

THE HIGH COURT

[2021] IEHC 746
[2021 No. 3393P.]

BETWEEN

LUKE CHARLETON

PLAINTIFF

AND

JOHN HASSETT

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 30th day of November, 2021

Introduction

1. This is an application for what, in form, is a series of interlocutory orders restraining the defendant from interfering with the plaintiff in carrying out his functions and duties as receiver and mortgagee's agent but is, in substance, a series of what are intended to be final orders directed to permitting the plaintiff to sell a mortgaged property. It immediately brings to mind the observation by Clarke C.J. in *Charleton v. Scriven* (Unreported, Supreme Court, 8th May, 2019) [2019] IESC 28, that interlocutory injunctions should not be treated as a means of attempting, in practice, to obtain summary judgment. As the Chief Justice said, such orders are designed to do what they say, that is, to hold the situation until there can be a full trial.
2. The plaintiff's case is that he was appointed as receiver and mortgagee's agent over the property on 6th July, 2018. This action was commenced by plenary summons issued on 23rd April, 2021. The plaintiff's motion for interlocutory relief was issued on 11th May, 2021 and was heard on 22nd October, 2021. In the meantime an appearance was entered by the defendant on 28th May, 2021. By his notice of entry of appearance the defendant called for delivery of a statement of claim, but no statement of claim was delivered.
3. On one view, the application could be dealt with by an examination of the plaintiff's proofs, but the case throws up a number of issues of general importance as to the correct approach to be taken by the court to what are loosely referred to as receiver injunctions.
4. The defendant, I should say, represented himself. The defendant did not identify, still less argue, the issues which prompted the court to reserve judgment, but they are issues which emerge quite frequently in the chancery list on such applications and issues which I believe the court was entitled and obliged to raise of its own motion with counsel for the plaintiff, for whose assistance I am grateful .

The evidence

5. Mr. Hassett is the registered owner of the property comprised in Folio 42891F, County Limerick, which is a seven bedroom, two storey house at Pass Road, which is sometimes called Old Cratloe Road, Meelick, Clonconnane, County Limerick. He was registered as such on 26th October, 2004, following a transfer to him by John Hassett Homes Limited, which had been registered as owner on 10th July, 2002.

6. On 12th December, 2005 Mr. Hassett executed a charge over the property in favour of Allied Irish Banks, p.l.c. ("AIB") to secure the payment to the bank on demand of all sums then or which might thereafter become due. It is not evident what Mr. Hassett's liabilities to AIB were at the time of, or immediately following, the creation of the charge but by a credit agreement in writing in the form of a facility letter dated 24th October, 2008 addressed to Mr. Hassett and on which he endorsed his acceptance on 5th November, 2008, AIB agreed to make available to Mr. Hassett a facility of €650,542.00 on the terms and conditions therein set out. The facility letter refers to an advance, but all the appearances are that it was a refinancing of an existing loan or loans.
7. Mr. Hassett failed to repay the loan and on 25th July, 2016 AIB recovered summary judgment against him for €801,324.97.
8. By deed made 6th July, 2018 and made between AIB and Luke Charleton and Damien Murran, and described as Instrument of Appointment of Joint Receivers, AIB appointed Messrs. Charleton and Murran to be joint receivers over the mortgaged property to the intent that they might exercise all the powers conferred on the receivers in relation to the mortgaged property whether by the charge or by law or otherwise. By the same instrument AIB appointed Messrs. Charleton and Murran "*as its agent for the purposes of taking possession of the Mortgaged Property on behalf of AIB as mortgagee in possession, securing the Mortgaged Property and effecting the sale of the Mortgaged Property.*" On the following day, 7th August, 2018, Messrs. Charleton and Murran endorsed their acceptance of their appointment as joint receivers and as agent, and the defendant was given notice of the appointment by letter of the same day.
9. By a deed described as an Irish Law Deed of Transfer (Excluding Property) dated 14th June, 2019 and made between AIB and a number of other AIB companies and Everyday Finance DAC ("*Everyday*") the defendant's loan and the security held for it were transferred to Everyday and on 27th August, 2019 Everyday was registered on the Folio as the owner of the charge.
10. In his affidavit grounding this application Mr. Charleton described the deed of transfer by reference to its date and exhibited a copy, redacted for reasons of confidentiality. He went on to say that "*Further, Allied Irish Banks plc agreed to novate the receivership and agency agreements over the property to Everyday, and inter alia Everyday agreed to assume the obligations of Allied Irish Banks plc under the receivership and agency agreements and I consented to the substitution of Everyday under the receivership and agency agreements*", and he exhibited a copy of what he described as the receiver novation deed, redacted for reasons of confidentiality.
11. Mr. Charleton did not, in the body of his affidavit, give a date for the receiver novation deed. The document exhibited as a copy – which must be taken to have been given in evidence as a true copy – is dated only "2019". By clause 2.1 it was provided that the parties agreed that with effect from the Effective Date (as defined) Everyday was to be and thereby was substituted in place of AIB as a party to the Receiver Agreements; and that the Continuing Parties, that is to say Messrs. Charleton and Murran, agreed that with

effect from the Effective Date they would perform and discharge all liabilities and obligations whatsoever from time to time to be performed or discharged by them by virtue of the Receiver Agreements in all respects as if Everyday were the original party to the Receiver Agreements instead of Allied Irish Banks, p.l.c. It is evident from the copy document exhibited that it was executed by AIB, by Mr. Charleton, and by Mr. Murran, but not by Everyday. This omission, when identified by the court, was described as an “*administrative mishap*”: but whether the suggested mishap was that the deed had not been executed by Everyday or that the purported copy deed was not a true copy is not clear. As far as the evidence goes, the receiver novation deed, upon which the plaintiff relies for his authority, was not executed by Everyday.

