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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **30/03/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

Between:

BANK OF IRELAND (UK) PLC

Plaintiff:

and

[1] MICHELLE McKEEVER
[2] JOHN McKEEVER

Defendants

_____

Douglas Stevenson, of counsel (instructed by DWF (NI) LLP Solicitors) for the Plaintiff
Michelle McKeever, in person, for the Defendants

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SIMPSON J

Introduction

[1] This is yet another example of a long running, protracted dispute between litigants in person and a financial institution. Such cases are usually plagued by significant delay, a plethora of documentation and the requirement for a court to consider points which range far and wide — some more, some less cogent. This case is no exception.

[2] As long ago as early 2007 the defendants approached their local branch of the Bank of Ireland to seek financial support for a scheme whereby they would demolish two derelict properties at 48/49 The Square (sometimes called Cardinal O'Fiaich Square), Crossmaglen, and construct five residential units and two commercial units. In a facility letter dated 6 March 2007 the plaintiff indicated its willingness to offer a loan of £450,000 for a term of 17 years with interest at 1.75% over the plaintiff's base rate (which was then 5.25%). For the first 24 months of the loan, interest only would be repayable. Thereafter — so, for 15 years — repayments would be on a capital and

interest basis. On 12 March 2007 the defendants signed the facility letter, indicating acceptance of its terms, and returned one signed copy to the Bank.

[3] The security for the loan comprised, inter alia, a first legal charge "to be registered in favour of Bank of Ireland over property at 48/49 the Square, Crossmaglen — registered owners John & Michelle McKeever."

[4] Between mid-June and December 2007 moneys were drawn down in stages. The plaintiff permitted each such drawdown on receipt of a certificate from a Quantity Surveyor that certain sums had been expended on the works.

[5] The plaintiff called in the loan on 10 January 2013, appointed receivers in February 2013 and issued these proceedings in May 2013.

[6] To date there has been a hearing before Deeny J in January 2014 when the plaintiff sought an injunction to prevent the defendants from entering onto the property, a substantive hearing before Horner J in 2016, following which the judge recused himself, a substantive hearing before Huddleston J, resulting in a final order dated 8 September 2021, and an appeal to the Court of Appeal. As a result of the judgment of the Court of Appeal on 22 December 2021 ([2021] NICA 64) the matter was remitted to the High Court for a further substantive hearing.

[7] The Court of Appeal noted (para [9] of the judgment) that by the time of the appeal there were 10 affidavits, sworn between March 2014 and February 2021 and there had been nine case management orders made in the same period. Matters have moved on since that judgment. Apart from the volumes of discoverable documentation there are now further affidavits and submissions.

These proceedings

[8] On 16 May 2013 the plaintiff issued a Writ of Summons with the Statement of Claim endorsed thereon. The plaintiff claims:

(a) payment of approximately £570,000 liquidated damages plus interest;

(b) a declaration that identified receivers had been well appointed and were empowered to let or sell the property;

(c) an injunction restraining the appellants from trespassing on the property;

(d) alternatively to (c), an order requiring the appellants to provide possession of the property.

[9] The defendants served a lengthy Defence and Counterclaim on 16 October 2019, effectively an amended Defence and Counterclaim since there was an earlier, shorter version served in January 2015. Rather than set out in detail what the

defendants included in the amended pleading, a succinct description of the relevant content appears between paragraphs 10 and 14 of the judgment of the Court of Appeal cited above. Thus:

