyday Finance DAC"* who – by special condition 5.3 – was said to have been appointed *"as agent to the Subject Property"*. Special condition 5.6 provided for an acknowledgement by the purchaser that Mr. Dolliver – variously described as the vendor and the Agent – would execute the contract *"in his capacity as agent only, pursuant to the powers granted to him in the Mortgage and Charge."* But the mortgage and charge did not contemplate a sale by any receiver; and – as was not then but would later become clear – Mr. Dolliver's capacity as agent did not derive from the deeds of mortgage and charge but from the agency agreements.

31. By special condition 5.5 it was provided that the sale and purchase would be completed by the delivery by Everyday of an assurance of the property executed by Everyday and that the contract and the vendor's obligations thereunder were ***"strictly conditional"*** [emphasis original] on Everyday delivering such assurance, failing which, the contract might be rescinded by the vendor. As is the common, if not invariable, practice in the case of such sales, all of the usual conditions and warranties were excluded.

32. By special condition 4.4, any potential purchaser was invited to acknowledge that *"... the vendor <u>may not</u> be in a position to deliver vacant possession on closing and vacant possession shall not be a condition of the closing of the sale ..."* (Emphasis added.) I am bound to say that I find it difficult to see how anyone thought that there might be the remotest possibility of the delivery of vacant possession.

33. The net practical effect of the particulars and conditions of sale was that Mr. Dolliver – if he could find one – would present to Everyday a potential purchaser who was prepared to buy the property, warts and all – and without vacant possession – to whom Everyday was free to sell to or not. Thus, it seems to me, whatever about the terms of the agency agreements, the height of what was contemplated was that Mr. Dolliver would continue to market the properties for sale but that they would be sold – if at all – by Everyday.

34. On 8th March, 2023 Mr. Dolliver filed a replying affidavit in which he deposed that in addition to his appointment as receiver, he had been appointed by Everyday as its agent for the purpose of providing services for the maintenance, marketing and sale of the properties. He exhibited copies of the deeds of 23rd September, 2023 and of his letters of 30th September, 2022 by which the appellant was notified of his appointment as agent. Mr. Dolliver suggested that the appellant had not made out a fair issue to be tried; that the appellant had not offered any basis for suggesting that damages would not be an adequate remedy; and that there was no evidence as to how the appellant – who was heavily indebted to Everyday – might make good on the undertaking as to damages which had been offered if the action were to fail.

35. I pause here to observe that while Mr. Dolliver said that the appellant had not offered any basis for suggesting that damages would not be an adequate remedy, in fact the grounding affidavit did not suggest that damages would not be an adequate remedy; and did not even suggest that the appellant would suffer damage if the sales were to proceed.

36. On 15th March, 2023 the affidavit of Ms. Margaret Hartigan, to which I have referred, was filed on behalf of the respondents. She suggested that the sole ground on which the application had been made appeared to be that Mr. Dolliver had been *"simultaneously"* appointed as receiver and as Everyday's agent for the purpose of marketing and selling the properties. That was in fact the ground on which the application had been made but it was not evident from the grounding affidavit. Ms. Hartigan also said that she had been advised and believed that the appellant had not identified a fair issue to be tried and went on to suggest that, in any event, the balance of convenience lay against the granting of the orders sought. By reference to Wilsons' valuations, she suggested that the value of the properties was dwarfed by the appellant's indebtedness. The properties, she suggested, were residential investment properties in which the appellant's interest was economic only and she suggested that it was difficult to see how there could be any loss to the appellant if the sales were permitted to proceed.

37. Ms. Hartigan also suggested that in considering the balance of convenience, the court should have regard to the fact that Mr. Duddy – personally – had previously issued proceedings which he had registered as a *lis pendens* but had not progressed.