12. The plaintiff’s case is that his appointment by AIB was novated by Everyday. That, in my view – and I do not understand counsel to have argued otherwise – was not established by the evidence. As the hearing continued, the plaintiff’s solicitor was endeavouring to locate a copy of the deed which might show that it had been executed by Everyday but did not succeed in doing so. At the conclusion of the hearing – the court having indicated that judgment would be reserved – counsel asked for permission to file a supplemental affidavit: but this would have been wholly unsatisfactory, never mind unfair to the defendant who would not have had any opportunity to comment on any additional evidence.
13. Apart from the fact that the purported deed of novation did not appear to have been executed by Everyday, there was no evidence that Mr. Hassett had ever been given notice of the novation. In an e-mail exchange with Ernst & Young (“EY”) on 1st May, 2020, Mr. Hassett suggested that his account had been “*transferred or gifted*” to Everyday and EY and said that he wanted to understand “*what us [recte. is] your role in all this.*” In reply Mr. Hassett was provided with a copy of the deed of appointment over the property at Clonconnane. “*As*”, it was said, “*you would have been previously advised, the case was included in a loan sale and the charge holder novated from AIB to Everyday Finance DAC as at 14 June 2019. Our appointment as Receiver has not changed and as per the above the properties are still under out management.*”
14. While EY’s e-mail suggested that something had been novated, it was the charge holder and not the receivers. Mr. Hassett was not given a copy of any deed of novation. Moreover, no reference was made to the fact – if it was the fact – that Mr. Murran had been discharged. On this application the plaintiff’s case is that Mr. Murran was discharged on 19th February, 2020. Mr. Charleton, having so averred, exhibited a form of deed of discharge dated 19th February, 2020. The back sheet suggests that the parties were to be Everyday, Mr. Charleton and Mr. Murran but the parties to it were Everyday and Mr. Murran, only. It is not suggested that Mr. Hassett was ever given notice of the discharge of Mr. Murran.
15. The Deed of Discharge is a very peculiar document. It recites and refers specifically to the appointment of 7th August, 2018 on foot of the charge dated 12th December, 2005 and goes on to recite that by deeds of novation dated 14th June, 2020 and 19th July,

2020 and subsequently by deed of transfer dated 23rd July, 2020 between Allied Irish Banks plc and Everyday, Everyday acquired the right, title and interest of the bank in the security held by the bank. Counsel submitted that it was not necessary that Mr. Charleton should have been a party to the discharge of Mr. Murran and suggested that he – Mr. Charleton – plainly did not have a problem with it, and that if he – Mr. Charleton – had had a problem with it he could have applied for his own discharge. Of this I am unconvinced, but for present purposes it is necessary to say no more than that the document exhibited is not obviously effective to allow and oblige Mr. Charleton to act on his own.

16. It is a puzzle how a document executed in February, 2020 might have come to refer to documents which did not come into existence until four or five months later.
17. The e-mail thread between the defendant and EY of 1st May, 2020, to which I have referred, shows that at the time of their appointment over the property the subject of these proceedings, Messrs. Charleton and Murran were appointed as receivers over two other properties owned by the defendant. No complaint is made of any obstruction of or interference with those other receiverships.
18. On 3rd February, 2020 – more or less nineteen months after the appointment of the receivers and agents, and a little less than seven months after the sale of the loan to Everyday – someone from Ktech Security & Property Services (“Ktech”) went to the property with instructions for “*Property Lockdown*”. According to Ktech’s report of the visit the case was not a contentious case: but whether that was Ktech’s assessment or an instruction given to them is not clear. That assessment was obviously wrong.
19. On 5th February, 2020 Ktech reported to EY that one person had attended at the property and had changed the locks. All of the internal doors were reported as having been locked but the agent had been able to open them all. The property was reported as being a seven bedroom, two storey detached house, in good condition and well kept. There was an office set up in the living room with paperwork on the table; an alarm system that was not working; and the power was switched off. It was reported that a neighbour had advised the agent that the borrower called to the property in the evenings and that another neighbour watched the property and called the borrower if he saw anything. It was reported that in addition to the changing of the locks on the house, new padlocks had been fitted to the main gate.
20. On 5th May, 2020 Ktech reported that one person from that firm had attended at the property following a report that the borrower had taken possession. It was reported that the property was secured and all keys working but that the padlock on the main entrance gate was “*still*” controlled by the borrower. The lawns around the house were reported to have been cut by someone, most likely the borrower.
21. On the same day Mr. Hassett wrote to EY in response to an e-mail he had from them on 1st May, 2020. Mr. Hassett had previously tried to telephone but was told to put any query he had in writing. It is not clear whether there is any connection between the letter

and the visit by Ktech to the property. In his letter Mr. Hassett asserted that he had been informed in November, 2018 that the receivers had been stood down and asked *inter alia* for a copy of the second deed of appointment. He challenged the validity of the appointment of the receivers and demanded the names of those who had entered his properties and his home without his knowledge or approval. Mr. Hassett asserted that he had re-taken possession of his home in Clonconnane and said that his neighbours would be on high alert for any further trespass and break-ins. There is no evidence that this letter was ever replied to.

