Neutral Citation No: [2019] NICA 39 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McA10948** *Delivered:* **03/05/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE (CHANCERY DIVISION)

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BETWEEN:

COLIN RICHARD JENNINGS AND MICHAEL SKINNER
OF LAMBERT SMITH HAMPTON
AS FIXED CHARGE RECEIVERS
IN RESPECT
OF PREMISES SITUATE AND KNOWN AS
60 ROCKDALE ROAD, COOKSTOWN, BEING ALL THE LAND AND PREMISES COMPRISED IN FOLIO 13054 COUNTY TYRONE, 13056 COUNTY TYRONE AND TY7443 COUNTY TYRONE

Respondents/Plaintiffs;

-and-

DECLAN QUINN

Appellant/Defendant.

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Before: Deeny LJ, McAlinden J and Sir Ronald Weatherup

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McALINDEN J (delivering the judgment of the court)

[1] These are conjoined appeals by Mr Declan Quinn against decisions of the Lord Chief Justice sitting as the Chancery Judge on 14 July 2017 and McBride J on 28 June 2018 arising out of the actions of Mr Jennings and Mr Skinner who were appointed as Fixed Charge Receivers by Barclays Bank in respect of two properties owned by Mr Quinn. Although legally represented in the lower Courts and at an earlier stage before the Court of Appeal, Mr Quinn represented himself in the substantive hearing of these appeals before the Court of Appeal and Mr Keith Gibson of Counsel has at all times appeared for the Fixed Charge Receivers.

Background

[2] On 19 July 2013 Mr Quinn entered into a mortgage deed with Barclays Plc ("the bank") whereby he granted the bank a legal charge over lands comprised in Folios 13054, 13055 and TY7443 County Tyrone ("the subject lands"). The charge was registered as a burden on the lands on 10 September 2013. Following the provision by the bank of a term loan facility to Mr Quinn in February 2014, on 4 June 2014, Mr Quinn entered into another mortgage deed with the bank whereby he granted the bank a legal charge over premises situate at 414 Ormeau Road, Belfast. In September and October 2015, after Mr Quinn fell into arrears of payment, the bank formally demanded payment of the full amounts due by Mr Quinn to the bank. By letter dated 10 November 2015 the bank indicated that the total sum due and owing was £652,761 before accrued interest. Before the lower Courts, Mr Quinn accepted that he entered into the mortgage deeds and that he had not satisfied the bank's demand for the monies due by him. Before Morgan LCJ, Mr Quinn did not challenge the appointment of receivers or the validity of the deeds under which they were appointed.

[3] On 28 January 2016 a Restraint Order was made on the application of the Director of Public Prosecutions in Northern Ireland under the Proceeds of Crime Act 2002, prohibiting the defendant from disposing, dealing with or diminishing the value of any of his assets. This prohibition specifically included the lands contained in Folio TY7443 and 13054 County Tyrone and the property at Ormeau Road, Belfast. It also included "all other realisable assets to which the alleged offender is entitled or in which he has a beneficial interest". At this time, Mr Quinn was in the process of carrying out refurbishment work to the property at Ormeau Road, Belfast with a view to either selling the property or letting the property to commercial tenants. He had engaged Lambert Smith Hampton to act for him in this regard.

[4] On 10 February 2016, the bank appointed Mr Jennings and Mr Skinner of Lambert Smith Hampton as receivers of the subject lands and also of premises situate at 414 Ormeau Road, Belfast in exercise of the power contained in clause 6 of the mortgage deed. Mr Jennings and Mr Skinner confirmed acceptance of appointment as receivers on the same date. At that time and indeed before the Lord Chief Justice, Mr Quinn did not dispute that the bank was entitled to appoint receivers pursuant to clause 6 of the mortgage deeds nor was it disputed that by virtue of the said clause the receivers were entitled to enter into possession of the property and lands and sell same.

[5] In relation to the Ormeau Road property, the receivers initially marketed the property for sale or letting. They eventually opted to proceed with the sale of the property and this took place in May 2017. It is important to note that Mr Quinn took no steps at this time to challenge the appointment of the receivers in respect of the Ormeau Road property or their decision to sell this property. In relation to the lands in Tyrone, the receivers entered into discussions with the owner of neighbouring property, Mr Kelso, as a result of which they agreed to sell the subject lands to

Mr Kelso for the sum of £600,000. On 8 July 2016 the High Court varied the Restraint Order to permit the receivers to sell the lands and on 28 September 2016 the Restraint Order was further varied to allow the receivers to receive the sum of £600,000 following the sale of the subject lands, to partially satisfy the debt owed by the defendant to the bank. In the meanwhile, Mr Quinn would appear to have continued to engage in some farming activities on the subject lands, including cutting silage.