38. A supplemental affidavit of Mr. Duddy was filed on behalf of the appellant on 23rd March, 2023 the substance of which was that most of what Mr. Dolliver and Ms. Hartigan had had to say were matters of law and therefore more properly the subject matter of legal submissions. Mr. Duddy did depose that he did not believe that damages would be an adequate remedy *"for me"* if the injunction were refused but he did not say what damage was apprehended – whether to him or the appellant – if the sales proceeded. Distracted by the mote in the eyes of Mr. Dolliver and Ms. Hartigan from the log in his own, Mr. Duddy averred that he had been advised by *"my"* solicitor that he had made out a fair question to be

tried, and that damages would be inadequate compensation if the injunction were refused. He again failed to say what that damage might be.

39. In reply to Mr. Dolliver's evidence of his appointment as agent for Everyday, Mr. Duddy did not contest that the appellant had been notified of that appointment on 30th September, 2022.

40. Mr. Duddy deposed that he had been advised by his solicitor *" ... that there is a clear conflict in law between a receiver whom I am further advised is actually my [sic.] agent and how [Mr. Dolliver] is claiming to be the purported agent of [Everyday] ."* This was fairly garbled but absent any suggestion that Mr. Dolliver had done or might do anything in his capacity as receiver, the point can only have been that Mr. Dolliver's appointment as receiver in and of itself precluded his later appointment as agent.

The High Court judgment

41. The appellant's motion was heard by the High Court (Stack J.) on 15th June, 2023 and she delivered a written judgment on 4th August, 2023.

42. As it was put by the High Court judge, the kernel of the appellant's case was the proposition that Mr. Dolliver could not, while he stood appointed as receiver over the properties, act as agent for Everyday in connection with the sale of the properties.

43. It was submitted on behalf of the respondents in the High Court that there was no issue to be tried as to whether a receiver can act as such at the same time as he is appointed as agent of the mortgagee. That point, it was said, had been settled by the judgments of the High Court (Clarke J.) (as he then was) in *Moorview Developments Ltd. v First Active* [2009] IEHC 214 and of this court (McGovern J., Peart and Baker JJ. concurring) in *Vitgeson Ltd. v. O'Brien* [2019] IECA 184.

44. The judgment of the High Court, at para. 12, suggests that it was then submitted on behalf of the respondents that two judgments which I delivered in the High Court on

interlocutory motions – *Sammon v Tyrrell* [2021] IEHC 6 and *Taite v. Molloy* [2022] IEHC 308 – on which the appellant relied, were wrongly decided and should not be followed; but if it was, any such oral submission appears to have been at variance with the written submissions filed on behalf of the respondents in the High Court in which it was said that those cases were distinguishable. As I will come to, the judge found that there was no inconsistency between *Moorview* and *Vitgeson*, on the one hand, and *Sammon v Tyrrell* and *Taite v. Molloy*, on the other. Whatever may have been said in oral argument, that appears to have been the substance of the respondents' written submissions.

45. In the High Court, it was further submitted on behalf of the respondents that if they were wrong in their primary submission, then damages were an adequate remedy, and in the further alternative, that the relief claimed ought to be refused by reason of the appellant's delay.

46. The focus of the High Court judgment was very much on the question whether the appellant had established a fair question to be tried. For the reasons given – to which I will return – the judge concluded that it did not follow, as a matter of law, that there was necessarily a conflict of interest where the same person was appointed as receiver and agent. Having come to that conclusion, the judge touched briefly on the issues as to the adequacy of damages and the delay between Mr. Dolliver's notification of his appointment as agent and the issue of the proceedings without – I do not think it is unfair to say – coming to any clear conclusion on either issue.

The notice of appeal

47. The grounds of appeal are very jumbled. The original notice of appeal was described by the respondents' notice – with abundant justification – as prolix, repetitive and oppressive and the 63 original grounds of appeal as presenting a challenge to almost every observation by the judge in the course of her judgment as if it was a discrete determination. The revised

notice – filed by direction of the list judge (Haughton J.) – was an improvement only to the extent that it was shorter.