> "[10] The following features of the Defence and Counterclaim are highlighted. First, the Bank's version (in its pleading) of the loan and charge arrangements giving rise to an agreement among the three parties is the subject of a "not admitted" plea. Second, there is a quibble about whether the charge was executed on 18 April 2007 or 15 June 2007. Third, it is pleaded that the deed of charge was not validly executed as it was not signed in the presence of a witness who attested the parties' signatures. Fourth, it is pleaded that there are material differences between a mortgage deed dated 18 April 2007 and one dated 15 June 2007, with a related plea that the only valid mortgage deed is that dated 18 April 2007 and that this predated the second appellant's ownership of the property. Fifth, it is pleaded that the "real" mortgage deed contains no express power of attorney for the Bank or the receiver. Next, there is a discrete plea that on 12 October 2009 the second appellant was adjudicated bankrupt and that no legally enforceable vesting of his assets in the first appellant materialised subsequently. This is followed by an alternative pleading. The denouement of these discrete pleas is the following:
>
> > 'In the premises the plaintiff is put to strict proof that the first defendant was and/or remains liable for the discharge of the second defendant's indebtedness to the Plaintiff such as that may be.'
>
> [11] Next, there are several passages in the Defence and Counterclaim relating to the first of the two issues decided by Deeny J (supra). This is followed by an elaborate pleading that no valid registration of the English High Court transfer of assets Order with the NI Land Registry was effected having regard to certain provisions of the Land Registration Act (NI) 1970 (the "1970 Act") and the Land Registration Rules (NI) 1994 (the "1994 Rules"), together with section 18 of and Schedule 7 to the Civil Judgements and Jurisdiction Act 1980 (the "1982 Act") [paras 18 – 30]. Next there is a discrete plea that the appellants did not consent to the transfer of assets, the subject of the English High Court Order and that, in

consequence, the purported transfer of the subject agreement on which the Bank's claim is founded is invalid. Furthermore, assorted deficiencies in Schedules 4, 5 and 6 to the aforementioned Order are asserted. Next there is a plea that the Bank is debarred from enforcing any loan by reason of its failure to serve a Notice of Default pursuant to section 89 of the Consumer Credit Act 1974.

[12] With regard to the Bank's purported appointment of receivers, there are three specific pleas:

(i) Their appointment was invalid (without any particulars).

(ii) There has been no obstruction of the work of the receivers by the appellants.

(iii) The receivers have taken no steps or action with which the appellants could interfere in any event.

(iv) The Bank has assumed control of the receivers and has "directed them contrary to law" (again without particulars).

Within these discrete pleas there is a specific averment that the purported appointment of the receivers by the Bank occurred on 22 February 2013 (which squares with the Bank's chronology of events).

[13] The following are the essential ingredients of the counterclaim of the appellants: when the receivers were appointed the property was "tenanted" (without particulars); on 21 March 2013 the receivers caused locksmiths to change the locks thereby "unlawfully excluding the tenants of the apartments"; in consequence the tenants left the property "on or about April 2013"; the receivers failed to take steps to re-let the properties subsequently; with the exception of the letting of one retail unit between July and October 2014, instigated by the appellants, all of the units which the property comprises have been vacant since April 2013. The following proposition of law forms part of the counterclaim:

> 'By reason of its actions in directing the receivers the [Bank] became mortgagee in possession and as such was subject to a duty to

> manage the property actively so as in particular to maximise its return by taking all necessary steps to re-let the property and to collect such rents or other sums as were owing as fell due from the remaining tenants.'
>
> It is pleaded that the Bank acted in dereliction of this duty.
>
> [14] The final feature of the Defence and Counterclaim to be highlighted is the following. It contains a vague averment that the appellants "... have suffered loss full particulars of which will be provided upon discovery herein." At the time when this pleading was served, the Bank had served a List of Documents followed swiftly by an amended List of Documents, in March and May 2014. Following the service of this pleading, the Bank served a further List of Documents dated 18 November 2019. No amendment of the Defence and Counterclaim – nor any other comparable measure – to particularise the appellants' alleged "loss" has materialised. Nor has there been any challenge to the adequacy of the Bank's discovery."

[10] The trial of the substantive issues began before me on Monday 20 February 2023. It was listed for three days, but lasted for five. The first defendant, Mrs McKeever, appeared and conducted the trial in person, with some assistance from a friend. The second defendant, Mr McKeever, did not physically attend the hearing (whether or not he linked in by Sightlink I do not know) but the first defendant indicated that she appeared for both defendants.

[11] At the commencement of the hearing the first defendant identified an order of the court made on 6 December 2022, that the plaintiff provide a paper on the issues raised by the first defendant. These related to the authorisation for proceedings to be issued. She contended that this order of the court had not been complied with and that the plaintiff was in contempt of court. Mr Stevenson, counsel for the plaintiff, produced a letter, dated 27 January 2023, written by DWF (the plaintiff's solicitors) explaining the basis of that firm's (formerly C & H Jefferson) instruction.