[6] On 27 October 2016 the receivers were informed by the PSNI that Mr Quinn had commenced laying a lane and services to a derelict building on the subject lands. Further enquiries were made by the receivers to verify that such activities were taking place. They contacted their estate agents who took photographs of the works. The receivers monitored the position and on 25 January 2017 were informed that there was considerable construction work being conducted on the subject lands including the presence of a digger, two vehicles and four or five men. An old derelict property which comprised a farmhouse had been knocked down and new foundations laid.

[7] Solicitors on behalf of the receivers wrote to Mr Quinn on 30 January 2017 requiring him to immediately desist from works on the site. In the absence of any reply Mr Jennings and Mr Skinner issued proceedings on 1 February 2017 claiming damages for trespass and unlawful interference with the subject lands and an injunction to prevent further such trespass. On the same day an application for an interlocutory injunction was issued seeking an injunction pending the trial of the action to restrain Mr Quinn, whether by himself or by his servants and agents or by anyone whomsoever, from "(a) carrying out any further works to property situate and known as 60 Rockdale Road Cookstown being all the land and premises comprised in Folio 13054 County Tyrone, 13055 County Tyrone and TY7443 County Tyrone; or (b) trespassing or entering onto the lands contained in 60 Rockdale Road, Cookstown being all the land of premises comprised in Folio 13054 County Tyrone, 13055 County Tyrone and TY7443 County Tyrone.

[8] The interlocutory injunction application was listed for hearing before Burgess J on 7 March 2017. On the application of Mr Quinn, the case was adjourned to enable him to explore alternative means of funding and to investigate the possibility of obtaining an offer at a higher price than the £600,000 agreed with Mr Kelso. The matter came before the Lord Chief Justice on 12 May 2017 and in the course of the hearing the Lord Chief Justice gave leave for certain further written material and submissions to be made by 2 June 2017. In essence, Mr Quinn's case before the Lord Chief Justice was that he needed more time to put in place alternative financing to pay off the debt owed to Barclays and in any event the farm was worth considerably more than the sum of £600,000. On 14 July 2017 the Lord Chief Justice granted an interim injunction restraining the defendant, whether by himself or by his servants and agents, from carrying out any further works to the subject lands.

[9] On 21 July 2017, Mr Quinn issued an originating summons seeking an injunction restraining Mr Jennings and Mr Skinner from entering into a contract for sale of the subject lands until the said lands had been marketed by them on the open market. Again, it is important to note that he did not challenge their entitlement to sell the lands. On 25 July 2017, Maguire J granted an interim injunction on foot of Mr Quinn's originating summons. Mr Quinn also appealed the order of the Lord Chief Justice made on 14 July 2017. The matter was initially listed before the Court of Appeal on 31 January 2018. On that occasion, the Court of Appeal adjourned the appeal until the receiver's substantive action and Mr Quinn's related application could be heard by the Chancery Judge, primarily because a number of the issues raised by Mr Quinn in relation to his appeal against the decision of the Lord Chief Justice had not received substantive final adjudication.

[10] The substantive action came on for hearing before McBride J on 12 March 2018 with the hearing lasting a number of days and judgment being delivered on 28 June 2018. It should be remembered that in this action, commenced by Writ of Summons, the receivers sought damages against the Defendant arising out of the Defendant's trespass and unlawful interference with the Plaintiffs' property. The Plaintiffs also sought an injunction to prevent any further trespass. The Court also had to adjudicate upon Mr Quinn's Originating Summons which was issued on 21 July 2017 in which he sought an injunction restraining the Plaintiffs from entering into a contract for sale or selling the farm in Tyrone until the said lands had been marketed by the Plaintiffs on the open market. Importantly, although the Plaintiffs had been appointed as Fixed Charge Receivers under two separate mortgage deeds relating to two separate properties, Mr Quinn only sought to challenge the actions of the receivers in respect of one of those appointments. Their appointment in respect of the Ormeau Road premises was not challenged nor was their decision to sell those premises in May 2017.

[11] The parties agreed that the various affidavits sworn by Mr Jennings, Mr Quinn and Mr Kelso would stand as the pleadings. In addition to this affidavit evidence, the Court heard oral evidence from Mr Jennings, Mr Thompson, a registered valuer, the Defendant and Mr Paudge Quinn, estate agent. At the hearing before McBride J, Mr Quinn accepted that he had entered into the mortgage in respect of the Tyrone farm and that he had not satisfied the demand for payment. He further accepted that the bank was entitled to appoint receivers. The case advanced on behalf of Mr Quinn was as follows:

(a) Mr Jennings and Mr Skinner were not properly appointed as they had a conflict of interest in that they were employed by Lambert Smith Hampton and this company had been engaged by Mr Quinn to sell or let the Ormeau Road premises.

(b) Mr Jennings and Mr Skinner were not entitled to enter into possession in the absence of a court order save with the consent of the defendant.

(c) Mr Jennings and Mr Skinner were acting in breach of their duties to Mr Quinn by proposing to sell the subject lands at an undervalue and without placing them on the open market for sale.