48. The first ground is that the judge erred:-

> *"… in fact and/or in law in deciding that the appellant had notice that the properties were put on the market on 4 January, 2023 for online auction on 22 February, 2023 by reason of Mr. Dolliver's letter of 30 September, 2022, resulting in the appellant exhibiting delay in not issuing proceedings until 17 February, 2023."*

49. There are a number of difficulties with this. While Mr. Dolliver deposed that the properties had been on the market since 4th January, 2023, the judge did not decide that the appellant had notice that the properties were put on the market on 4th January, 2023 or that there was any delay on the part of the appellant between the time it became aware that the properties were on the market and the time it issued proceedings and applied for interlocutory relief. Indeed, the judge clearly said that she did not need to come to a final view on the issue of delay. Moreover, the delay identified by the respondents was the delay – or the passage of time – after the notification of Mr. Dolliver's appointment as agent on 30th September, 2022 and the date of issue of the proceedings, rather than after the date the properties were put on the market.

50. As is clear from para. 84 of the judgment, the judge correctly identified the delay relied on by the respondents as the time between 30th September, 2022 and 17th February, 2023 when the summons was issued. It was no part of the respondents' case that the specific proposed online auction should have come to the appellant's notice any earlier than Mr. Duddy had deposed that it did. The argument was that as the appellant's case was based on a principled objection, it could have moved at any time after it became aware of the

appointment of Mr. Dolliver as agent as well as receiver and of his intention to offer the properties for sale.

51. The second ground of appeal is that the judge erred in identifying the kernel of the appellant's case as being that Mr. Dolliver cannot act as agent for Everyday while he stands appointed as receiver, in which capacity he is deemed by clause (3) of the relevant mortgage and charge to be the agent of the appellant borrower. But that clearly is the kernel of the appellant's case. The appellant, in the revised notice of appeal, identifies the issue of law before the High Court to the extent that it is relevant to the appeal as being:-

> *"... that [Mr. Dolliver] cannot act as agent of [Everyday] while he stands appointed as receiver, in which capacity he is deemed by the relevant empowering section of the respective mortgages and charges to be the agent of the borrower."*

52. Each of the grounds suggests that the judge erred *"in fact and/or in law"* without any attempt to distinguish between the two. Three, or maybe four, of the grounds allege errors of fact.

53. Ground No. 1, as I have said, suggests that the judge found that the appellant had notice that the properties were put on the market on 4th January, 2023 which she did not.

54. Ground No. 10 suggests that the judge erred in deciding that there were no funds in the receivership to complete the properties. But the uncontroverted evidence was that the appellant was and is grossly and hopelessly insolvent.

55. I am not entirely sure what to make of Ground No. 19. This suggests that the judge:-

> *"... erred in fact and/or law in deciding that there is no conflict here between [Mr. Dolliver's] status as receiver as he does not appear to have purported to have exercised any of her/his [sic.] powers as receiver and he has not sought to go into possession as well as given that the unfinished nature of these properties means that*

there appears to be no scope for the exercise [by] [Mr. Dolliver] of his powers [as] receiver."

56. It is not clear to me whether the appellant accepts or contests the finding by the judge first, that Mr. Dolliver does not appear to have exercised any of his powers as receiver, and secondly, that given the unfinished nature of the properties there appeared to be no scope for the exercise of those powers. But the uncontested evidence was that the properties are not habitable and so – if no one spelled it out – by necessary inference incapable of being let. There was no evidence that Mr. Dolliver had done anything in his capacity as receiver; there was no apprehension expressed that he might; and there was no suggestion that the sale of the properties would impact upon anything which he might do as receiver.

57. Ground No. 23 suggests that the judge erred:-

"... in fact and/or in law in deciding that as there is simply no conflict on the facts of this case, the appellant has failed to establish a fair question to be tried and the injunction must be refused."

58. If this is intended to suggest that the judge erred in finding that there was no conflict on the facts, it is plainly wrong. There was no such conflict.

59. Elsewhere in the revised notice of appeal – in section (d) of the grounds of appeal – it is said that:-

"It is submitted that [Mr. Dolliver] is acting as a double agent. It is submitted that Mr. Dolliver was not bona fide appointed as a receiver."

60. The uncontested evidence was that Mr. Dolliver had offered the properties for sale, *qua* agent. There was no evidence that he had done, or proposed to do, anything *qua* receiver. Therefore, whatever about his appointment in a dual capacity – or in two capacities – he was acting in only one.