22. Over the course of the next nine months or so the locks were changed and re-changed three or four times. Ktech reported that on 14th September, 2020 an unidentified sales agent had reported to them that the locks had been changed and that a beehive had been put outside the door. Three days later Ktech attended at the property and changed the locks on the front door. There is no reference in that report to any beehive. On 1st February, 2021 Ktech reported that the keys had been snapped off in the cylinders and asked for instructions as to whether they should proceed with another lock change. In a supplemental affidavit sworn on 23rd September, 2021 Mr. Charleton exhibited a property inspection form dated 12th April, 2021 which reported that the power and water were off; "Keys: Yes", and "access point locks" were working. A series of photographs annexed to the report form shows that Ktech had access to most of the house.
23. As I have said, there appears to have been no reply to Mr. Hassett's letter of 5th May, 2020 but on 17th September, 2020 OSM solicitors wrote to him on behalf of Mr. Charleton and Everyday. That letter asserted that Mr. Charleton had been validly appointed as receiver by AIB on 7th August, 2018 and that his appointment had been novated by deed dated 14th June, 2019. It asserted repeatedly that Mr. Charleton, as receiver, was entitled to collect the rents and profits in respect of the mortgaged property but made no reference to his appointment as mortgagee's agent. Mr. Hassett was asked for confirmation that he would not interfere with the work of the receiver and was required to sign a form of undertaking to that effect by close of business on 23rd September, 2020, failing which, it was said, injunctive proceedings would be instituted.
24. Mr. Hassett did not reply directly to OSM but on 1st October, 2020 wrote instead to Mr. Charleton, copy to Mr. O'Sullivan of OSM. He wrote:-

"Dear Luke and Richard,

It has come to my attention that you Luke are claiming to be a validly appointed receiver over properties owned by me. I became aware of this from a letter from a Richard O'Sullivan of some company called OSM by letter dated 17th September, 2020. In that letter it appears that Richard is looking for some undertakings from me to you Luke.

In the said correspondence Mr. O'Sullivan has typed up a consent not to interfere in the properties. However, I do not think that he has sought enough to give you,

Luke, comfort and I do not want to go to court as I suffer terribly with anxiety and depression, so to that end I will give the following undertaking:

I, John Hassett, solemnly undertake to Luke Charleton the alleged receiver that not only will I not interfere in any of the properties he alleges he is appointed over, but I will assist him in whatever way he wishes in his role as receiver, provided he provides me with the following documents for inspection within 21 days from today's date,

- 1. Any original mortgage upon which Mr. Charleton relies.*
 - 2. Any original facility letter associated with any mortgage upon which Mr. Charleton relies.*
 - 3. Any original deed of appointment upon which Mr. Charleton relies.*
 - 4. Any copies of supplemental deeds to either the mortgage or the deed of appointment upon which Mr. Charleton relies.*
 - 5. The undertaking is strictly subject to the inspection the above documents and all those documents being in order.”.*
25. Mr. Hassett went on to suggest that any failure to produce the documents would be taken as a tacit acknowledgement that Mr. Charleton's appointment was invalid and that he was a trespasser. Citing the judgment of Cregan J. in *McCleary v. Phillips* [2015] IEHC 591, Mr. Hassett contended that it was for the receiver to prove that he is validly appointed when there is a challenge to his appointment. He said that he was challenging Mr. Charleton's appointment but repeated that if it was shown to be valid, he would cooperate. Mr. Hassett suggested that in circumstances in which he had offered a stronger undertaking than he had been asked for, he would defend any proceedings that might be instituted and use that letter to fix Mr. Charleton with any costs.
26. The response to Mr. Hassett's letter came not from OSM solicitors but from Beauchamps solicitors, who wrote to Mr. Hassett on 27th November, 2020.
27. Beauchamps asserted the appointment of Mr. Charleton by AIB in the dual capacity as receiver and mortgagee's agent, and that his appointment had been novated by a deed of novation of 14th June, 2019. They charged that Mr. Hassett had obstructed "the Receiver" in the carrying out of his duties; that he had entered the property without the consent of the receiver; and that he had changed the locks. They protested that Mr. Hassett had made unnecessary and inflammatory remarks in his correspondence, specifically that he had alleged that his property had been "criminally entered upon" leading to a "violation" of his privacy. They recalled that Mr. Hassett had reported the matter to the Gardaí, who had taken the view that it was a civil matter. This, it was said, completely undermined any suggestion of criminality on their clients' part.

28. Beauchamps noted that Mr. Hassett had asked to examine the original mortgage, facility letter, deed of appointment and supplemental deeds. Mr. Charleton and Everyday, by Beauchamps, refused to make the original documents available for inspection. They gave three reasons. First, it was said, their client (singular, but the letter identified their client as both Mr. Charleton and Everyday) was under no obligation to make the documents available for inspection and Mr. Hassett had not advanced any sensible reason why the copy documents furnished to date did not suffice. Secondly, it was said, the country was in Level 5 COVID-19 lockdown. Thirdly, it was said, it was irresponsible for Mr. Hassett, who had been diagnosed with cancer and was in remission, to attend in person for the examination of documents. In any event, it was said, examination of the original documents would not be facilitated. The letter went on to demand, by close of business on 4th December, 2020, the usual litany of undertakings: starting with an undertaking not to impede or obstruct Mr. Charleton and his servants and agents in their efforts to take possession of the property.
29. Mr. Hassett replied to Mr. Darragh O'Doherty of Beauchamps on 18th December, 2020. He asserted that he had no idea who Mr. O'Doherty was as Mr. Charleton had already engaged Mr. O'Sullivan of OSM, who had asked for and had been given an undertaking. Mr. Hassett wrote:-
- "Darragh I cannot spell this out any clearer, if you feel that you have the right based on my undertakings to commence legal proceedings then go for it, as I have offered and given comprehensive undertakings that have exceeded what I was asked for in the first place by ROS of OSM and Luke Charleton."*
30. Quoting the prophet Micah, 2: 1-3, Mr. Hassett wrote:-
- "But this is what the Lord says. 'I will reward your evil with evil: you won't be able to pull your neck from the noose. You will no longer walk about arrogantly, for this time will be a terrible time.'"*
31. Mr. Charleton took this correspondence to amount to a refusal to give the undertakings sought. The plenary summons was issued on 23rd April, 2021 and the motion for interlocutory relief now before the court issued on 11th May, 2021. The affidavit of Mr. Tom Ryan, filed on 30th August, 2021, shows that the summons was served personally on Mr. Hassett on 21st May, 2021. It is not evident when the notice of motion was served.
32. Mr. Hassett promptly entered an appearance on 28th May, 2021. By his notice of entry of appearance he called for delivery of a statement of claim. Under the rules, as they then were, a statement of claim ought to have been delivered within twenty one days.
33. On 1st September, 2021 Mr. Hassett swore an affidavit in answer to the motion. It is not altogether easy to follow.