[12] Having regard to the issues raised by Mr Quinn and the concessions made by him, the Court set about answering the following seven questions:

(a) Was Barclays Bank entitled to appoint Mr Jennings and Mr Skinner as receivers?

(b) Are Mr Jennings and Mr Skinner, as receivers, entitled to enter into immediate possession of the subject lands in the absence of a court order?

(c) Is Mr Quinn entitled to remain in possession of the lands or is he a trespasser?

(d) Are Mr Jennings and Mr Skinner entitled to injunctive relief to restrain trespass on the subject lands by Mr Quinn?

(e) What duties do Mr Jennings and Mr Skinner, as receivers, owe to Mr Quinn when selling the mortgaged property?

(f) Are Mr Jennings and Mr Skinner in breach of their duties on the basis that either:

(i) They did not market the lands on the open market; and/or
(ii) The proposed sale is at an undervalue.

(g) Should the court grant injunctive relief to Mr Quinn to restrain the proposed sale to Mr Kelso?

[13] In her judgment dated 28 June 2018, McBride J in answering these questions rejected Mr Quinn's arguments and ordered Mr Quinn to pay nominal damages for trespass and made an order restraining him from trespassing on, entering onto or carrying out any works on the subject lands. Following the handing down of this judgment, Mr Quinn served a Notice of Appeal. In addition, Mr Quinn also issued a Notice of Motion claiming injunctive relief seeking to prevent Mr Jennings and Mr Skinner from selling the subject lands to Mr Kelso. The matter was reviewed by the Court on 4th July 2018 and on that occasion Mr Jennings and Mr Skinner gave an undertaking not to proceed with the sale until the substantive appeal was determined. It is clear that this Court's adjudication on the questions set out above will dispose of Mr Quinn's application for injunctive relief and his appeal against the decision of the Lord Chief Justice.

[14] Mr Quinn, the Appellant, in his Skeleton Argument prepared for the purposes of these appeals concentrated on the questions posed in paragraph [12] and it is therefore appropriate for this Court to dispose of these appeals by addressing these

questions in turn although in a slightly different sequence. Prior to addressing the substance of the Appellant's arguments, it is worthy of note that in the period between judgment being given by McBride J and the substantive hearing before the Court of Appeal on 8 April 2019, Mr Quinn applied to have the Restraint Order imposed by Maguire J on 28 January 2016 discharged. Keegan J heard such an application on 15 October 2018 and declined to discharge the Order at that time. Mr Quinn renewed his application on 18 February 2019 and Keegan J by Order dated 28 February 2019 discharged the Restraint Order on the basis of the delay in bringing charges against Mr Quinn, the police investigation having commenced in 2015. On the same date this Court adjourned the hearings of these appeals to 8 April, on Mr Quinn's application, to allow him to prepare for these appeals and explore settlement with the Plaintiffs.

[15] Mr Quinn applied for a further adjournment of the hearing before the Court of Appeal on 8 April 2019 on the basis that the Restraint Order had recently been lifted and he was almost in a position to fund legal representation to prosecute his appeal properly. In addition, he stated that he was willing to enter into binding mediation with the Bank re the outstanding debt and had agreed heads of terms with an English finance company, identified as TFI Finance, to enable him to secure funding to discharge the debt owed to the Bank. Mr Quinn stated that he was in a position to provide the letter setting out the heads of terms to the Solicitors for the receivers and the Court rose for a short time to allow the parties to discuss this development. Upon the Court sitting again, the Court was informed that Mr Quinn was unable to produce any such letter. He said it must have been left in his office rather than being placed in the file which he had taken to Court. Mr Quinn also stated that he had sought a report from an English expert in duties of fixed charge receivers and he was awaiting this report and wished to adduce the same in evidence at the hearing of the appeal.

[16] Mr Gibson for the receivers confirmed that his clients were opposed to any further adjournment of the hearing of the appeal. The Court noted that the matter had been adjourned on a number of occasions at Mr Quinn's request. The Court noted that the Bank had previously informed Mr Quinn that it was not prepared to engage in mediation as the debt had not at any stage been disputed. The Court noted that the matter had previously been adjourned to allow Mr Quinn to secure legal representation and/or alternative funding to discharge the debt owed to the Bank and that on the last occasion when the matter was adjourned, Mr Quinn was informed that no further adjournments would be permitted. It is to be noted from paragraph [7] of the judgment of the Lord Chief Justice that the receivers' application for an interim injunction was adjourned by Burgess J on 7 March 2017 "…to enable him to explore alternative means of funding…". Therefore, Mr Quinn's quest for alternative funding has been ongoing for over two years. Having considered Mr Quinn's application, the Court determined that the receivers were entitled to have this matter dealt with and that the appeal should proceed as no new material had been put forward by Mr Quinn which would justify a further adjournment of the matter.