61. Nor was there any suggestion that Mr. Dolliver had not been *bona fide* appointed as receiver. The premise of the appellant's argument was that he had been appointed both as receiver and as agent. Insofar as the appellant might impugn the validity of his appointment as receiver, this would undermine the legal argument as to the validity of his appointment as agent.

62. The revised notice of appeal did not engage in any meaningful way with the requirement – spelled out on the printed form – that the appellant should identify the legal principles related to each numbered ground and confirm how that or those legal principles apply to the facts or relevant inference or inferences drawn therefrom. Instead, it simply listed the cases referred to in the High Court judgment

63. At Ground No. 20 it was suggested that the judge erred in deciding that the question of whether a mortgagee might be required to attempt to sell with vacant possession in order to discharge his duty to the borrower to obtain the best price reasonably obtainable had not been raised by the plaintiff and was not before the court. But it was no part of the appellant's case that the properties were being sold without vacant possession or that the mode of sale would not achieve the best price reasonably obtainable.

64. The evidence was that the appellant was indebted to Everyday in a sum in excess of €2 million. Ms. Hartigan put up the valuations obtained from Wilsons which put a range of combined estimated value for the three properties of between €330,000 and €480,000, *"subject to VP and contentious levels."* There was no challenge to the accuracy of the valuations. It can hardly be gainsaid that a forced sale is likely to achieve less than a sale by a willing vendor, *a fortiori* that a sale with vacant possession is likely to achieve a better price than a sale with the mortgagor in possession. But there was no suggestion that the appellant might cooperate with a sale or that vacant possession might be available. If it was not obvious why Everyday had not issued proceedings claiming possession in order to facilitate a

sale, the appellant could hardly have been heard to complain. Moreover, the upper end of the range of combined value of the properties was a fraction of the appellant's indebtedness so that there could never have been any question of a surplus. But more to the point, it was no part of the appellant's case that the properties were being sold at under value. The appellant had identified the mode of sale as being by way of internet auction but made no complaint about that. The appellant had exhibited the conditions of sale – from which it was apparent that the properties were to be offered for sale *"warts and all"* and without vacant possession – but had made no complaint about that. As Ms. Hartigan correctly divined, the sole ground of the appellant's challenge was that Mr. Dolliver could not lawfully act as Everyday's agent because, *qua* receiver, he was the appellant's agent.

The substance of the appeal

65. The core issue on the appeal is whether the judge erred in her conclusion that the appellant failed to establish that there was a fair question to be tried that the appointment of the same person as receiver and agent necessarily gives rise to a conflict of interest. The issue is not – as the appellant contends – whether a receiver can act as such at the same time as he is appointed the agent of the mortgagee. The High Court judge was at pains to emphasise that this is not a case in which a receiver acting in a dual capacity arranges a sale on behalf of the mortgagee without entering into possession. On the evidence, Mr. Dolliver has done nothing in his capacity as receiver and so has not acted as such. And there is no apprehension that he will act as such. The appellant's objection to the proposed sale is a principled objection.

66. There appears to have been some confusion in the arguments made to the High Court as to the effect of the judgments in *Vitgeson*. The judge found – at para. 48 – that *Vitgeson* is authority for the proposition that a receiver can act as agent in arranging a sale and that this does not in itself conflict with his duties *qua* receiver. The notice of appeal suggests, on the

one hand – at Ground No. 11 –that the High Court judge erred in so finding, but on the other hand – in section 4 – asks that this court should depart from its decision in *Vitgeson "... where it is authority for the proposition that a receiver can act as agent in arranging a sale and that this does not in itself conflict with his duties qua receiver."*

67. Without getting bogged down in the detail, *Vitgeson* was a case in which a receiver acted as agent for the mortgagee in arranging for the sale of the secured property. On the facts, Haughton J. found that this was unobjectionable and that finding was upheld on appeal to this court. If, on the facts, it was unobjectionable that a receiver should have acted as agent for the mortgagee, it follows that the appointment of an insolvency practitioner in a dual capacity is unobjectionable in principle. It by no means follows that there can never be a conflict between the two roles but in this case the appellant's argument was founded solely on principle.