34. The address for service given in the appearance is Pass Road, Clonconnane, Meelick, County Clare, and that is also the address which Mr. Hassett gives himself in his replying affidavit, which was sworn on 1st September, 2021. It is also the address shown for Mr. Hassett on the plenary summons and on the notice of motion. According to the affidavit of Mr. Charleton and the Ktech reports, the property is at Pass Road, Meelick, County Limerick: which of course it has to be, since it is a Limerick Folio. As I will come to, the plaintiff's case is that the defendant does not live at that address.
35. Mr. Hassett deposed that he made a substantial offer to have his debt paid in July, 2016 which was ignored. He has deposed that he and Mr. Charleton did not enter into a personal guarantee but that he did enter a trade agreement with a senior manager of AIB in 2008 in a public house in Limerick. This makes no sense.
36. Mr. Hassett suggests that there was a breach of EU Directive 85/557/EEC and S.I. No. 853 of 2004, which are, respectively, a Council Directive to protect consumers in respect of contracts negotiated away from business premises and the European Communities (Distance Marketing of Consumer Financial Services) Regulations, 2004. There is no indication as to how either measure might be engaged in this case. Mr. Hassett has deposed that the trade agreement did not include his "*Family Home*" and that the house at Pass Road, Clonconnane is his family home. He has deposed that he has vigorously maintained that position with a case manager in Link Finance and provided evidence to that effect in the way of household bills and running costs. He charged that Mr. Charleton and others are in clear contravention of S.I. No. 27 of 1995 and 2011/83/EC, which are, respectively, the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 and a Council Directive on consumer rights amending previous Directives, including 85/557/EEC. Mr. Hassett does not say in what respect the rights which he claims were infringed.
37. Mr. Hassett asserts that his rights as a senior and aged gentleman with severe incapacitating disabilities have been violated and that he wishes to question the legality of "*the previous order of 2016*" – which I take to be a reference to the order for summary judgment obtained by AIB on 25th July, 2016.
38. Mr. Hassett asserts that "*Receivers Luke Charleton et al*" were removed by AIB in November, 2019 and that he was not informed of their re-engagement as receivers and managers. Having deposed that "*Receivers Luke Charleton et al*" were removed by AIB in November, 2019 and that he had not been told thereafter of their re-engagement, Mr. Hassett immediately went on to say that Mr. Charleton is not the receiver and that "*it is indeed Luke Charleton and Damien Murray (sic.) as joint receivers.*"
39. Mr. Hassett challenges the validity of the appointment of receivers and managers and makes what appears to be a rather garbled reference to the judgment of McDonald J. in *McCarthy v. Moroney* [2018] IEHC 379. He also made a perplexing reference to *Morrison v. State* 252 S.W. 2d 97 – which is a 1952 decision of the Missouri Court of Appeals in relation to proposed medical treatment which is dangerous to life

40. Mr. Hassett in his affidavit did not really engage with Mr. Charleton's evidence but he asserted – without elaboration – that proper procedures of repossession in law were not taken by Link Asset or EY and he denied trespassing.
41. In response to the affidavit of Mr. Hassett, Mr. Charleton swore a second affidavit on 23rd September, 2021, in which he made three points. Mr. Charleton deposed that he was advised – he did not say when or by whom – that of the €830,841.40 for which judgment was recovered by AIB on 25th July, 2016, €545,903.21 plus interest remained due and owing after deductions made for the proceeds of receivership sales. He did not identify the receivership sales or give any breakdown of what was realised by them or when.
42. As to Mr. Hassett's contention that the property was his "*family home*", Mr. Charleton pointed to the Folio which showed that Mr. Hassett was registered as owner of the property on 26th October, 2004; to the mortgage which was signed on 12th December, 2005; and the credit agreement dated 24th October, 2008: all of which showed Mr. Hassett's address as Sixmilebridge, County Clare. Based on what he suggested were these objective facts, Mr. Charleton contended that there could be no dispute that the property was not Mr. Hassett's family home. Mr. Charleton deposed that he was advised – he did not say when or by whom – that Mr. Hassett had made no attempt to provide any credible evidence that AIB had notice that the property was being used as his principal private residence, and that Mr. Hassett had failed to provide any credible documentary proof that he was living in the property as his principal private residence, either at the date of demand or the date of appointment of the receiver. He suggested that the occupancy status of the property was evident from the photographs taken by Ktech and pointed to the report in February, 2020 that the power was switched off by the electricity company.
43. As to the current occupancy status of the property, Mr. Charleton pointed to a Ktech Property Inspection Form of 12th April, 2021 and attached photographs which was said to confirm that the water and power are turned off.