[17] Although the Court proposes to dispose of this appeal by addressing the questions set out in paragraph [12] above, it is clear from Mr Quinn's skeleton argument that the gravamen of his case as contained in his lengthy skeleton argument served on 27 March 2019 and his speaking note served on 8 April 2019 is that (a) Mr Jennings and Mr Skinner should not have been appointed as fixed charge receivers in the first place due to a conflict of interest and (b) these receivers were proposing to sell the subject lands at a substantial undervalue. In making this case, Mr Quinn seeks to challenge a significant number of factual findings of the trial Judge, who had the benefit of hearing oral evidence from a number of witnesses including Mr Jennings and Mr Quinn.

[18] Having regard to the nature of the challenge mounted by Mr Quinn to the Judge's factual findings, it is important to emphasise the role of the appellate Court in such circumstances. Lord Hodge's speech in *Carlyle v Royal Bank of Scotland* [2015] UKSC 13 provides a useful synopsis.

> "[21] But deciding the case as if at first instance is not the task assigned to this court or to the Inner House. It is not appropriate to restate at any length in this judgment the dicta from prior cases which this court recently set out in *McGraddie v McGraddie* (at paras 1-4) and discussed in *Henderson v Foxworth Investments Limited* (at paras 61-68). In *Thomas v Thomas* the House of Lords re-asserted the need for an appellate court to defer to the findings of fact of the first instance judge unless satisfied that the judge was plainly wrong (Lord Thankerton at p 55, and Lord MacMillan at p 59). Lord Du Parcq expressed himself differently but to similar effect when he quoted (at pp 62-63) Lord Greene MR in *Yuill v Yuill* [1945] P 15 (at p 19):
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> > 'It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.'
>
> Lord Reed summarised the relevant law in para 67 of his judgment in *Henderson* in these terms:
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> > 'It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a

> demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.'

When deciding that a judge at first instance who has heard the evidence has gone "plainly wrong", the appeal court must be satisfied that the judge could not reasonably have reached the decision under appeal.

[22] The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantages which the first instance judge has in assessing the credibility of witnesses. It is the first instance judge who is assigned the task of determining the facts, not the appeal court. The re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a greater familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence. On these matters see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, Lord Wilson at para 53; the US Supreme Court in *Anderson v City of Bessemer* 470 US 564 (1985), pp 574-575; and the Canadian Supreme Court in *Housen v Nikolaisen* 2002 SCC 33, para 14, to all of which Lord Reed referred in paras 3 and 4 of *McGraddie*."

[19] The Court also considers it necessary to remind litigants that insofar as they seek on appeal to raise factual issues which were not raised before the trial Judge, it is necessary to seek leave to do so and such leave will only be granted if the various limbs of the test laid down in Ladd v Marshall [1954] 1 WLR 1489 are satisfied. In summary, it will be necessary for the party seeking to raise new matters to demonstrate that:

(a) the evidence could not have been obtained with reasonable diligence at the original trial;

(b) it would probably have had an important influence on the result, though it need not be decisive; and

(c) it must be apparently credible though not incontrovertible.

[20] By means of the voluminous written submissions made by Mr Quinn for the purposes of this appeal, Mr Quinn sought to raise some new issues before the Court of Appeal but he did not seek leave to adduce any new evidence and, in his oral submissions, he mainly concentrated on material and arguments made before McBride J at first instance and the Court proposes to determine the appeals on the basis of the material before the lower Court.

Question 1 – Is the bank entitled to appoint Mr Jennings and Mr Skinner as receivers?

[21] Mr Quinn's case is that the Belfast office of Lambert Smith Hampton were engaged by him in June 2015 to rent his premises at 414 Ormeau Road. He submitted that as Mr Jennings and Mr Skinner were employed by Lambert Smith Hampton albeit in their Manchester office, they had a conflict of interest and therefore could not be appointed by Barclays Bank as fixed charge receivers. Mr Jennings in his evidence denied there was a conflict of interest. He stated that he worked in England and worked in an entirely different department from the department that had advised Mr Quinn in relation to the marketing of the premises on the Ormeau Road. It is important to note that Mr Quinn did not challenge the appointment of Mr Jennings and Mr Skinner when they proceeded to sell the Ormeau Road premises.

[22] Further, even if Mr Quinn had sought to challenge the appointment of Mr Jennings and Mr Skinner prior to the sale of the Ormeau Road premises on the basis that his alleged engagement of Lambert Smith Hampton (LHS) to advise on the rental those premises and the subsequent engagement of employees of the same company by the Bank as fixed charge receivers to sell those premises gave rise to a conflict of interest, such an argument would have been easily and successfully rebutted on the facts of this case as even a cursory analysis of the relevant documentation clearly reveals that Mr Quinn engaged LHS to advise in relation to the sale or rental of the Ormeau Road premises and when Mr Jennings and Mr Skinner were appointed as fixed charge receivers they also initially pursued the same twin track approach of ascertaining whether the premises could be sold or rented. Before the Court of Appeal, Mr Quinn also argued that, as his letting agent, LHS had access to confidential information about his business affairs which the same company as fixed charge receivers for the Bank was able to misuse against him. He specifically referred to the loan to asset values of the properties subject to the charges. The engagement of LHS by Mr Quinn was to facilitate the sale or rental of the Ormeau Road premises. The engagement of LHS by the Bank was for precisely the same purposes. Mr Quinn was unable to demonstrate how any information about the loan to asset values of the properties subject to the charge could be used against him. There is nothing to suggest that information relating to the loan to asset values of the properties subject to the charges in any way influenced the fixed charge receivers in their decision making. The information specifically referred to by