[12] I held that the contents of this letter satisfied the order made on 6 December 2022 and, accordingly, that the plaintiff was not in contempt of court by not abiding by the order, as the first defendant had asserted. The first defendant, initially, did not accept this ruling. I explained to her that she had the option of appealing the ruling to the Court of Appeal, but that I was refusing leave to appeal, and she would have to make an application to the Court of Appeal for leave to appeal. In the event, during the course of the first day's hearing, it seems that the first defendant accepted that

since the ruling would be incorporated in the judgment in the substantive case, she could seek to appeal the ruling at that stage.

[13] The case began, with the plaintiff calling its witnesses. They were, in the order called:

(i) Michelle McArdle, in 2007 employed as a solicitor in the office of Tara Walsh, Solicitor;

(ii) Eamonn O'Neill, now retired but employed by Bank of Ireland (using the term entirely neutrally because of the issues discussed below) at all material times;

(iii) Seamus Patrick O'Kane, Treasurer for Bank of Ireland (UK) PLC;

(iv) Nicholas Gracey, from 2011 the defendants' relationship manager employed by Bank of Ireland;

(v) Gerard Kelly, a chartered surveyor employed by Best Property Services, Newry, one of the receivers appointed by the plaintiff;

(vi) Ciara McQuillan, Senior Manager of Bank of Ireland Customer Loans Solutions;

(vii) Kimberley Elizabeth Addis, Senior Solicitor employed in-house in Bank of Ireland's legal department.

[14] Since the first defendant had apparently thought that because of her contempt point the case would not proceed on 20 February, she indicated that she was not in a position to cross-examine the witnesses and, indeed, had not brought with her the trial bundles. Accordingly, in an effort to accommodate her, I directed that the plaintiff's witnesses would only give their evidence in chief on the first day, and that the first defendant could cross-examine them on subsequent days. This would give her time to prepare.

[15] On the night of Monday 20 February, after the first day of hearing, the court office received an email from the first defendant indicating that she had attended an out-of-hours GP in Newry with chest pains and raised blood pressure. As a result, the case did not restart on Tuesday morning. During the course of the morning, she supplied a handwritten note from a GP, which really did little more than report what the first defendant had told her (the doctor). I indicated to the first defendant that the GP's note was not sufficient medical evidence to result in the further delay of the case. Accordingly, on Tuesday afternoon a further witness for the plaintiff gave evidence, with the first defendant attending by Sightlink. No cross-examination of the witness took place on that day.

[16] On the third, fourth and fifth days of the trial the first defendant cross-examined the plaintiff's witnesses, and I facilitated the first defendant by having the witnesses recalled in whichever order she wished.

[17] At the conclusion of the plaintiff's case, the first defendant indicated to me that she was not going to give oral evidence. I had explained to her, the previous day — so as to give her time to consider the matter — that if she did not give oral evidence, and be subjected to cross-examination, factual matters asserted by her in submissions would not carry the same weight as they would have carried if she had given evidence. I deliberately did not provide any warning about the drawing of inferences as I had decided that it would be inappropriate in this case to draw any adverse inferences against the defendants following the first defendant's choice not to give oral evidence. I confirm that in my analysis of the evidence in the case I have not drawn any inferences adverse to the defendants based on the first defendant's decision not to give oral evidence. There are a number of properly sworn affidavits from the first defendant and I have afforded these appropriate weight in considering matters dealt with therein.

[18] At the conclusion of the evidence the first defendant asked to make a very short oral submission, which she duly did. I then allowed time for written submissions to be prepared by both sides, and those were received within the time set by me; the first defendant's closing submissions by 6 March 2023; the plaintiff's replying submissions on 8 March 2023; and the first defendant's further submissions on 17 March 2023.