The application

44. By the notice of motion now before the court the plaintiff claims, first, an order directing the defendant his servants and agents and all persons in occupation or having notice of the order to forthwith vacate the property, and thereafter a number of orders restraining the defendant his servants and agents and all persons in occupation or having notice of the order from trespassing upon the property or obstructing or interfering with the plaintiff his servants and agents in carrying out his functions and duties as receiver and mortgagee's agent. On the hearing of the application it was said that the claim for an order directing the defendant to vacate the property was not being pursued. It was suggested, by reference to the Ktech property inspection form dated 12th April, 2021, that the plaintiff had possession. It was acknowledged that the threshold test for a mandatory interlocutory injunction was that the plaintiff would have to establish that he had a strong case likely to succeed but it was argued that because the plaintiff was pursuing only the prohibitory orders he need establish no more than that there was a fair question to be tried.

45. As to what locks are on the property, I would not be confident to find that after a protracted game of cat and mouse over fourteen months, the defendant had given up changing the locks and that the position on the ground in October, 2021 is the same as it was on 12th April, 2021: but I do not believe that anything much turns on that. The reality of the case is that the plaintiff asks for orders which will allow him to immediately sell the house. If such orders were to be made and the house sold, I cannot see that the action would ever come to trial. The plaintiff is quite candid as to his intentions and I believe that I am justified in inferring from the fact that no statement of claim has been delivered that if the orders now sought were to be made, the action would not be further pursued. In a case in which the practical effect of making interlocutory orders will be to determine the dispute once and for all, I believe that however the orders sought are framed, the plaintiff must meet the higher threshold.
46. Nor do I believe that in determining whether the orders sought ought to be made, I should attach any significance to which of the plaintiff or the defendant has most recently replaced the locks. Rather, the essential issue is the legal effect of the changing of the locks for the first time on 3rd March, 2020. If, immediately after that was done, the plaintiff was lawfully in possession of the house, any later interference by the defendant with that possession will have been trespass. If, on the other hand, the plaintiff was not entitled to change the locks, the defendant was perfectly entitled to change them.
47. Whether, if the plaintiff lawfully took possession of the house on behalf of Everyday, any interference by Mr. Hassett is actionable by him – rather than by Everyday – is another day’s work: to which I will come.

Analysis

48. The plaintiff, as I have said, was appointed in a dual capacity. He was, at the same time, appointed as receiver – invested with the powers created by the deed of charge and by law – and as the mortgagee’s agent – invested with whatever powers the mortgagee had under the deed of charge. It is acknowledged that *qua* receiver, the plaintiff is entitled to the rents and profits from the property: but there are none such and the plaintiff does not intend to let the property. It is acknowledged – quite correctly – that the plaintiff *qua* receiver has no power of sale. The case made is that the plaintiff, *qua* mortgagee’s agent, has lawfully taken possession of the property and is entitled to sell it and is entitled, as of right, to an injunction restraining the defendant from interfering with the sale.
49. For the reasons already given, I am not satisfied that the plaintiff has adduced sufficient evidence of the novation by Everyday of his appointment but what prompted me to give a written judgment is what I will quite frankly say is my disquiet as to the circumstances in which the dispute as to the entitlement to possession of this house arose and was thereafter escalated.
50. It is common case that Mr. Hassett was given notice by letter of 7th August, 2018 of the appointment by AIB of Messrs. Charleton and Murran as receivers and as the bank’s agents for the purposes of taking possession of the property. The case now made is that

the loan and security were transferred to Everyday on 14th June, 2019; that the appointment of Messrs. Charleton and Murran was novated on the same day; that Everyday was registered as the owner of the charge over the Folio on 27th August, 2019; and that Mr. Murran was discharged on 19th February, 2020. In the ordinary way it could have been expected that Mr. Hassett would have been given notice of the assignment, novation, and discharge but as far as the evidence goes, the locks on a house which was evidently occupied to at least some extent were changed without warning to anyone.

51. When, on 1st May, 2020, Mr. Hassett first asked to be told what EY's role was, he appears to have been provided with a copy of the original deeds of appointment but not any deed of novation or deed of discharge. When on 1st October, 2020 Mr. Hassett asked to inspect the original deed of mortgage, facility letter, deed of appointment, and any supplemental deeds his request was refused.
52. It seems to me that there are two parts to the first reason given for the refusal to permit inspection of the deeds: the first being that there was no obligation to produce them, and the second that the request had not been justified.
53. As to Mr. Hassett's right to inspect the documents, s. 91 of the Land and Conveyancing Law Reform Act, 2009 provides:-

"91. - (1) Subject to subsection (2), a mortgagor, as long as his right to redeem exists, may from time to time, at reasonable times, inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the possession or power of the mortgagee.

(2) Rights under subsection (1) are exercisable –

(a) on the request of the mortgagor, and

(b) on payment by the mortgagor of the mortgagee's reasonable costs and expenses in relation to the exercise.

(3) Subsection (1) has effect notwithstanding any stipulation to the contrary."
54. In refusing Mr. Hassett's request, it was not suggested that the deed of appointment, any supplemental deeds, or the facility letter, fell into any different category than the deed of charge. I cannot see how Mr. Hassett's right to inspect the documents could properly have been contested.
55. As to the second element of the first reason for the refusal, there is no obligation on the mortgagor to justify a request for inspection. That apart, as Mr. Hassett had pointed out in his request to inspect the documents, it is for the receiver, if his appointment is challenged, to prove the validity of his appointment. The fact of the matter was that someone had been sent by someone other than the original mortgagee to change the locks on Mr. Hassett's house and Mr. Hassett wanted to interrogate the asserted entitlement to have done so. He said that if he was satisfied that the appointment was

valid he would cooperate. Moreover, on the evidence, all that Mr. Hassett had been provided with was a copy of the deed of appointment by AIB which could not by itself have authorised Mr. Charleton to do anything on behalf of Everyday. In my view the request to inspect the documents relied on was abundantly justified.