Mr Quinn would quite independently have been readily apparent to the receivers once appointed in any event. On the facts of this case, there was no actual conflict of interest in relation to Ormeau Road premises and in relation to the lands which are the subject of this appeal. Mr Quinn cannot even point to a theoretical conflict of interest as LSH was never engaged by him to advise in respect of the subject lands.

[23] Because the Court has so readily disposed of the conflict of interest argument raised by Mr Quinn on the facts of this case, it is unnecessary for the Court to determine whether in law a conflict of interest is a ground for disqualifying a fixed charge receiver. It is clear that both the Association of Property and Fixed Charge Receivers and the Royal Institution of Chartered Surveyors place great emphasis on the necessity of avoiding engaging in relevant professional activities where a conflict of interest could arise. The Court assumes without deciding the point that a mortgagee could be prevented from appointing a fixed charge receiver where a conflict of interest existed and insofar as the decision of the lower Court could be interpreted as supporting the proposition that a conflict of interest is not a ground for disqualification of a fixed charge receiver, subject to further argument on this point, this Court would not be inclined to favour or support that interpretation.

[24] It was not seriously disputed by Mr Quinn in this case that under section 19(1)(iii) of the 1881 Conveyancing and Law of Property Act ("the Conveyancing Act") the lender has a statutory power to appoint a receiver once the mortgage money has become due. Nor was it disputed that under section 20 of the Conveyancing Act this power is exercisable when the following conditions have been met:

> "(i) Notice requiring payment of the mortgage money has been served on the mortgagor … and default has been made in payment of the mortgage money, … for three months after such service; or
>
> (ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
>
> (iii) There has been a breach of some provision contained in the mortgage deed …"

[25] In respect of the question, "Who may be appointed as a Conveyancing Act receiver?", *Fisher and Lightwood's, Law of Mortgage, 14th Edition* at paragraph 28.7 states:

> "When the statutory power is exercisable the mortgagee may appoint, in writing, such person as he thinks fit to be receiver … The mortgagee may owe a duty in the manner

> in which he exercises the right, for instance, to take reasonable care not to appoint an incompetent. Subject to that, there are in general, few restrictions on who may be appointed as receiver."

[26] Even a cursory examination of both mortgage deeds executed in this case reveals that the Bank was given the express power under clause 6 of each mortgage deed to appoint fixed charge receivers and that having regard to acceptance by Mr Quinn that he had entered into both mortgage deeds and had and has not satisfied the bank's demands for payment, it is clear that the Bank had a statutory power and a power under the mortgage deeds to appoint receivers and in the circumstances which had arisen this power was exercisable.

[27] In his written submissions and his oral arguments before the Court of Appeal, Mr Quinn placed reliance on rules, evidential provisions and guidance of the "Consumer Credit Sourcebook" in particular "CONC 2 Conduct of business standards: general" and "CONC 7 Arrears, default and recovery (including repossessions)" He argued that by reason of the failure of the Bank to comply with these rules, evidential provisions and guidance, the Bank was somehow prevented from exercising its statutory and contractual power to appoint fixed charge receivers to realise the assets which were the subject of the charges in order to discharge the mortgagor's indebtedness to the mortgagee. It would appear that this argument was not advanced before the lower Court in anything like the same degree of detail as is evident in the written submissions before the Court of Appeal. Regardless of that potential to its serious consideration by this Court, it is, however, an argument that is fundamentally flawed. This appeal does not arise out of a consumer credit agreement. These were commercial loans and no material was put before the Court to support the case that the provisions of "CONC" have any application to the circumstances of this case.

Question 2 – Do Mr Jennings and Mr Skinner as fixed charge receivers have an immediate right to possession of the subject lands in the absence of a court order?

[28] It is Mr Quinn's case that Mr Jennings and Mr Skinner as fixed charge receivers were only entitled to enter into possession of the subject lands if they either had his consent or had obtained a court order for possession. On behalf of Mr Jennings and Mr Skinner it was argued that they were entitled to enter into possession without a court order as Clause 6 of the Mortgage Deed stated the receiver had power to:

> "(i) Take possession of, collect and get in all or any of the mortgaged property …
>
> (iv) To sell by public auction or private contract …

> (x) To do all such acts and things as may be considered to be incidental or conducive to any of the matters or powers aforesaid …"

[29] It is clear that the fixed charge receivers in this case had an immediate right to possession of the subject lands upon their appointment without the need to first seek a court order for possession. As the learned trial Judge rightly observed, the powers of a receiver are set out in section 24(3) of the Conveyancing Act. These powers can be varied or extended by the mortgage deed. *Fisher and Lightwood* note at paragraph 28.28:

> "Once the receiver has the power to act he is entitled to possession of the property to which his appointment extends subject to the rights of any prior incumbrancer in possession" – see *McDonnell v White* [1865] 11HL Cas 570.

