Neutral Citation Number: [2019] EWHC 2611 (Ch)

Case No: CH-2018-000333

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
ORDER OF HHJ DIGHT CBE
DATED 10TH DECEMBER 2018
COUNTY COURT CLAIM NO E1PP8171

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07/10/2019

Before :

MR JUSTICE MANN

- -

Between :

(1) KAVESSERI VEETIL PRADEEP MENON
(2) BEENA MENON — **Appellants/ Defendants**

- and -

NATHAN PASK AND ROSALIND GOODE (As Joint Fixed Charge Receivers) — **Respondents/ Claimants**

- -
- -

Michael Walsh (instructed by **RadcliffesLeBrasseur**) for the **Appellants**
Francis Moraes (instructed by **Mishcon de Reya LLP**) for the **Respondents**

Hearing date: Thursday, 9th May 2019, 29th July 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This is an appeal from a decision of HHJ Dight in which (in substance) he granted possession in favour of LPA receivers of property known as 43 Porchester Terrace, London W2. Two significant questions arise on this appeal – can a receiver appointed under a mortgage of property owned by individuals (not a company) claim possession of the property occupied by the mortgagors by suing in his or her own name as receiver (or at all); and if so, does the court have the usual discretion to postpone possession on terms under section 36 of the Administration of Justice Act 1970. There is no direct authority on either point. The judge below decided the former point (when the action was differently constituted, as will appear) against the defendant property owners, and decided that on the terms of the 1970 Act no discretion was available because the action was being brought by receivers and not by mortgagees. The result was that he made a possession order. Both main points arising are significant points of principle.

History[1]

2. The defendants, Mr and Mrs Menon, charged the property to Bank of Singapore Ltd by a legal charge dated 14th March 2014. It secured the payment on demand of the liabilities of a company known as Silky Way Investments Ltd to the bank, which was also a party to the charge as borrower, and was in a familiar form. Clause 5.3 provided for the appointment of a receiver, and for the receiver to be treated as being the agent of the borrower:

> "5.3. The Bank may under the hand of any official or manager or by deed appoint or remove a receiver or receivers of the Property and may fix and pay the fees of a receiver but any receiver shall be deemed to be the agent of the Borrower and the Borrower shall be solely responsible for the receiver's acts or defaults and remuneration.
>
> 5.4 All or any of the powers conferred on a receiver by clause 8 may be exercised by the Bank without first appointing a receiver or notwithstanding any appointment."

[1] In his suggested corrections presented to me by Mr Walsh he indicated that he considered my outline of how the present point arose in procedural terms was erroneous in some respects. I confess I did not understand his proposed exposition and have not corrected my version. On any footing it is adequate for the purposes of this judgment. I believe his main concern to be as to how those events impact on costs orders. If I have overlooked some of the detail in my account he will be at liberty to propound a more accurate version when it comes to costs arguments.

3. Clause 8 deals with the powers of a Receiver:

> "**Receiver**
>
> 8.1 Any receiver appointed by the Bank shall (in addition to all powers conferred on him by law) have the following powers which in the case of joint receivers may be exercised jointly or severally:
>
> 8.1.1 to take possession of and generally manage the Property
>
> 8.1.2 [power to carry out works]
>
> 8.1.3 [power to purchase or acquire land and release rights]
>
> 8.1.4 to sell lease surrender or accept surrenders of leases or charges or otherwise deal with and dispose of the Property without restriction including (without limitation) power to dispose of any fixtures separately from the Property.
>
> 8.1.5 to carry into effect and complete any transaction by executing deeds or documents in the name of or on behalf of the Mortgagor Borrower
>
> 8.1.6 [continuation and defence of proceedings and to compromise]
>
> 8.1.7 [power to insure]
>
> 8.1.8 [employment of advisers consultants etc]
>
> 8.1.9 [borrowing money]
>
> 8.1.10 [power to do other incidental acts]
>
> …
>
> 8.3 A receiver shall apply all money he receives first in repayment of all money borrowed by him and his expenses and liabilities and in payment of his fees and secondly towards the remaining matters specified in Section 109(8) of the Law of Property Act 1925.
>
> …

> 8.5 Any receiver appointed hereunder shall so far as the law allows be deemed to be the agent of the Mortgagor and Borrower for all purposes and the Mortgagor and Borrower shall be solely responsible for its acts and omissions defaults and remuneration and the Bank shall not be under any liability for his remuneration or otherwise." (my emphasis)

4. The borrower defaulted and demand was made of the mortgagors on 24th October 2017, following which receivers (Nathan Pask and Rosalind Goode of GVA Grimley) were appointed on 9th November 2017 in exercise of all available powers under the Law of Property Act 1925 and the legal charge. The receivers were appointed in respect of "all of the Property (and any related rental income)", and paragraph 3 provided for delegation:

> "3. The Lender further delegates to the Receivers all powers on the part of the Lender and/or the Receivers referred to in the Legal Charge."