[19] In reaching my determination of the issues in this case I have read the pleadings, the documents in the trial bundles, those in the core bundle where they are not duplicated in the trial bundles, all the affidavits filed in the case and all the parties' skeleton arguments and written submissions. I have also read the judgment of Deeny J and the judgment of the Court of Appeal. This judgment is unusually lengthy due to the large number of issues raised and which have to be dealt with. It would be impossibly long if I was to rehearse all of the material in the bundles. The fact, therefore, that any particular matter is not specifically mentioned in this judgment does not mean that I have not considered it in coming to my conclusions on the issues raised.

The plaintiff's case

[20] The case being made by the plaintiff is comparatively simple. On foot of a facility letter dated 6 March 2007 the plaintiff offered a loan to the defendants for a term of 17 years with interest to be payable at a rate of 1.75% over the plaintiff's base lending rate. For the first 24 months repayments were to be on an interest-only basis and thereafter on an interest and capital basis. Liability to the plaintiff was on a joint and several basis. Part of the security for the loan was a "First Legal Charge to be registered in favour of Bank of Ireland over property at 48/49 The Square, Crossmaglen — registered owners [the defendants]."

[21] Below the heading "Events of Default" the letter provided:

> "Should any of the above terms and conditions be breached, or, if in the opinion of the Bank, there has been a material change in circumstances affecting the facilities, or if the borrower defaults in payment of any indebtedness or in discharge of any obligation to any lender, the Bank will have the right to cancel the facilities and call for immediate repayment of all amounts outstanding."

[22] The defendants signed the facility letter on 12 March 2007.

[23] The charge was registered in the Land Registry in favour of the Governor and Company of the Bank of Ireland on 17 December 2007.

[24] Draw down of the loan began on 15 June 2007 and continued on foot of certificates from a Quantity Surveyor — as the premises were demolished and the new units constructed — until 10 December 2007 when the loan account was recorded as being £450,168.54 overdrawn.

[25] The defendants defaulted, as a result of which the plaintiff demanded repayment of the loan, subsequently appointed receivers and issued the present proceedings.

[26] The plaintiff's claim, as articulated by Mr Stevenson during the hearing, is for £477,622.91, the overdrawn amount of the loan account as shown on 5 September 2017.

The issues

[27] In the Defence and Counterclaim, in her cross-examination of the plaintiff's witnesses, in her affidavits and in her submissions the first defendant raised a very substantial number of issues on behalf of the defendants. I note from the Court of Appeal judgment what was said in paragraphs 39 and 40:

> "[39] … In short, in the events which occurred at the trial, there was no adjudication of the multiple issues raised in the Defence and Counterclaim of the appellants. This is the irresistible analysis of both the transcript and the final order of the court of trial. This too, ultimately, was not contested on behalf of the Bank. It represents the second ground on which this appeal must be allowed.
>
> [40] It is in this context that this court must add the following observation. It is not clear that the careful judgment of Deeny J was, as a matter of law, finally dispositive of the legal issues which it addressed, subject of course to onward appeal. This was a purely

> interlocutory judgment. Furthermore, the judge expressly acknowledged that he was not attempting to determine any disputed material issues of fact. While the question of whether there are in reality any such issues is unclear to this court, it is inappropriate to venture beyond this limited observation. It has been unnecessary for this court to explore, much less determine, the application of the familiar principles of issue estoppel/res judicata to this interlocutory judgment. This will be a matter lying within the exclusive domain of the first instance court pursuant to the order which we propose to make."

[28] Accordingly, as it seems to me, all of the issues raised by the first defendant fall to be decided in this case.

[29] The following were the issues raised:

(i) In one of her affidavits Mrs McKeever says:

> "… the plaintiff in this case is a stranger to us. We have no contact with them and they do not have our Power of Attorney as any Power of Attorney that may have been granted to the Governor and Company of Bank of Ireland does not transfer to a third party "Delegatus non protest Delegare." The plaintiff cannot put a new charge in their name on our folio at Land Registry nor can they appoint solicitors to act for them or appoint receivers against us because they do not have our Power of Attorney."

I will call this "the Governor & Co issue."

(ii) The terms of the facility letter dated 6 March 2007 were not admitted and the plaintiff were put to strict proof of the terms. In addition, the defendants contend that since the facility was not drawn down within the three-month period provided in the facility letter it is null and void and no liability arises. I will call these "the facility letter issues."