[30] The Court endorses the conclusion of the learned trial Judge and the rationale put forward for that conclusion that Mr Jennings and Mr Skinner do not require a court order for possession of the subject lands. It is correct that this approach is in line with the historical origin of the appointment of receivers. Under the common law a mortgagee under a legal charge has an immediate right to possession of the mortgaged property at any time after the mortgage deed is executed, by virtue of the estate vested in him. As it is sometimes put, a mortgagee may go into possession "before the ink is dry on the mortgage" – *Four Maids Ltd v Dudley Marshall (Properties) Ltd* [1975] Ch 37 at 320. As a result of the harsh liabilities imposed upon a mortgagee in possession, mortgagees historically sought to obtain the advantages of possession without its drawbacks. This led to the appointment of receivers and in time this practice was given statutory recognition in the Conveyancing Act. If receivers do not have an immediate right to possession of the mortgaged property without first obtaining a court order there is no point in appointing receivers as they would have fewer powers than a legal mortgagee who does have an immediate right to possession. The submission made by Mr Quinn is completely misconceived.

Question 3 – Is Mr Quinn entitled to remain in possession or is he a trespasser?

[31] Mr Quinn's case is that that Mr Jennings gave him permission to remain on the subject lands and to farm them and in reliance upon this permission he carried out various works to the subject lands and spent money on the lands. In these circumstances he submitted that the fixed charge receivers were estopped from withdrawing this permission and estopped from treating him as a trespasser. Mr Jennings before the lower Court denied ever giving such permission although it is to be noted that no steps were taken by the fixed charge receivers to prevent Mr Quinn taking silage off the subject lands or grazing cattle on the subject lands. Mr Jennings' evidence was that it was only when the PSNI and the local estate agent informed him that Mr Quinn was in the process of carrying out certain works of

construction on the subject lands including clearing the site; laying a lane and services to a derelict building; and placing hardcore on the site that he took steps to prevent Mr Quinn from doing so.

[32] Taking Mr Quinn's case at its reasonable height, it is clear to the Court that the best case he can make is that he remained in possession of the subject lands under a licence allowing him to engage in normal farming activities, including grazing cattle and taking silage. Having regard to the fact that Mr Quinn knew that the fixed charge receivers were attempting to sell the subject lands to Mr Kelso and he also knew and understood that such a sale would be on the basis of vacant possession, any such licence would have been subject to an implied term that he would do no damage or substantial alterations to the subject lands which could jeopardise any sale agreed by the fixed charge receivers. On this analysis, any such licence would have been determined by Mr Quinn engaging in such forbidden activities and would have been capable of determination upon reasonable notice being given by the fixed charge receivers that they required vacant possession to effect the sale.

[33] The carrying out of the said works on the subject lands without the permission of the fixed term receivers constitutes a trespass to those lands. By commencing the works which he commenced in the autumn of 2016 and by failing to desist from works on the subject lands when ordered to do so by way of notice in January 2017, Mr Quinn's licence was determined and his presence on the lands thereafter constituted a trespass to those subject lands. A mortgagor who refuses to give up possession has the status of a trespasser, see *Birch v Wright* (1786) 1 TREM Rep 378. The fixed charge receivers were, therefore, entitled to seek an interim injunction to prevent Mr Quinn carrying out further works on the lands and to prevent him from trespassing or entering onto the subject lands and the Lord Chief Justice's decision to grant such an interim injunction and his reasoning for doing so applying the *American Cyanamid v Ethicon Ltd* [1975] AC 396 test cannot be faulted.

[34] At no stage of the proceedings did Mr Quinn adduce evidence to substantiate his claim that he had expended considerable sums improving the lands. On the contrary, it is clear that he did receive profits from the subject lands, namely profit from sale of silage grown on the lands and the rent-free grazing of his animals for a considerable period of time. Mr Quinn has been unable to demonstrate any detriment arising from his occupation of the subject lands nor has he been able to formulate in a cogent manner the terms of any representation allegedly made by the fixed charge receivers which could possibly have encouraged him to act to his detriment and in those circumstances no issue of estoppel can legitimately be raised by him.

Question 5 – What duties do Mr Jennings and Mr Skinner owe to Mr Quinn?

[35] The learned trial Judge distilled a number of principles from the wealth of jurisprudence and academic commentary on the duties owed by a receiver to a

mortgagor in the exercise of the power of sale of mortgaged property. This Court endorses those principles with some further explanatory commentary in sub-paragraphs (a) and (b).