56. As of 2nd March, 2020 – the day before the locks on the property were changed – it is clear that the defendant was legally in possession of the house. Everyday, as the registered owner of the charge, had the right to apply to the court under s. 62(7) of the Registration of Title Act, 1964 in a summary manner for possession.
57. The issue of general importance thrown up by this application is the manner in which a mortgagee – whether by itself or by proxy – is entitled to take possession of the mortgaged property. While the plaintiff's case is that he was appointed in a dual capacity as receiver and mortgagee's agent, it seems to me that his appointment – if he was so appointed – as receiver is immaterial because he did not and does not wish or intend to do anything qua receiver. *Qua* mortgagee's agent, the receiver cannot do anything that the charge holder cannot do. Nor, in my view, does the dual appointment serve to distinguish the plaintiff from any other person – for example an estate agent or a private security firm – who might have been appointed directly by the charge holder as its agent. Similarly, the plaintiff cannot have conferred on Ktech any authority to do anything that the charge holder might not have directly asked Ktech to do.
58. The rather anodyne description of what was done on 3rd March, 2020 is that the locks on the house and gate were changed. If no one has said so expressly, nevertheless it is quite clear that the Ktech agent did not have the keys to the several locks. The photographs show that the gate is a six bar tubular steel gate with a bolt and a locking hasp. Absent any suggestion that the padlock was picked, it seems to me that the inference is irresistible that it was cut. Similarly, to my mind, the inference is irresistible that the barrels were drilled out of the locks on the outer doors. There is a dispute – to which I will come – as to whether the property the subject of the action is the defendant's "family home" but whether it is or was the defendant's principal residence, the evidence is that it was certainly occupied by him.
59. Counsel for the plaintiff points to clause 8.02 of what is described in the grounding affidavit of Mr. Charleton as the Deed of Mortgage and which provides that:-

"8.02 At any time or times after the execution of these presents the bank may without any consent from or notice to the Mortgagor or any other person enter into possession of the mortgaged property or any part thereof or into receipt of the rents and profits of the mortgaged property or any part thereof."
60. This clause, it is said, entitled the plaintiff to do what was done on 3rd March, 2020.
61. The deed of charge dated 12th December, 2005 is the usual printed form of mortgage/charge by which the "mortgagor" demised to AIB such unregistered freehold or leasehold property as might be described in the schedule, and charged such property

described in the schedule as might be registered in the Land Registry, with payment to the bank of the secured moneys. The land the subject of these proceedings is registered land.

62. In the absence of provision to the contrary, a mortgagee of the legal estate in land is entitled to enter the mortgaged property at any time after the execution of the mortgage. The owner of a charge over registered land, by contrast, has no estate in the lands but *Gale v. First National Building Society* [1985] I.R. 609 is clear authority for the proposition that an express provision in a deed of charge of registered land permitting the registered owner of the charge to take possession in the event of default by the chargor creates a contractual licence between the parties under which the registered owner of the charge may take possession of the property without the necessity of obtaining a court order. However, as *Gale* makes clear, the registered owner of a charge (or a mortgagee of the legal estate in land) may only lawfully take possession if that can be done peaceably.
63. In *Gale v. First National Building Society* an auctioneer acting on behalf of a building society took possession of a house which had been vacant for at least 22 months. The report does not disclose exactly or even generally how he took possession, but it does show that the defaulting borrowers had left Ireland and Costello J. (as he then was) was in no doubt that possession was obtained peaceably. In *Irish Life & Permanent plc v. Duff* [2013] IEHC 43, Hogan J. suggested that *Gale* might need to be re-examined in the light of Article 40.5 of the Constitution and the contemporary jurisprudence concerning the interpretation of the constitutional protection of the inviolability of the dwelling but on its face, I do not understand *Gale* to be authority for the proposition that a chargee is entitled to take possession by changing the locks while the householder happens not to be at home.
64. In *ILG Limited v. Aprilane Limited* [2020] IEHC 420, I expressed scepticism of the argument made in that case 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. In that case counsel had referred 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. As I observed in *ILG Limited v. Aprilane Limited*, that 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 appeared 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 saw nothing in that case 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.