(iii) The first defendant makes the case that the solicitor, Ms McArdle, did not meet her or her husband on 18 April 2007 and did not witness the signature of the defendants on that date on the Deed of Charge. I will call this "the signature issue."

(iv) Although the Deed of Charge was signed by the defendants on 18 April 2007, the date on the first page of the Deed is 15 June 2007. Therefore, say the defendants, the Deed has been altered without their knowledge. I will call this "the date issue."

(v) The first defendant makes the case that the Deed of Charge was executed by the second defendant before he became an owner of the property. I will call this "the ownership issue."

(vi) It is asserted by the first defendant that the "purported mortgage deed contains no express power of attorney for the Bank or the receiver within it, and if it is claimed that it is implied, it will fail as the purported deed was not witnessed or attested, therefore it is not a deed, and a power of attorney must be created by deed." I will call this "the power to appoint a receiver issue."

(vii) It is also part of the first defendant's case that the fixed charge receivers were never validly appointed by the plaintiff. I will call this "the appointment validity issue."

(viii) The case is made that since the defendants are individuals within the meaning of the Consumer Credit Act 1974 as amended, they are entitled to the protections afforded by the Act, so that the plaintiff is not entitled to enforce the loan. I will call this "the 1974 Act issue."

(ix) The first defendant raises the issue of the second defendant's bankruptcy in paragraphs 12 and 16 of the Defence and Counterclaim. She makes a number of points, which I will call "the bankruptcy issues."

(x) The first defendant asserts that although an order was made in the High Court in England on 29 October 2010, there was a failure to register what is asserted to be a foreign judgment in this jurisdiction as required by certain provisions of the Civil Jurisdiction and Judgments Act 1982. This, it is submitted, had a knock-on effect in relation to the registration of the charge in the Land Registry; such registration, it is submitted, being invalid. Further, no notice of the transfer was ever sent to the first defendant. As a consequence of this the first defendant says that the order is unenforceable in the jurisdiction. I will call this "the transfer and registration issue."

(xi) The defendants make the case that the plaintiff has included the defendants' mortgage in a package of other debts and transferred these to a third party, so that the plaintiff no longer owns the debt. Alternatively, that the plaintiff has received payment for the debt, so that it no longer has any loss. I will call this "the securitisation issue."

(xii) One of the first defendant's recurring themes during the hearing was that the defendants were deprived of information about the state of a current account because statements were withheld. I will call this "the statements issue."

(xiii) The first defendant contends that the loan account was never in arrears, so that the plaintiff had no right to demand repayment or appoint receivers. I will call this "the default issue."

(xiv) The first defendant identifies a bank document, being a statement showing that the loan account stands at zero, and asserts that there is no debt owing to the Bank. I will call the "the zero balance issue."

[30] For the avoidance of any doubt, in my consideration of these issues when I use the expression in this judgment "I am satisfied" I mean that I am satisfied of the matter on the balance of probabilities.

[31] I now turn to consider the issues identified above.

(i) The Governor & Co issue

[32] There are several aspects to this. First, it is asserted by the first defendant that since any agreement which the defendants had was with the entity known as the Governor and Company of the Bank of Ireland, and since the plaintiff — Bank of Ireland (UK) PLC — and the Governor and Company of the Bank of Ireland are separate legal entities, neither she nor the second defendant have any agreement with the plaintiff in this case. Therefore, the plaintiff has no right to bring these proceedings. (This leads on to another issue which I explain and deal with below, under the rubric "the registration issue.") The point is made, further, that the first defendant never received any notice of any relevant transfer and never consented to it. The other main aspect of the point is that since the various Bank employees are employed by the Governor and Company of the Bank of Ireland, and not by the plaintiff, they have no authority to act for or on behalf of the plaintiff, for example, they have no authority to appoint solicitors or receivers on behalf of the plaintiff nor make affidavits on behalf of the plaintiff nor give any evidence on behalf of the plaintiff.

[33] This broad point also led to the defendants asserting that C & H Jefferson (now DWF) were never validly appointed, so could not purport to act for the plaintiff nor instruct counsel, Mr Stevenson.