68. My understanding is that the appellant now acknowledges that the judgments of the High Court in *Moorview* and of this court in *Vitgeson* are authority for the proposition that a receiver can act as agent in arranging a sale and that this does not in itself conflict with his duties *qua* receiver. It contends, however, that *Moorview* and *Vitgeson* were wrongly decided: or, perhaps more correctly, for present purposes, that there is a fair question to be tried as to whether they were correctly decided. Specifically, the argument is that those decisions were so undermined by the later judgments of the High Court in *Sammon, Taite, Nihill v. Everyday Finance DAC* [2022] IEHC 484 and *McGirr v. Everyday Finance DAC* [2022] IEHC 612 – that there was a fair question to be tried.

69. *Moorview* was one of a number of written judgments delivered by Clarke J. (as he then was) in what – by 6th March, 2009 – was already protracted and tangled litigation and was to continue for another ten years. Following the financial collapse of the plaintiff mortgagor in 2003, the first defendant mortgagee appointed the second defendant insolvency

practitioner as receiver over a partially completed mixed commercial and residential development in Galway. The receiver, while in possession as receiver, found a purchaser for the property and gave up possession to the mortgagee to allow the sale to be completed. One of the myriad arguments made on behalf of the various companies associated with the borrower was that there was a *"fatal incongruity"* in the mortgagee's argument that a receiver can at the one time be agent for a company in receivership and agent for the bank. Clarke J. held, at para. 16.62, that:-

> *"... While it is true to say that a mortgagee has no right to interfere in the receivership in the sense of interfering in the relationships between the receiver and third parties arising out of the receivership, that does not, in my view, provide support for the proposition that a mortgagee who is entitled, independently of the receivership, to enter into possession itself as a mortgagee in possession, is not entitled to do just that, and to require the receiver to give up possession. The receiver is, of course, in one sense, an agent of the company. However, the company itself was required to give up possession to the mortgagee and there is nothing inconsistent, even to the extent that Mr. Jackson was receiver of Porterridge, in Mr. Jackson giving up possession in that capacity and on behalf of Porterridge in favour of First Active as mortgagee in possession. The fact that Mr. Jackson also acted as agent for First Active thereafter seemed to me to be of no relevance."*

70. *Moorview*, then, is clear authority for the proposition that there is no objection in principle to a receiver acting in a dual role as agent for the mortgagee. Counsel for the appellant points to the fact that the receiver in *Moorview* was a receiver and manager, as opposed to a mere receiver, but I cannot see that this makes any difference.

71. At the oral hearing of the appeal, counsel for the appellant relied on a case which had not been opened to the High Court and had not been referred to in the written submissions but

which was said to be authority for the proposition relied on and to have been overlooked by Clarke J. in *Moorview* – and, I suppose, by Haughton J. and this court in *Vitgeson*. It was a judgment of the High Court of Justice in Ireland in *Hibernian Bank v. Yourell* [1919] 1 I.R. 310 in which O'Connor M.R. held that a receiver appointed by a mortgagee pursuant to the power in s. 24 of the Conveyancing Act, 1881 is *"for all purposes"* the agent of the mortgagor. As I understand the argument, it is that a receiver so appointed, is, if later appointed also as agent for the mortgagee, the agent of the mortgagor for that purpose also.

72. I cannot see how *Hibernian Bank v. Yourell* avails the appellant or, indeed, how it is relevant at all to the issue in this case. In is acknowledged by the respondents that Mr. Dolliver was and is, in his capacity as receiver, the appellant's agent. The deeds of his appointment say so, and so does the Conveyancing Act. The fact that a receiver, as such, is for all purposes the agent of the mortgagor does not mean that he cannot, otherwise than as such, and for a purpose other than the purpose of the receivership, act as agent for the mortgagee. The proposition that the purpose of the appointment of a receiver pursuant to s. 24 of the Act of 1881 might extend beyond the receivership would extend his powers; which are limited by the Act. This, with no disrespect, makes no sense.