(a) In the exercise of the power of sale receivers owe the same duty to the mortgagor and those interested in the equity of redemption as is owed by a mortgagee – See *Silven Properties Limited v Royal Bank Of Scotland Plc* [2004] 4 All ER 484. By accepting office as receivers of the mortgagor's properties, the receivers assume a fiduciary duty of care to the mortgagee, the mortgagor and all others interested in the equity of redemption. See paragraph [29] of *Silven* and paragraph [6] of *O'Kane and Another v Rooney* [2013] NIQB 114, in which Deeny J applied the principle set out in *Silven* in this jurisdiction.

(b) A receiver is under a duty to the mortgagor and those interested in the equity of redemption to act in good faith and take reasonable care to obtain the best price reasonably obtainable – see *Silven Properties Limited*. In this context the best price normally equates with "the true market value of the mortgage property" – see Salmon LJ in *Cuckmere Brick Company Limited v Mutual Finance Limited* [1971] Ch 949 at 969. As Deeny J stated at paragraph [8] of *O'Kane*: "So it is taken as read and is clear law that a mortgagee and therefore a receiver must be under a duty to act in good faith and honestly as well as having a duty to obtain the true market value for the property." Mr Quinn argued that the decision of *O'Kane* supported the proposition that fixed charge receivers owed a duty of "absolute loyalty" to the mortgagor. However, nowhere in the judgment does this proposition appear and no other authority was proffered in support of it.

(c) It is a matter for the receivers how their general duties are to be discharged in the circumstances of any given case. The extent and scope of the duties are not inflexible. What a receiver must do to discharge them depends on the facts of each case – see *Medforth v Blake* [2000] Ch 86. The duty imposed on a receiver is to exercise his judgment reasonably.

(d) The mode of sale calls for an informed judgement. It is for the receiver to decide on the mode of sale and whether the sale should be by public auction or private contract. In some cases the appropriate mode is by public auction, in others it is by private treaty. In other cases a receiver may act reasonably by accepting an offer in advance of an auction or a sale by private contract – see *Michael v Miller* [2004] EWCA Civ 282. It is for the receiver to decide how the sale should be advertised and how long it should be left on the market. Such decisions inevitably involve an exercise of informed judgement on the part of the receiver in respect of which there can, almost by definition, be no absolute requirements.

Thus there is no absolute duty to advertise widely and what is proper will depend on all the circumstances of the case – see *Michael v Miller* [2004] EWCA Civ. 282 at paragraph [132].

(e) Receivers will not breach their duty of care to the mortgagor, if in the exercise of their power to sell the mortgage property they exercise their judgement reasonably. To the extent that that judgement involves assessing the market value of the mortgage property they will have acted reasonably if their assessment falls within an acceptable margin of error or 'reasonable bracket'. Coulson J in *K/S Lincoln v CB Richards Ellis Hotels Ltd* [2010] EWHC 1156 indicated that the margin of error can range from plus or minus 5%-10% depending on the nature of the property in question. As Salmon LJ said in *Cuckmere Brick* at page 968H:

> "I … conclude, both in principle and authority that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgage property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

(f) The need for the receiver to exercise an informed judgement in the exercise of his power of sale means he will take advice. Generally this means obtaining valuation advice from a qualified agent – see *Michael v Miller*. It also means that a receiver should follow up the possibility of a sale at a higher price.

(g) A receiver is not under a duty to accept any reasonable proposal by the debtor to repay the sums due and thereby end the relationship – *Lloyds Bank Plc v Cassidy [2002] EWCA Civ 1606.*

(h) The burden of proof is on the mortgagor to prove breach of duty by the receiver.

Question 6 - Did Mr Jennings and Mr Skinner in their capacity as fixed charge receivers act in breach of those duties by (a) not marketing the subject lands on the open market and/or (b) proposing to sell the subject lands at undervalue?

[36] The learned trial Judge having had the opportunity to evaluate the oral evidence of Mr Jennings, Mr Thompson, Mr Quinn, the Defendant and Mr Paudge Quinn, and having considered all the documentation put before her, concluded that the fixed charge receivers, in proposing to sell the subject lands to Mr Kelso, were

not proposing to sell the subject lands at an undervalue and were not required to market the subject lands on the open market in order to obtain market value price. The arguments made by Mr Quinn before the learned trial Judge were essentially repeated before this Court. Mr Quinn accepted that he had initially agreed to sell the subject lands to Mr Kelso but, when pressed, could not provide a good or even coherent reason as to why he has reneged on this agreement. Mr Quinn again repeated the assertion that at least two other individuals were prepared to offer more for the land but acknowledged that these individuals had never engaged with the fixed term receivers in order to formally put offers to the receivers and explained that they were probably unwilling to do so in circumstances where Mr Quinn was still hoping to arrange alternative finance to prevent the sale of the subject lands.