[34] Each of the Bank's witnesses was cross-examined about this and from their evidence it is clear that, apart from Mr O'Kane, their contract of employment is with the Governor and Company of the Bank of Ireland.

[35] This point was dealt with comprehensively by Ms Kimberley Addis, a senior in-house solicitor. She was a most impressive witness, and clearly was fully conversant with and understanding of all the documentation which underlay her testimony. Her evidence begins with an order of the Chancery Division of the High Court of Justice (in England & Wales) made by Henderson J and dated 29 October 2010. It is entitled: "In the Matter of the governor and Company of the Bank of Ireland and In the Matter of Bank of Ireland (UK) PLC and In the Matter of Part VII of the Financial Services and Markets Act 2000."

[36] The order recites, inter alia:

> "UPON THE APPLICATION by Claim Form … of the Governor and Company of the Bank of Ireland (Bank of

> Ireland) and Bank of Ireland (UK) plc (Bank of Ireland (UK)), the Claimants named in the Claim Form issued in the above matter on 29 June 2010 for, inter alia, the sanctioning of a banking business transfer scheme set out in the Schedule hereto (the Scheme) pursuant to Part VII of the Financial Services and Marketing Act 2000 …
>
> THE COURT HEREBY SANCTIONS, pursuant to Section 111 of the Act, the Scheme as set out in the Schedule hereto
>
> IT IS ORDERED THAT, pursuant to section 112 of the Act
>
> (a) on and with effect from the Effective Date, the Business shall, by virtue of this Order be transferred to and be vested in the Transferee, in accordance with and object to the terms of the Scheme;
>
> (b) subject to paragraph 6 of the scheme, on and with effect from the Effective Date, each transferred Asset and all of the rights, benefits, powers, obligations and interests of the Transferor in each Transferred Asset shall, by virtue of this Order and without any further act or instrument be transferred to and be vested in the Transferee and the Transferee shall succeed to each Transferred Asset as if in all respects it were the same person in law as the transferor, subject to all Encumbrances (if any) affecting such Transferred Asset and in accordance with and subject to the terms of the Scheme…"

[37] The Governor and Company of the Bank of Ireland is the Transferor; the plaintiff (Bank of Ireland (UK) PLC) is the Transferee; and the Effective Date was one minute past midnight on 1 November 2010. The Scheme definition of 'Business' includes "NI Banking" and goes on to say "including … (a) all activities and services carried on principally in connection or principally for the purposes of any such businesses (b) all rights, undertakings and assets of whatever nature used in or relating to, any such businesses including the Transferred Assets…"

[38] The phrase "NI Banking" is defined as "the transferor's branch banking, business lending, deposit-taking and current account business carried on through establishments in Northern Ireland, including the products listed in Part B of Schedule 1." Part B of Schedule 1 includes "Base Rate Sterling Loan" — which is the type of product provided to the McKeevers.

[39] The definition of "Transferred Assets" is:

> " … all assets of the transferor whatsoever or wheresoever situated in relation to the Business as at the Effective Date

> including without prejudice to the generality of the foregoing:
>
> …
>
> (iii) the rights, interests, benefits and powers of the transferor arising under, or by virtue of, the Transferred Loans, the Transferred Mortgages (and in each case the legal and beneficial title to the same) and in relation to Deposit Accounts."

[40] "Transferred Loans" — "means each loan, overdraft or other lending or finance arrangements relating to the Business other than the Transferred Mortgages … under which any liability to the transferor remains unsatisfied or outstanding at the Effective Date…."

[41] Paragraph 1.2 of the Scheme defines both "asset" and "security" in the widest possible terms. Paragraph 5.15 provides, where material:

> " … any security in relation to the Business held immediately before the Relevant Date[1] by the Transferor … as security for the payment or discharge of any liability … shall, on and from that day, be held by the Transferee … and be available to the Transferee … as security for the payment or discharge of that liability (and if not physically delivered to the Transferee shall be deemed to be so delivered on that day."