5. The receivers then started proceedings to obtain possession of the property. The proceedings were first brought by "Silky Way Investments Ltd, acting by Nathan Pask and Rosalind Goode as joint fixed charge receivers of [the property]". That was a mistake. They were not appointed over the assets of the borrower company, they had no authority to act in its name and the company had no rights at all which they could enforce anyway. That mistake was appreciated and they therefore sought to amend to change the claimants. The amendment they chose to make was to substitute the names of the Menons, acting by the receivers. The action was thus constituted as the Menons suing the Menons for possession, with the claimant Menons acting by their agents.

6. Having pleaded once without taking a point on the identity of the claimants, shortly before trial of the action the defendants sought permission to amend their Defence to take that point in the form of an averment (as described by the judge) that the receivers did not have a right to make the claim for possession, and pleading reliance on section 36. That amendment application came before the judge at the trial, and he regarded the principal question before him was whether to allow that amendment. It was in the context of that application that he decided the first question that arose, namely the ability of receivers to claim possession.

7. The judge did not consider whether or not it was too late to amend (a point which was taken by the receivers) but instead refused permission to amend on the footing that the point, if pleaded, would still not give the Menons an arguable defence (judgment paragraph 29). On that footing he refused permission to amend (he did not expressly say so, but that is implicit in his judgment and is reflected in paragraph 1 of his order

of 10 December 2018). Basically he held that receivers had a right to possession. He took some trouble to consider the nature of their agency and the rights flowing from it and said:

> "17. Therefore the analysis if one looks at both the *Silven Properties* case and the *Re [Satoris]* case is that the receivers do not get title as such, they make their title as deemed agents of the mortgagor. The property does not vest in them but they can prevent the mortgagors from exercising the rights which the mortgagors have agreed that the receivers can exercise. That in my judgement is the true effect of section 109 [of the Law of Property Act 1925] …
>
> 18. That right must also be construed in the light of the fact that the right of the mortgagors to possession of the property is postponed to the right of the receivers to exercise control of the property. According to Lord Justice Lindley's analysis the mortgagor would, in my judgement, be restrained by the appointment of a receiver from exercising their right to possession in the face of a claim by the receivers to exercise that right to possession themselves. If one stands back and asks, in the same way that the matter was analysed by Lady Justice Arden in McDonald v McDonald [2014] EWCA Civ 1049, what is the purpose behind the provisions that are being construed and how should they be given effect the answer is, in my judgement, obvious. The receivers are intended to get in the property to enable it to be sold at the proper market price in accordance with the receivers' equitable duties to enable the sums due under the charge to be repaid. The receivers themselves cannot give title to the property but they will make title through the mortgagors.
>
> …
>
> 20. The existence of the right of the receivers to seek possession from their principals does not affect the duties of the receivers to the mortgagors which arise in equity. It is merely that the mortgagors' own rights to deal with the property have been postponed to the rights that they have conferred effectively on their deemed agents. Those rights necessarily include the right to possession of the mortgaged property. In my judgment there is no real arguable case for suggesting that the defendants can defeat the claim to possession in the way suggested in the amended Defence."

8. Thus the judge dealt with the amendment application. He then went on to deal with section 36 and concluded that since the receivers did not derive title from the mortgagee, and since the section only operated when a mortgagee or a person deriving

title under it was seeking possession, then section 36 did not apply and he had no statutory (or other) discretion to postpone any possession order to allow time for payment. He therefore ordered possession be given.

9. The Menons sought to appeal and permission was granted by the High Court (by me, as it happened). The form of the appeal was such that the Menons did not seek to appeal the paragraph of the judge's order which refused permission to amend to challenge the locus of the receivers. If that position had stood then the only point in the appeal would have been the section 36 point. However, it was apparent from their grounds of appeal and from their skeleton argument that they were taking the locus point. This led to a certain amount of confusion. What seemed to be apparent to me was that it was obvious that the defendants were taking the locus point but it was not apparent that the then current form of the proceedings raised it satisfactorily, because they were not proceedings brought by the receivers. They were proceedings apparently brought by the Menons against themselves (albeit that as claimants they were said to be acting by their agents). At first sight it seemed to me (and I said so) that this was a very strange form of proceeding, because the Menons were on both sides of the record and were seeking possession from themselves. As the proceedings stood they did not seem to be proceedings which reflected the real difference between the parties on the point.