73. *Vitgeson* was a case in which a receiver – who was only a rent receiver – acted in a dual capacity by instructing estate agents to prepare proposals to bring the properties to market. Haughton J. in an *ex tempore* judgment ([2017] IEHC 846) adopted the passage I have just quoted from *Moorview* and found that:-

> *"... I'm quite satisfied that a receiver can undertake other work as agent for a charge holder notwithstanding that this is in apparent conflict with the receiver's deemed agency for the mortgagor in terms of income and rents qua receiver."*

74. Vitgeson's appeal to this court was dismissed by McGovern J. (Peart and Baker JJ. concurring) ([2019] IECA 184) on the ground that there was sufficient evidence to entitle the

judge to find that the receiver could and did act in a capacity other than that of receiver in arranging for the marketing of the lands for sale.

75. In the same way that the notice of appeal did not attempt to identify and engage with the legal principles, I do not think that it is unfair to say that the written and oral submissions comprised, in the main, an examination of the authorities without forging any link between them and the case in hand.

76. In a passage identified and relied on by the appellant in my judgment in *Sammon* I said, at para. 47:-

> *"I do not believe that it is objectionable in principle that a person appointed as receiver should undertake a dual role as agent of the mortgagee, but it seems to me that there is a difference between a receiver with a dual role and a double agent."*

77. If this is thought to have been cryptic, that was not my intention.

78. In *Sammon*, the substantive dispute in the action was whether, properly construed in the context of the circumstances in which it was given, the security created by a printed standard form mortgage to secure all sums due was limited to the borrowers' liabilities at the time of the mortgage. The issue on the interlocutory motion was whether the property the subject of the charge – the borrowers' home and an adjacent hobby farm, which were in the possession of the borrowers – should be sold before that dispute was resolved. In that case, as is this, a rent only receiver had been appointed who had advertised the property for sale. In that case, as in this, there was no evidence that the receiver had done anything or threatened or intended to do anything in his capacity as such. What prompted the borrowers' motion for interlocutory relief was an apprehension that the property might be sold before the action was determined: which was something the receiver, *qua* receiver, had no power to do. The question of the dual role of the insolvency practitioner as receiver and as agent was – as I

said at para. 47 – touched on in argument but was not fully argued. In that case, as in this, I could not immediately see what purpose was served by the appointment of a receiver.

79. Quite frankly, I do not understand the appellant's reliance on the passage which I have quoted. If my reference to a double agent was a bit cryptic, I clearly said that there was nothing objectionable in principle to the same person undertaking a dual role. What I intended to convey was that I was prepared to contemplate that in practice a conflict of interest might arise. I cannot see how, on any reading, it might have been thought that there was any divergence from *Moorview* and *Vitgeson*.

80. The appellant now argues that the High Court judge did not adequately distinguish *Sammon* by ruling out that Mr. Dolliver was acting as a double agent: but on the evidence, he was acting in one capacity only and there was no suggestion that there was or might be any conflict between what he had done as agent and anything he might do as receiver.

81. The appellant also relies on my judgment in *Taite*. The issue in that case – as the appellant correctly submits – was whether the receivers were entitled to take possession of a residential property for a purpose other than that for which they had been appointed. The receivers were rent only receivers. The property was not let and the evidence suggested that they had no intention of letting it. I held that the receivers were entitled to possession only for the purpose for which they were appointed namely, to collect the rents – and if not for that purpose, then they were not entitled to possession at all.

82. In this case, as far as the evidence goes, no one has asked the appellant for possession.

83. The appellant points to the finding of the High Court judge that unless it was to avail of the lesser legal duty of a receiver on possession, the purpose for which the receiver was appointed is entirely unclear and submits that Mr. Dolliver has undermined any justification for his appointment as receiver as, it is said, it appears that he never intended to exercise any of the powers granted by that appointment.

84. The dual problem with this – as I have already said – is that first, the evidential ground was not laid for any challenge to the validity of Mr. Dolliver's appointment as receiver and secondly, any invalidity of his appointment as receiver would mean that he was appointed in one capacity only: which would undermine the whole basis of the challenge.