65. In support of the application counsel for the plaintiff relies on the decision of the Court of Appeal in *Vitgeson v. O'Brien* [2019] IECA 184. That case is authority for the proposition that a rent receiver may later act in marketing the property for sale. I am uncertain that it deals with the question of appointment in a dual capacity as opposed to successive engagements but that is not an issue which arises in this case. Whatever about the capacity in which he was appointed, Mr. Charleton does not act or wish to act as receiver but only as mortgagee's agent to recover or retain possession with a view to sale.
66. Reliance was also placed on the decision of Costello J. in *Havbell DAC v. Maria (otherwise Mariah) Isabel Dias (otherwise Harvey)* [2018] IEHC 175. That was a case in which the assignee of a charge sought an interlocutory order to recover possession of the mortgaged property from a purported tenant of the mortgagor. The mortgagor had executed a voluntary surrender in favour of the original mortgagee and the purported tenancy had been granted in breach of a negative pledge. The primary ground on which the order was made was that the defendant was shown to have been a trespasser. Again, it does not appear to me to be on point.
67. The judgment of Reynolds J. in *Murphy v. Doran and Murphy* [2020] IEHC 28, to which the court was referred, is relevant to one of the issues which Mr. Hassett has raised. The plaintiff in that case was a receiver appointed by the assignee of the mortgage and loan facility. The defendants sought to resist the application on the ground that the property was their principal private residence and that they were entitled to the protection of the Code of Conduct on Mortgage Arrears. The evidence was that the original lending was expressly for the purpose of buying the property as a buy-to-let and that that the defendants had first moved into it four and a half years later. Applying the principles established by *Fennell v. Creedon* [2015] IEHC 711 and approved by the Court of Appeal in *Tyrrell v. Wright* [2018] IECA 295, Reynolds J. was satisfied that the Code of Conduct did not apply in a case in which the first defendant had drawn down a commercial mortgage for the purpose of purchasing a residential investment property.
68. In this case Mr. Hassett has sworn that the property is his "family home", by which I understand him to mean that it is his principal private residence. Mr. Charleton has expressed his concern at that contention but has not positively averred otherwise. By reference to the Ktech reports and photographs the house does not immediately look like anyone's principal private residence but any inference based on what the unidentified Ktech agent was told by an unidentified neighbour that it is not, would be based on second-hand hearsay. More to the point, perhaps, on the authorities, the relevant time is the time at which the loan was drawn down and not the time at which the mortgagee seeks to recover possession.
69. If the evidence was otherwise clear I would have been prepared to overlook the fact that the plenary summons and notice of motion were addressed to Mr. Hassett at the security

address but it seems to me that there is a conflict on the evidence which I cannot resolve on this application.

70. I do not believe that it is of any significance that the address given for Mr. Hassett on the Folio is Feenagh Lodge, Sixmilebridge, County Clare. Mr. Hassett was registered as the owner of the lands on 26th October, 2004, which was about thirteen months before he executed the charge.
71. The address shown on the deed of charge is Streamstown, Sixmilebridge, County Clare: but that would not necessarily be inconsistent with a loan to build a house on the lands, to be used as a principal private dwelling. What has been exhibited by Mr. Charleton as a copy of the deed of charge is a printed form apparently entitled but perhaps overwritten "*Copy Mortgage/Charge Re s. 130 Consumer Credit Act, 1995.*" Section 130 of the Consumer Credit Act, 1995 requires a mortgage lender in respect of a housing loan to issue to the borrower a copy of the mortgage deed. A "*housing loan*" is defined by s. 2 of the Act of 1995 as an agreement for credit on the security of a mortgage where the loan is made for the purpose of enabling the borrower to provide or improve a house, or for the purpose of refinancing such a loan, or the house is to be used or continue to be used as the principal residence of the borrower or his dependants. A "*borrower*", for the purposes of the Act of 1995, is a consumer acting as a borrower.
72. As evidence of the security held over the property, Mr. Charleton relies on a facility letter of 24th October, 2008, addressed to Mr. Hassett at what may be to be yet another County Clare address – Feenagh House, as opposed to Feenagh Lodge, Sixmilebridge, County Clare – but as the summons and notice of motion show, the address shown on documents may not always be reliable. The facility letter relied on post-dates the charge by nearly three years; and it includes a series of waivers of rights under the Consumer Credit Act, 1995.
73. Whether, at the relevant time, Mr. Hassett was or was not a consumer, AIB certainly dealt with him as if he was.
74. In *Fennell v. Creedon*, *Tyrrell v. Wright*, and *Murphy v. Doran and Murphy* the loans were clearly drawn down as commercial loans and the borrowers had moved into the secured properties years later. The letter of 24th October, 2008 is fairly obviously a refinancing agreement for it provides for a facility of €650,542 repayable by 30th March, 2009. The 2008 facility letter shows the purpose of the lending as "*Property Related*", which could be housing or commercial. The original facility letter is not before the court nor is there anything from which the court could confidently decide the purpose of the original lending.
75. Finally – and not because it was of any materiality but because it loomed large in argument – I want to say something about the beehive allegation. On the hearing of the motion, Mr. Hassett was indignant at the suggestion that he had placed a beehive outside the front door. Counsel for Mr. Charleton objected to him saying that on the basis that he

had not, in his replying affidavit, denied that he had placed a beehive outside the front door.

76. Mr. Charleton in his grounding affidavit exhibited and briefly summarised a number of Property Status Reports by Ktech to EY. The Property Status Report of 7th October, 2020 was a chronicle, set out in a table, which was reproduced in in the body of the grounding affidavit and included an entry against 14th September, 2020 that:-

"EY emailed to advise that a sales agent had attended and found that locks had been changed and beehive had been put outside the front door."

77. The immediately preceding entry, on 7th September, 2020, was to the effect that Ktech had emailed EY to advise no further interference to date, and the entry immediately following, for 17th September, 2020 recorded that Ktech had attended and changed the locks back on the front door only, and that the rest of the doors had keys broken in the locks externally.
78. Mr. Charleton does not expressly depose to his belief in the truth of what was reported by Ktech but if I take it that he does believe what he was told by Ktech, what he was told by Ktech was not that a beehive had been put outside the front door but that someone in EY had told someone in Ktech that at an unspecified time an unidentified sales agent had told someone in EY that a beehive had been put outside the front door. Strictly speaking, the entry for 7th September, 2020 did not record that anyone had attended at the property before EY was advised that there had been no further interference and, as will have been noted, there was no report from Ktech that anyone from that firm had seen a beehive. Nor in the dúirt bean liom entry of 14th September, 2020 is there any indication as to what might have become of any beehive.
79. I find that the evidence is insufficient to establish that Mr. Hassett put a beehive outside the front door. If he had, he would have been perfectly entitled to do so unless he had been lawfully dispossessed on 3rd March, 2020.