10. The parties each took steps to deal with the point. They each agreed not to oppose an amendment proposed by the other. The defendants did not oppose an application by the receivers to substitute themselves as claimants in place of the Menons, and the receivers did not oppose an application by the Menons to amend their appellants' notice to challenge the refusal of permission to amend. Thus the appeal was constituted so as properly to raise the issue which the parties had really been debating. It seemed to me, and still seems to me, that the second go of the receivers at constituting the proceedings (with the Menons as claimants) was not a form of proceedings which could succeed. It is not possible to have the same people on both sides of the record, and not possible for claimants to claim possession from themselves even if at the behest of people with authority to act for them. The real point is the existence or otherwise of a right of the receivers to have possession of the property as against the Menons, and the proceedings as now constituted raise that question (which was basically the question argued below and before me).

11. For the sake of completeness, I should say that there is an outstanding application by the bank to be joined as claimant in the event that there is a successful challenge to the status of receivers. That application was before the judge but it was unnecessary to pursue it because of his decision on the amendment. It remains live but all parties seemed to think that I should decide the issue on the appeal first. The Menons have indicated that if the bank were joined they would seek to counterclaim, so it is not plain that the present claim would inevitably be rendered otiose by joinder of someone who certainly does have a prima facie right to possession under the legal charge.

The dispute

12. Thus it is necessary to embark on a consideration of a question which, somewhat surprisingly, has never been considered in any reported authority – does a fixed charge receiver with the benefit of a power to take possession under the usual modern form of mortgage providing for receivership and for receivers to be the agents of the mortgagor, entitle the receiver to get possession as against an individual (non-corporate) mortgagor-occupier. That is in distinction to a receiver who claims possession as against a third party – in that situation the receiver does not have the same problem because the agency of the receiver enables him/her to claim possession in right of the mortgagor and as agent for the mortgagor. As against the mortgagor himself/herself it is not obvious that the receiver can assert that right. The problem (if there is one) does not arise in practice where there is a corporate mortgagor because if employees or directors fail to acknowledge the authority of a receiver who seeks possession, the receiver can act in the name of the company and remove them as individuals. He/she does not somehow need an order against the company, because he/she is, for these purposes, the company and the defendants are not mortgagors – there are mere individuals who cannot resist the company's (receiver's) claims. The central difficulty in this case is how does a receiver, who is the agent of the mortgagor, assert rights of possession against his principal, at least absent a clear express term to that effect?

13. Not only has this question not been addressed as such in reported authority, I am told that it has not received consideration in any of the established textbooks on receivership save for one, namely Tozer and Crampin on Mortgage Receivership: Law and Practice.[2] The authors of that work claim to have successfully argued in favour of a right to possession in the county court but acknowledge in one unreported case in the Chancery Division the claim failed (*Patmore v Bean*, 2002 – see fn 149 to paragraph 10.178). The authors seek to overcome difficulties posed by the agency by relying on the special nature of the agency as described in *Sowman v David Samuel Trust Ltd* [1978] 1 WLR 22, the fact that it is implicit in the charge that the receiver should have possession, and cases said to show that a receiver can get an injunction against those who obstruct him/her in the exercise of his/her receivership functions.

14. There is one case in which the right seems to have been assumed. In *Jennings v Quinn* [2018] NI Ch 17 receivers were appointed under a legal mortgage, and under that mortgage the receivers had "power" to "Take possession of, collect and get in all or any of the mortgaged property" (see para 14). The mortgagor started to carry out works on the mortgaged property of which the receivers did not approve, and they issued proceedings damages for trespass and for unlawful interference with their property, and an injunction restraining the mortgagor from carrying out further works. The trial judge (McBride J) satisfied himself that the mortgagee was entitled to

[2] It may be that one reason why the matter has not come before the courts is that, since 2008, the members of the Council of Mortgage Lenders have voluntarily agreed not to appoint a receiver to sell residential owner-occupied property without first getting a possession order or the borrower's consent. This follows the decision in *Horsham Properties Group Ltd v Clark* [2009] 1 WLR 1255. In the vast majority of cases to appoint receivers to get possession of owner-occupier residential mortgages would obviously give rise to unjustifiable and excessive costs.

appoint receivers and moved on to the second question before him which he considered to be: "Do the plaintiffs as receivers have an immediate right to possession of the subject lands in the absence of a court order?". The issue was not clearly identified as whether they had a right to possession at all, but whether they were entitled to it without a court order. At paragraph 18 the judge found:

> "Upon appointment [the receivers] were, as appears from the provisions of the Conveyancing Act and clause 6 of the mortgage deed, entitled to immediate possession of the subject lands."

He went on:

> "19. In all the circumstances I am therefore satisfied that the receivers do not require a court order for possession of the subject lands. 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. I therefore find that the submission by the defendant is completely misconceived."