85. *Nihill v. Everyday Finance DAC* [2022] IEHC 484 was yet another last minute challenge to an online internet auction. In that case, as in this, the affidavits filed on behalf of the plaintiff did not set out the full facts with the result that Dignam J. had to rely on the affidavit filed on behalf of the defendant. One of the many and varied arguments advanced on behalf of the plaintiff was that the purported appointment of a receiver was invalid because he had been appointed both as a rent receiver and as agent for the mortgagee and that that gave rise to a conflict of interest. However, there was no evidence that the receiver had been appointed as agent. Dignam J. restrained the sale *pendente lite* on the sole ground that the plaintiff had established an arguable case that the rent only receiver was exceeding his powers by purporting to exercise a power of sale which he plainly did not have.

86. *Nihill* is *nihil ad rem.*

87. *McGirr v. Everyday Finance DAC* [2022] IEHC 612 was another case in which the High Court granted an interlocutory injunction restraining the sale of mortgaged property by a rent only receiver appointed on foot of an AIB standard form charge. Roberts J. found that the plaintiffs had established fair issues to be tried on three points, one of which was that there was no evidence of the terms of the asserted oral appointment of the receiver as agent for the purpose of marketing the properties for sale. It is immediately and obviously distinguishable on that ground. However, Roberts J. – having referred to *Moorview, Vitgeson, Tyrrell v. O'Connor* [2022] IEHC 274, *Nihill* and *Taite* – accepted that a receiver can undertake work outside of the receivership as agent for the charge holder notwithstanding

that this may appear to conflict with the receiver's deemed agency for the mortgagor in terms of the collection of rents *qua* receiver.

88. The appellant now submits that Roberts J. in *McGirr* was in error in not adopting the same analysis of *Vitgeson* as I did in *Taite*. However, while Roberts J. (at paras. 36 and 37) set out the arguments made on behalf of the defendants in that case as to why it was said my analysis of *Vitgeson* was wrong, she immediately said that it was not the role of the court at the interlocutory stage to determine disputed issues of fact. Moreover, it is not absolutely clear from the judgment in *McGirr* what the position on the ground was. It is clear that in *McGirr*, as in this case, the proposed sale was to be by online auction. The defendants' submission as to the balance of convenience (at para. 48 of the judgment) – that even if an injunction were to be granted it would be open to Everyday to simply reappoint the receiver to act as a rent receiver, thus depriving the plaintiffs of any income from the properties – strongly suggests to me that the plaintiffs were collecting the rents from the properties. The reference to the reappointment of the receiver to act as rent receiver thus depriving the plaintiffs of the income from the properties conveys to me that the receiver – although ostensibly appointed for that purpose – had not been collecting the rents.

89. I do not understand the supposed divergence in *McGirr* from *Taite*. On the issue as to the terms of oral appointment of the receiver to act as agent, Roberts J. concluded – at para. 41 – that because she had no evidence of the specifics of the agency agreement, there remained some scope for argument, and therefore a fair question to be tried as to his role. The premise of this, it seems to me, can only be that depending on the terms of appointment or engagement and on what the agent is doing, there may or may not be a conflict of interest. This is perfectly consistent with all of the authorities.

90. The fundamental flaw in the appellant's argument is that it conflates the potential for a conflict of interest with an actual conflict. The potential for a conflict of interest in Mr.

Dolliver acting at the same time as agent for the appellant and as agent for Everyday was recognised at the time of his appointment as agent for Everyday. The deeds of appointment recognised the theoretical possibility of a conflict of interest by expressly precluding the possibility that he might be asked by Everyday to do anything which might conflict with his duties to the appellant. There is simply no suggestion that there is, in fact, any conflict of interest.