Conclusions

80. I am bound to say that I found the plaintiff's case to be confusing. In form it was an application for interlocutory relief but in substance it appeared to me to be an application for summary judgment. On the one hand – on the basis that when the music stopped it was the plaintiff's locks that were on the property – the court was invited to approach the case on the basis that there was a fair issue to be tried, but on the other – particularly by reference to the plaintiff's second affidavit – the argument seemed to be that the defendant had failed to establish a *bona fide* defence.
81. If, for the sake of argument, the plaintiff had adduced satisfactory proof of the novation by Everyday his appointment by AIB, the action was commenced, and the motion issued significantly upwards of two and a half years after the plaintiff's appointment and about 22 months after the transfer of the loans to Everyday and the suggested novation of the

receivership and agency. In my view, if not on any view, the *status quo ante* was that the defendant was in possession of this house and was refusing to give it up.

82. The premise of the argument that the defendant had interfered with the process was that the had obstructed the plaintiff in the carrying out of his duties both as receiver and mortgagee's agent by changing the locks without consent. But if it was an interference with the plaintiff's possession and unlawful for the defendant to have changed the locks without the plaintiff's consent, I find it difficult to see how it could have been lawful for the plaintiff to have changed the locks without the defendant's consent at a time when the defendant was unquestionably in lawful possession of the property.
83. The premise of the application was that the defendant had "*flouted the receivership process*" but the plaintiff did not, *qua* receiver, claim to have a power of sale. In my firm view a refusal by a mortgagor to surrender within a week of a demand for possession does not amount to an unlawful attempt to frustrate a receiver or mortgagee's agent in achieving what the mortgagor wants to do with the property.
84. On the evidence I do not accept that Mr. Hassett refused to give the undertakings sought. Rather he said that he would cooperate with Mr. Charleton, subject to being shown evidence of the validity of his appointment. For the reasons given, Mr. Hassett was entitled to inspect the title deeds.
85. The premise of the application for interlocutory relief was that damages would not be an adequate remedy if the action were to take its ordinary course but there is no evidence as to the value or estimated value of the property and no suggestion that the property is deteriorating. At the time of swearing of the grounding affidavit on 30th April, 2021 the plaintiff was advised by Everyday that the defendant's current liability under the loan facility – not the judgment – was €636,225.90. At the time of swearing of his second affidavit the plaintiff was advised by someone that the liability on foot of the judgment was €545,903.21, following deductions for the proceeds of receivership sales to which no reference had been made in the earlier affidavit. The uncontested evidence of the plaintiff is that the efficient disposal of the mortgage security for the best price achievable is in the best interest of the defendant having regard to the level of his indebtedness and that without vacant possession the security will be very difficult if not impossible to realise. But by contrast with *Charleton v. Coates* [2021] IECA 58, on which the plaintiff relies – there is no evidence of the value of the property with vacant possession. As I have said, it is common case that the property is not generating any rent which is sought to be preserved *pendente lite*.
86. If I were to approach the case on the basis that the plaintiff has made out a fair question to be tried, or even a strong case, that the defendant is unlawfully interfering with the plaintiff's right to possession it seems to me that I could not make any assessment of the adequacy of damages without some evidence that if the case were to go to trial in the ordinary way it would likely realise less than the liabilities secured by the charge. If, for the sake of argument, there was evidence that the realisable value of the property with vacant possession was €1 million, there would be little risk of injustice in allowing the

action to go to trial. To be sure, if the action were to succeed, the practical effect of refusing interlocutory relief would be that the charge holder's remedy would have been postponed: but interest on the loan continues to accrue and it would have suffered no loss.

87. By the same token, it seems to me that without any evidence that the property is likely to realise less than the secured liabilities there is little basis for concluding that the intervention of the court is called for at this time.
88. This brings me on to the next issue. The premise of the plaintiff's case is that he acts as the agent for Everyday and that as the agent of Everyday he lawfully took possession of the property and that the defendant has unlawfully interfered with that possession. By the terms of the appointment relied on, the plaintiff was authorised to act on behalf of the charge holder as mortgagee in possession in securing possession and effecting a sale. The plaintiff was not expressly authorised to sue on behalf of Everyday and Everyday has not sued on its own behalf. If the changing of the locks was lawful and effective to recover possession of the property on behalf of Everyday, it seems to me that from then on it could only have been Everyday's possession that could have been interfered with by the changing and re-changing of the locks. There is no evidence that Mr. Charleton has any interest in when the security will be realised. As between the plaintiff and the defendant, then, the balance of justice must lie squarely in favour of the defendant.
89. For completeness, I mention that any offer of settlement that might have been made and refused – reasonably or unreasonably – is irrelevant. So too is Mr. Hassett's expressed desire to revisit the money judgment obtained against him by AIB. That is something which he is not entitled to do.
90. Having carefully considered the case I find that my initial impression of it has been reinforced. It is an attempt to use an interlocutory injunction as a means of attempting to obtain summary judgment. It is not, in truth, as Clarke C.J. put it in *Charleton v. Scriven*, a case in which the court is asked to fashion an appropriate order at the interlocutory stage to attempt to put in place a regime pending trial that runs the least risk of injustice, having regard to the uncertainty as to what the ultimate result of the trial may be.
91. For the reasons given the motion must be refused.
92. I will deal with the question of costs on 14th December, 2021 at 11:00 a.m.