15. That case is consistent with the idea that the receivers have a right to get possession from an individual mortgagor, but the point in issue in this case does not seem to have been seriously argued in that one. The issue in that case on which the defendant lost was whether a court order was required. There seems to have been no contention that they were not entitled at all; a right to possession seems to have been more or less assumed. It simply does not address the effect of the agency provision (it does not appear from the report whether there was the usual agency provision in that mortgage, but I assume there was – if there was not then the case assists even less). It therefore cannot be treated as an authority which positively supports the receivers in this case.

16. One of Mr Walsh's main arguments against the receivers having a right of possession was one based on the absence of an estate in the receivers, and based on the nature of the old action for ejectment in which the present day action for possession has its roots. I do not consider that the answer lies there. The question is whether the receivers have a right to possession as against the mortgagor, for which purpose they do not necessarily need an estate in the land themselves; they just need a better right to possession than the current occupier. Similarly the old action for ejectment, with its fictions, is not going to provide an answer to a problem whose real answer lies in the terms and effect of this legal charge.

17. It is not at first sight immediately obvious how the receivers themselves have a right to possession as against the mortgagor. The mortgagee has a right of possession, but the receivers are the not the mortgagee for these purposes. The whole purpose of a receivership is to distance the mortgagee from the acts of the receiver – hence the disavowing of an agency for the mortgagee and making the receiver an agent of the mortgagor (in the case of this charge "for all purposes" – see clause 8.5). So unless the receivers have had the mortgagee's rights to possession delegated to them and are exercising them (which is not relied on in this case, if it might otherwise have occurred) the receivers are not exercising the mortgagee's rights as such (a problem which will have to be addressed when considering section 36, if the case gets that far, as will appear). So far as the receivers derive their powers from the mortgagor via the agency, it is not at first sight easy to see conceptually how those powers can be turned on the mortgagor himself/herself. That is best demonstrated by the second attempt at constituting these proceedings with the Menons as both claimants and defendants – as already appears, I do not see how that is possible.

18. Before moving on it is necessary to dispose of a form of delegation that was relied on by Mr Moraes. As I have just indicated, Mr Moraes did not rely on his clients' having some form of mortgagee's right to possession delegated to his clients under paragraph 3 of the appointment. That would in any event have been difficult for him because of the wording of paragraph 3, which delegates "powers … referred to in the Legal Charge". The mortgagee's right to possession does not qualify.

19. Mr Moraes for the receivers did, however, seek to rely on a different delegation. He sought to say that the receivers have their powers under clause 8, which the bank can exercise under clause 5.4, and that right to exercise was delegated back to the receivers under paragraph 3 of the appointment. Apart from the fact that that route was not pleaded (a point which I would not hold against Mr Moraes in the light of the fact that many of the real points that arise in this case have not been pleaded, and in the light of the fact that it is a legal argument which does not depend on evidence), I do not think that this line of argument works for Mr Moraes. Assuming he can establish the passing and re-passing of some sort of power via that route, he still has to start from some sort of power or right which the receivers can assert against the Menons, the existence of which is the central question on this appeal. If he can establish that right or power he does not need his (somewhat tortuous) delegation route. If he cannot, then his delegation route does not assist him because under it the

bank cannot be in a better position than the receivers and has nothing useful to delegate.

20. So it becomes pertinent to inquire whether, despite the shortcomings apparently presented by their status as agents ("for all purposes"), the receivers in this case have some separate right which they can utilise as against the mortgagor, their principal. In my view they do, and the reason lies in the special nature of the agency relationship as demonstrated by the authorities.

21. The history of the appointment of receivers is usefully set out in the dissenting judgment of Rigby LJ in *Gaskell v Gosling* [1896] 1 QB 669 at 691ff:

> "A mortgagor left in possession of the mortgaged property, whether real or personal, had a right to receive the income and apply it to his own use, without becoming liable to account to the mortgagee. If there was no receiver, the mortgagee could only make the income available for keeping down the interest on his security by entering into possession. This entry into possession by a mortgagee was always considered a strong assertion of his legal rights, since he did not come under any obligation to account to the mortgagor except in a suit for redemption. He was accordingly treated with exceptional severity in a suit for redemption and made to account, not only for what he actually received, but for what he might without wilful default have received. This was bad enough when there was only one mortgage; but the position became much worse when the mortgage was a second mortgage, since the second mortgagee could at any moment be turned out by the first, and for the sake of such a precarious possession it could seldom be worth while for a second mortgagee to incur the liabilities of a mortgagee in possession. Still greater were the risks and less desirable the possession when the mortgaged property consisted of or included, as it might do, property embarked in trade and subject to the vicissitudes of commercial business. It follows of course from the almost penal liabilities imposed upon a mortgagee in possession that Courts of Equity were very slow to decide that possession had been taken, and would not do so unless satisfied that the mortgagee in possession took the possession in his capacity of mortgagee without any reasonable ground for believing himself to hold in any other capacity: Parkinson v. Hanbury. The Courts also favoured any means which would enable the mortgagee to obtain the advantages of possession without its drawbacks. Mortgagees began to insist upon the appointment by the mortgagor of a receiver to receive the income, keep down the interest on incumbrances, and hold the surplus, if any, for the mortgagor, and to stipulate often that