91. The judge's conclusion on the issue as to whether the appellant had established that there was a fair question to be tried was:-

> *"80. In my view, it does not follow as a matter of law that there is necessarily a conflict of interest where the same individual is appointed as both receiver and as agent of the mortgagee. Such a conflict could arise on the facts of a particular case, however, where that individual is in possession and where the property is capable of generating an income. Or at least there is a fair question to be tried as to whether that is so.*
>
> *81. However, as there is simply no conflict on the facts of this case, the [appellant] has failed to establish a fair question to be tried and the injunction must be refused."*

92. Subject only to emphasising that the judge's conclusion followed her analysis of the authorities, it was, in my view, correct. I do not understand the judge to have found that the potential for a conflict of duty is dependent upon either the receiver being in possession, or on the capacity of the property to generate an income, still less on both.

93. The appellant's suggestion that *Vitgeson* was wrongly decided was founded on the argument that there was an inconsistency in the authorities. As I believe was amply demonstrated by the judgment under appeal, the authorities are perfectly consistent and in my firm view, the judge was correct to find that the appellant had not established a fair question to be tried.

Balance of justice

94. As I have endeavoured to demonstrate, the appellant's objection to the proposed sale was entirely principled and solely and exclusively directed to Mr. Dolliver's involvement in identifying a potential purchaser or potential purchasers. The height of the justification offered by the appellant for an interlocutory injunction (or an order in the nature of an injunction, whatever that is) was Mr. Duddy's belated and bald assertion that damages would not be an adequate remedy if the sales were to proceed. There was no challenge to the entitlement of Everyday – otherwise than strictly in the manner proposed – to sell the secured properties. Whatever purpose it might have served, there was no challenge to the entitlement of Everyday to appoint someone – anyone – other than Mr. Dolliver to act as its agent. There was no challenge to the mode or conditions of sale. Crucially, there was no suggestion that the proposed sale – whether by reason of the involvement of Mr. Dolliver or otherwise – would achieve less than the best price reasonably obtainable.

95. Even if the appellant had identified a fair question to be tried as to the entitlement of Everyday to engage Mr. Dolliver as its agent, or the entitlement of Mr. Dolliver to have accepted that engagement, it is difficult to see how the jurisdiction of the court to intervene was engaged by the evidence. The effect of an interlocutory injunction would have been to delay the realisation by Everyday of its security. If – for the sake of argument – the action were to fail, Everyday would have been impeded in the lawful realisation of its security and would have been wrongly kept out of its money while the interest clock remained ticking. If – for the sake of argument – the appellant might have established a technical infirmity in the appointment as agent, I cannot see what, in practical terms, that would have achieved.

96. In those circumstances, it seems to me that the balance to be struck would have been between an inevitable risk of tangible and measurable – and by reason of the appellant's insolvency, uncompensatable – loss to Everyday and a risk of *injuria sine damnum* to the

appellant. If the appellant had nothing to gain by the action other than to make a point, I fail to see the apprehended injustice against the eventuality of which the interlocutory orders were sought.

97. The appellant having failed to establish a fair question to be tried, I think that the judge was perfectly within her rights not to speculate as to what she might have done if it had.

98. As to Mr. Duddy's personal action against AIB and Everyday, the only evidence was that a plenary summons had been issued and registered as a *lis pendens* and the *lis pendens* registered as a burden on the two folios. If Mr. Dolliver and Ms. Hartigan were not entitled to say that the summons was never served on either AIB or Everyday, Mr. Duddy did not say that it had been. Despite being invited to do so, the appellant failed to produce a copy of the summons. It was, I think, fairly to be inferred that Mr. Duddy was abusing process but in argument another theoretical issue arose as to whether this might have been material in considering whether the relief claimed by the corporate appellant should be refused. In the end, counsel did not press this point and in circumstances in which the appeal fails, it is unnecessary to say any more about it.

Conclusion

99. For the reasons given, I would dismiss the appeal and affirm the order of the High Court.

100. The respondents having been entirely successful, it seems to me that they are entitled to an order for their costs of the appeal. In the event that the appellant wishes to contend for any other costs order, I would – with very considerable misgivings – allow the appellant a period of 10 days from the electronic delivery of this judgment within which to file and serve a short written submission, not exceeding 1,000 words; in which event the respondents will have 10 days to file and serve any response, similarly so limited.

101. As this judgment is being delivered electronically, Binchy and Pilkington JJ. have authorised me to say that they agree with it and with the order proposed.