[37] In *Northern Ireland Railways v Tweed* [1982] NIJB Lord Lowry gave valuable and concise guidance in relation to the circumstances in which a trial Judge's findings of fact can be set aside by the Court of Appeal:

> "[1] The Trial Judge's finding on primary facts can rarely be disturbed if there is evidence to support it. This principle applies strongly to assessments of credibility, accuracy, powers of observation, memory and general reliability of a witness.
>
> [2] The appellate court is in as good a position as the Trial Judge to draw inferences from documents and from facts which are clear but even here must give weight to his conclusions.
>
> [3] The Trial Judge can be more readily reversed if he has misdirected himself in law or if he has misunderstood or misused the facts and may therefore have reached the wrong conclusion. For this purpose his judgment may be analysed in a way which is not possible with a jury's verdict. The appellate court should not resort to conjecture or its own estimate of the probabilities of a balanced situation as a means of rejecting the Trial judge's conclusions."

[38] In *Murray v Royal County Down Golf Club*, Kerr LCJ stated the following at paragraphs [11], [12] and [14]:

> "[11] On an appeal in an action tried by a judge sitting alone the burden of showing that the judge was wrong in his decision as to the facts lies on the appellant and if the Court of Appeal is not satisfied that he was wrong the appeal will be dismissed – *Savage v Adam* [1895] W. N. (95) 109 (11). But the court's duty is to rehear the case and

in order to do so properly it must consider the material that was before the trial judge and not shrink from overruling the judge's findings where it concludes that he was wrong – *Coghlan v Cumberland* [1898] 1 Ch 704.

[12] In *Lofthouse v Leicester Corporation* (1948) 64 T.L.R. 604 Goddard LCJ described the approach that an appellate court should take thus: -

> 'Although I do not intend to lay down anything which is necessarily exhaustive, I would say that the Court ought not to interfere where the question is a pure question of fact, and where the only matter for decision is whether the Judge has come to a right conclusion on the facts, unless it can be shown clearly that he did not take all the circumstances and evidence into account, or that he has misapprehended certain of the evidence, or that he has drawn an inference which there is no evidence to support.'

[14] … It is not only in the resolution of conflicts in the evidence therefore that the trial judge enjoys an advantage. In assessing the reasonableness of a suggestion that a particular course ought to have been followed the judge will have the benefit of observing how the witness has reacted to such a proposition and this can often provide an invaluable guide to the feasibility of precautions which it is said ought to have been taken..."

[39] Having carefully considered the submissions made by Mr Quinn, the documentation presented to the Court by Mr Quinn in support of those submissions, and the judgment of the learned trial Judge which sets out in very great detail the evidence given before her on these issues and the rationale underlying her analysis of the evidence, this Court concludes that there is absolutely no basis on which to interfere with the learned trial Judge's findings in respect of issues of true market value and the reasonableness of the steps taken by the fixed charge receivers to obtain the true market value for the subject lands.

Question 4 – Are Mr Jennings and Mr Skinner entitled to injunctive relief?

[40] Before the lower Court it was accepted by Mr Quinn that Mr Jennings and Mr Skinner had made out a *prima facie* case for an injunction. The case made on behalf of Mr Quinn was that the Court should exercise its discretion not to grant an injunction because Mr Jennings and Mr Skinner were estopped from treating

Mr Quinn as a trespasser because of his detrimental reliance on assurances given by Mr Jennings and because Mr Jennings and Mr Skinner, as fixed charge receivers, were going to sell the subject lands at an undervalue and without marketing them on the open market.

[41] On appeal, it was also argued by Mr Quinn that an injunction should not be made because of the clear conflict of interest which vitiated the appointment of Mr Jennings and Mr Skinner as fixed charge receivers. The lower Court rejected the arguments put forward by and on behalf of Mr Quinn at that time. This Court has upheld the learned trial Judge's findings on those issues. In addition, this Court has rejected Mr Quinn's arguments in relation to the existence of a conflict of interest. Having regard to the fact that Mr Quinn has frequently indicated that he wished to retain ownership of the subject lands and that he wished and indeed intended to remain on the subject lands and having regard to established need to obtain vacant possession in order to facilitate the sale of the subject lands to Mr Kelso, this Court concludes that it was clearly within the reasonable exercise of the learned Trial Judge's discretion to grant the injunction in the terms set out in paragraph [28] of her judgment. In the circumstances, the award by the learned trial Judge of nominal damages for trespass to land cannot be faulted.

Questions 7 – Should the court grant injunctive relief to Mr Quinn?

[42] In light of the conclusions reached by the learned trial Judge, there were no grounds upon which the injunctive relief sought by Mr Quinn could have been granted. In light of the conclusions reached by this Court including the rejection of Mr Quinn's case in relation to a conflict of interest, this Court likewise finds that there is no basis upon which this court could or should grant injunctive relief to Mr Quinn.

[43] The Court, therefore, dismisses Mr Quinn's appeals on all grounds.