the receiver should have extensive powers of management. Presently mortgagees stipulated that they themselves should in place of the mortgagor appoint the receiver to act as the mortgagor's agent. This made no difference in the receiver's position, and imposed no liability on the mortgagee appointing. Though it was the mortgagee who in fact appointed the receiver, yet in making the appointment the mortgagee acted, and it was the object of the parties that he should act, as agent for the mortgagor. Lord Cranworth, in Jefferys v. Dickson, stated the doctrine of Courts of Equity on the subject to the effect following. The mortgagee, as agent of the mortgagor, appointed a person to receive the income, with directions to keep down the interest of the mortgage, and to account for the surplus to the mortgagor as his principal. These directions were supposed to emanate, not from the mortgagee, but from the mortgagor; and the receiver therefore, in the relation between himself and the mortgagor, stood in the position of a person appointed by an instrument to which the mortgagee was no party. Lord Cranworth, in the case referred to, was speaking of a mortgage of lands; but the same doctrine applies to all kinds of property, being founded, as it is, not upon any considerations peculiar to the law of real property, but upon the contract between the debtor who gives and the creditor who takes the security. Of course the mortgagor cannot of his own will revoke the appointment of a receiver, or that appointment would be useless. For valuable consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with. The appointment so made will stand good against himself and all persons claiming through him, except incumbrancers having priority to the mortgagee who appoints the receiver. By degrees the forms of appointment of receivers became more complicated, and their powers of management more extensive; but the doctrine explained by Lord Cranworth in the case cited was consistently adhered to, and it remained true throughout that the receiver's appointment, and all directions and powers given and conferred upon him, were supposed to emanate from the mortgagor, and the mortgagee, though he might be the actual appointor, and might have stipulated for all the powers conferred upon the receiver, was in no other position, so far as responsibility was concerned, than if he had been altogether a stranger to the appointment. So common did this practice of appointing receivers by agreement between the parties become that, first by Lord Cranworth's Act (23 & 24 Vict. c. 145) to a limited extent, and afterwards by the Conveyancing and Law of Property Act, 1881, in a more general manner, a power to the mortgagee to appoint a receiver, who was to be agent of the mortgagor, was made a usual incident of mortgages, when not excluded by agreement between the parties. The last-mentioned Act extended the power to property of every description, placed

> the power to revoke as well as to make the appointment in the hands of the mortgagee, gave the receiver considerable powers of management, and yet made the mortgagor solely liable for all his acts and defaults. This Act, however, only applies in default of agreement between the parties. In itself it is useful only as a statutory recognition and approval of the practice of making the mortgagee's appointee the agent of the mortgagor only; but of course any of its provisions may be embodied in, as they may be excluded from, any particular mortgage security by express agreement between the parties." (the emphasis by underlining is mine)

22. Most of that analysis does not necessarily assist Mr Moraes, who wants to find a power to claim possession against the mortgagor (the principal) because of the emphasis on the agency. However, the special nature of the agency is made clear by the words which I have emphasised. If the mortgagor cannot interfere with the appointment, that would be the start of a case based on a primacy for the receiver. But it is not enough if the agency is the factor governing the relationship to the extent that it is treated as a normal agency and if that is the only relationship arising out of the mortgage; and it is not enough as it stands to give the agent some independent rights of his own (which is another way of saying the same thing).

23. In *Sowman v David Samuel Trust* [1978] 1 WLR 22 Goulding J had to consider the effect of a liquidation on a receiver's powers of disposition given in a debenture, given that a liquidation would normally terminate an agency. He held that the winding up did not affect the receiver's powers to "hold and dispose of" the company's property (p30B), and that "In truth the rights and powers given by the debenture are themselves property, but not the property of the company…". Mr Moraes submitted that this case demonstrated that the rights of the receiver were free-standing rights. That seems to me to go too far, and not to be a proper analysis, but the words which I have just cited can be relied on to show that the receiver's powers have something special about them.

24. The unconventional nature of the agency also appears from the judgment of Lightman J (delivering the judgment of the Court of Appeal) in *Silven Properties Ltd v Royal Bank of Scotland* [2004] 1 WLR 997. His judgment shows that one must be wary about applying the normal consequences of agency to the receiver:

> "27. The peculiar incidents of the agency are significant. In particular: (1) the agency is one where the principal, the mortgagor, has no say in the appointment or identity of the receiver and is not entitled to give any instructions to the receiver or to dismiss the receiver. In the words of Rigby LJ in Gaskell v Gosling [1896] 1 QB 669, 692: "For valuable

> consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with"; (2) there is no contractual relationship or duty owed in tort by the receiver to the mortgagor: the relationship and duties owed by the receiver are equitable only: see Medforth v Blake [2000] Ch 86 and Raja v Austin Gray [2003] 1 EGLR 91; (3) the equitable duty is owed to the mortgagee as well as the mortgagor. The relationship created by the mortgage is tripartite involving the mortgagor, the mortgagee and the receiver; (4) the duty owed by the receiver (like the duty owed by a mortgagee) to the mortgagor is not owed to him individually but to him as one of the persons interested in the equity of redemption. The class character of the right is reflected in the class character of the relief to be granted in case of a breach of this duty. That relief is an order that the receiver account to the persons interested in the equity of redemption for what he would have held as receiver but for his default; (5) not merely does the receiver owe a duty of care to the mortgagee as well as the mortgagor, but his primary duty in exercising his powers of management is to try and bring about a situation in which the secured debt is repaid: see the Medforth case at p 86; and (6) the receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee: ...."

25. The purpose of the appointment, and therefore of the agency, was also emphasised by Arden LJ in *McDonald v McDonald* [2015] Ch 357. In that case the Court of Appeal had to consider the effect of a notice given to a tenant by receivers, appointed under a charge given by the landlord. It was held that on the facts they had that power. At paragraph 65 of her judgment Arden LJ put the receivers' powers in their commercial and legal context:

> " 65. The mortgage conditions have to be interpreted purposively: the clear purpose of the mortgage conditions was to enable the receivers to proceed to realise the charged property in an orderly and efficient way. The powers conferred on the receivers must therefore include power to do anything which is necessarily incidental to the exercise of the specified powers: see *M Wheeler & Co Ltd v Warren* [1928] Ch 840. The specified powers included the power to sell the property and to take possession of it: clause 9.2.1 of the mortgage conditions. In the circumstances, service of the section 21 notice was an act which the receivers had to do to get vacant possession and thereby to sell the property at the best price. The fact that the mortgage conditions could have been drafted so as to confer an express power on the mortgagee to give a section 21 notice or that the mortgagee might be able to serve the notice by virtue of

> being within the definition of "landlord" does not mean that the receivers cannot do so where they have that power under the mortgage conditions. As a result of the true interpretation of the mortgage conditions, no question of strict compliance with formalities arises. Moreover the agency of the receivers must encompass the powers to enforce the security which the receivers are empowered to exercise."

26. Against that legal background certain facts and matters relevant to this case (and actually relevant to many others) then have to be taken into account, all of which would have been apparent to both mortgagee and mortgagor. First, in this case, as in all cases, the receivership would be known to be carried out in the interests of the mortgagee, not the mortgagor – see in particular Lightman J's point 6 above. Second, the property in this case would be known to be a dwelling house in the occupation of the mortgagor, so the most likely person against whom possession would be needed, in the event of enforcement, would be the mortgagor. Third, the receiver has a power of sale, and the parties would have expected such a sale to be with vacant possession; so the receiver would need possession against the most likely possessor – see point 2. Fourth, other powers given to the receivers only make business sense if they have possession of the property – see the powers to manage the property, let it and carry out improvements.

27. All this makes it rather odd were it the case that the receiver should not be able to claim possession against the mortgagor. The person in possession of the property would be the one person in the world against whom the receivers would not be able to get possession. That makes no business sense. In my view the answer is that the power to take possession, on its true construction, is one that can be asserted against the mortgagor by the receivers notwithstanding the agency. The receivers have power to demand that possession be given up, and if it is not given up then the receivers must have power to take proceedings, and those proceedings would have to be in their own names. That seems to me to be the only solution which makes business sense. Insofar as it is inconsistent with normal concepts of agency, then that is because the agency of the receivers is not a normal agency, for all the reasons appearing above. The receivers clearly have the right to retain possession as against the mortgagors were they to go into possession and be sued by the mortgagors. That demonstrates that they have a better right of possession than do the mortgagors (if they insist on it), and it is consistent with that they be able to claim possession as against mortgagors in possession and, if necessary, sue. Since they cannot sue in the name of the mortgagors, they would have to sue in their own name. That is an ancillary power impliedly given to them by the mortgage.

28. There is an arguable alternative way of reaching the same conclusion as to their right to sue, and that is via an implied term that the mortgagors would give up possession to the receivers were they required to do so. My original leaning was towards this as a conclusion, and if my reasoning above (which I now prefer) does not work then in my view it is the alternative correct resolution of the dispute. Were it necessary to do so I would imply such a term in order to make the contract work as a matter of business

efficacy so far as the appointment and acts of a receiver are concerned. The existence of the right is how the receiver manages the security for the benefit of the mortgagee (see point (6) in *Silven*) and (given the right to appoint a receiver) is necessary in business terms for that purpose. I do not consider that the term is inconsistent with any express term of the contract – it fills in a gap left by the express terms. One has to reconcile it with the rest of the agency provisions, but in my view that presents no problem. Once the receivers have gained possession they retain possession as agents of the mortgagor (see eg *Ratford v Northavon District Council* [1987] QB 357 in relation to liability for rates) and they can exercise other powers as agents.

29. If one goes down this route one has to consider how it is that the receivers would enforce the term, because they are not parties to the charge and would be seeking to enforce a term in a contract to which they not a party. The answer to that is, in my view, that they are entitled to the benefit of the term under the Contracts (Rights of Third Parties) Act 1999 which provides:

> "1(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if –
>
> (a) the contract expressly provides that he may, or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him".
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party."

30. The implied term which I consider to exist is a "term". The Act does not expressly rule out implied terms for these purposes, though two references to "expressly" do require one to tread carefully. So there is apparently a "term" for the purposes of subsection (1). It does not expressly (ie in terms) provide that the receiver may enforce the right to possession, so paragraph (a) does not apply. However, that is not in my view fatal to the argument for the application of the Act thus far because in my view it would be clear enough that the term purports to confer a benefit on the receiver within section 1(1)(b). The mortgage makes it plain that it is the receiver that gets on with the job of making good the security and realising it for the ultimate benefit of the mortgagee. Everything else that the receiver is empowered to do to that end are things that the receiver does himself/herself (albeit as agent) and it seems to me to be sufficiently obvious that a term requiring possession to be given up to the receiver is one which is for the benefit of the receiver himself (qua receiver) so that he/she can pursue enforcement in that way. To construe the term as benefiting only the mortgagee, so that the mortgagee would have to sue to require possession to be

given up to the receiver, would negate the commercial purpose of the receivership and the implication of the term. It follows that subsection (2) does not apply to prevent the receiver from relying on the term.

31. One then has to consider subsection (3). That provides:

> "(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into."

32. The requirements of this subsection would also be fulfilled. The receivers are expressly identified as members of a class or as persons answering a particular description, and they become clearly identified when appointed. I have wondered whether they are "expressly" identified when the term which they seek to benefit from is an implied term, but I do not think that there is an obstacle here. They are identified as a class of appointees by express terms, and it would be very odd if a party thus identified they could not benefit from implied terms. Fraser J in *Bates v Post Office* [2019] EWHC 606 (QB) does not seem to have thought that this point would pose a difficulty for the third party though he did not in the end decide it (see paras 938 to 946).

33. I therefore find that if I am wrong in my construction of the power to take possession, the receivers are entitled to the benefit of and to enforce the implied term which I have found, under the 1999 Act.

34. The receivers are therefore, subject to the possible application of section 36, entitled to possession of the mortgaged property.

Section 36

35. It therefore becomes necessary to consider the operation of section 36 of the Administration of Justice Act 1970. This section was passed in order to give the courts a discretion as to the granting of an order of possession in mortgage possession actions in circumstances in which it had been found that they did not have that discretion at common law or in equity.

36. The relevant part of the section reads:

> "**36.— Additional powers of court in action by mortgagee for possession of dwelling-house.**
> (1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event

> of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.
> (2) The court—
> (a) may adjourn the proceedings, or
> (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—
> (i) stay or suspend execution of the judgment or order, or
> (ii) postpone the date for delivery of possession,
> for such period or periods as the court thinks reasonable."

37. The expression "mortgagee" is defined in section 39:

> *"***Interpretation of Part IV**
> (1) In this Part of this Act—
> ...
>
> *"mortgagor"* and *"mortgagee"* includes any person deriving title under the original mortgagor or mortgagee."

38. Judge Dight held that section 36 had no application to a claim for possession by the receivers because they were neither the mortgagee nor a person deriving title under the mortgagee. If they had any title at all, it would have come from the mortgagor, not the mortgagee. He derived support for that straightforward way of looking at the matter from the Court of Appeal decision in *Ropaigealach v Barclays Bank* [2000] 263, and said that the reason for the use of receivers as a means of enforcing the rights under a mortgage is precisely so that the mortgagee is not involved.

39. I do not consider that the *Barclays Bank* case provides much support for the judge's conclusion. What that case did was set (or set out) limits to the process of statutory interpretation. Those limits meant that the court could not try to define some overall intention of Parliament and then force that on the section in a manner which the words would not bear. That is not a new principle. I accept that in considering whether receivers fall within the statutory meaning of "mortgagee" I must not force on the words a meaning which they cannot properly bear, whether in order to comply with some perceived underlying policy or for other reasons.

40. The relevant words are the definition of "mortgagee" in section 39 – do the receivers "derive title under the original mortgagee"? It is true that in a traditional sense they do not. It is not even clear that they have a "title" in traditional property terms under analysis appearing above. However, I do not consider that the inquiry stops there. One has to bear in mind the nature and source of the receiver's rights, how they came to be appointed what their fundamental purpose is.

41. The following are essential aspects of the appointment of the receivers, as demonstrated by the documents and the cases referred to above:

    i) They are, in their acts, technically agents of the mortgagor.

ii) They are appointed pursuant to an instrument to which the mortgagor is a party.

iii) However, they are appointed by the mortgagee.

iv) The mortgagor has no say in whether they are appointed, or in any aspect of their appointment.

v) They are not appointed so that the mortgagor can better manage his or her property. They are appointed so that the mortgaged property can be best managed in the interests of the mortgagee, so that the mortgagee can recover the mortgage loan. "The mortgage conditions have to be interpreted purposively: the clear purpose of the mortgage conditions was to enable the receivers to proceed to realise the charged property in an orderly and efficient way" (*McDonald*). They are only appointed in the event of a default.

vi) The agency of the receivers is in the nature of a device to restrict liability, not a genuine agency to assist the mortgagor (*Gaskell*).

vii) When it comes to realising the property, it will be realised whether or not the mortgagor wishes it, so that the mortgagee can be paid first out of the proceeds of sale.

viii) It is appropriate to regard the right to appoint the receivers as a property right of the mortgagee – see *Sowman*, above.

ix) "… the receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee" (*Silven*)

x) In terms of enforcement, the receivers essentially stand in the place of the mortgagee, for the mortgagee's benefit.

42. In the light of those striking features of the receivership, while it would in most cases be technically right to say that in the exercise of their powers they act as agents of the mortgagor, it would not reflect reality (legal and literal) to treat them as such, particularly so far concerns the enforcement of possession rights against a resident mortgagor. They are appointed by the mortgagee to enforce the mortgagee's security. Were it not for the appointment they would never exist as receivers. In all those circumstances it seems to me to be right, and not an improper strain on the language of section 39, to say they derive title from the mortgagee for the purposes of section 36. "Title" for these purposes means their right to possession. Such a conclusion would coincide with the obvious Parliamentary intention in enacting section 36. It plainly applies where a mortgagee is enforcing a mortgage, via proceedings, so as to give the mortgagor an opportunity to pay or to remedy defaults. Where the receivers sue for possession, they are making the same claim for the benefit of the mortgagee. Bearing in mind the close identity of purpose, and who it is who appoints them, it would be right to say that they derive title from the mortgagee for the purposes of sections 39 and 36, and not be a strain on the language of the section so to find. It may be the case that receivers are appointed so that the mortgagee is not itself involved, but that does not determine the question. The appointment is in fact in the

nature of a permissible device to distance the mortgagee, but so as to enable the mortgagee's rights to be enforced. That is a reason for leaning towards an interpretation of section 36 which brings receivers in, not for leaning away from it.

43. I therefore find, as a matter of principle, that the Menons should have the same opportunities of resisting possession under section 36 as they would have had had the bank been a claimant. Whether or not they can make realistic proposals in that respect is an entirely different matter. Judge Dight did not make any findings about that, and I was not fully addressed on actual proposals, though it is right to say that proposals, or further proposals, were said by the Menons to be intended to be forthcoming during the course of these proceedings and, as far as I know, they have not been. However, whether section 36 applies on the facts is something that will have to be dealt with separately. I have dealt with just the matter of principle.

44. This conclusion has a strand which goes back into the implied term point. Had it been the case that the receivers should not be treated as deriving title from the mortgagee it would have been much more difficult to imply the term I have found to exist because it would have been much harder to assume an acceptance by the mortgagor of a term which left him or her without the protection of section 36. However, in the light of my conclusion on section 36 the point does not stand in the way of the implication.

Conclusion

45. I have found that the receivers are entitled to make a claim for possession, but that the Menons should have, or should have had, the opportunity of invoking the court's discretion under section 36. The appellants therefore fail on the first point but the appeal succeeds on the second, so far as the principle is concerned. The precise form of order to be made as a result of that (for example, whether I am to be invited to decide issues under section 36 or whether they should be remitted) will have to be decided on the consequentials hearing after this judgment. My inclination would be to decide the section 36 point myself, not least to save more time being wasted as a result of a remission to the court below, but the parties will be free to make submissions about all this.