[42] Paragraph 11 of the Scheme provides:

> "The production of a copy of the Order … shall for all purposes be evidence of the transfer to, and vesting in, the Transferee of the Business, the Transferred Assets …"

[43] Paragraph 7 of Part B of Schedule 1 to the Scheme specifically includes as transferring to the plaintiff "Base Rate Sterling Loan", which was the type of facility granted to the defendants.

[44] Having read and examined the Order, including the Scheme, and having heard the evidence of Ms Addis, I am satisfied that the McKeevers' loan comes within the definitions of NI Banking and Transferred Loans and has been transferred by the Governor and Company of The Bank of Ireland to the present plaintiff, with all the rights, benefits and powers pertaining thereto. Accordingly, I am satisfied that the plaintiff has the right to bring these proceedings against the defendants.

[45] As to notice of the transfer, Ms Addis explained that while some letters were sent to some people, in fact there was no requirement for notice to be provided individually to customers. The assignment was not a contractual assignment but a

[1] defined in paragraph 5.1 as the Effective Date

statutory assignment. Accordingly, the only requirement was to publish the appropriate notice in newspapers, which was done by publishing in 2 UK national newspapers and in the Belfast Telegraph, the Irish News and the Belfast Gazette.

[46] Ms Addis also gave evidence in relation to the first defendant's point about the employees not being employed by the plaintiff, but by another entity, the Governor and Company of the Bank of Ireland. She told me that this is covered by a Service Level Agreement entered into between the Governor and Company of the Bank of Ireland and Bank of Ireland (UK) PLC on 28 October 2010. She described it as a "quirk of the Scheme" that the staff did not transfer from the former to the latter; their contracts of employment remained with the Governor and Company of the Bank of Ireland. The Service Level Agreement was, in effect, an outsourcing agreement between the two entities.

[47] Some pages in the Service Level Agreement included in the trial bundles were redacted. The first defendant was concerned about the extent of redactions. I directed that the full, un-redacted version be provided to me, and the plaintiff's solicitor made this available. I read the whole document to see whether any of the redacted material might contain information directly or indirectly enabling the first defendant either to advance the defendants' own case or to damage the case of the plaintiff — see eg *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano* (1882) 11 Q.B.D. 55. I was satisfied that none of the redacted material fell into either category so there was no requirement to provide the defendants with an un-redacted version.

[48] The Service Level Agreement is described (para 2.1 of the document) as "a contract for the provision of the Schedule Services by each of the Service Providers to the Firm." The Service Providers are various business units of Bank of Ireland and Schedule services includes Business Banking. Paragraph 2.2 provided:

> "The Firm hereby appoints each of the Service Providers to perform, or procure performance of, the Schedule Services … with effect from the start Date and the Service Providers hereby accept such appointment on the terms and conditions set out herein."

[49] The Business Banking Services were given reference numbers. BB-S009 was described as "Credit Management - Customer Credit Facility Underwriting and Management." BB-S010 was "Credit Management - Collections & Recovery. BB-S011, also "Credit Management - Collections & Recovery", described the service element as undertaking debt recovery activities, including seeking legal advice where necessary. One of the tasks involved "Ownership of the asset taken and liquidation of capital where necessary."

[50] In my view it is clear, both from the Service Level Agreement documentation and the evidence of Ms Addis, that those who acted in this case on behalf of the plaintiff entity were fully entitled to do so on foot of the outsourcing agreement. Accordingly, I am satisfied that the point being made by the first defendant as to the right of those personnel to act on behalf of the plaintiff is incorrect. I am satisfied that

those witnesses whose present contract of employment is with the Governor and Company of the Bank of Ireland were fully entitled to give evidence on behalf of the present plaintiff, whether orally or on affidavit, and I am satisfied that those employees who appointed the fixed charge receivers and instructed the solicitors to act on behalf of the plaintiff were entitled to do so.

[51] That brings me to another point raised by the first defendant — that the plaintiff had no policy document permitting employees at certain levels to sign documentation on behalf of the plaintiff, so that those witnesses who signed various documents had no authority so to do. The first defendant's assertion arises from a document entitled:

"Bank of Ireland
Business Banking UK
Authorised/Panel Signatory Arrangements (June 2009)"

The document in the trial bundles — the only one presented to the Court — was clearly created on 13 September 2006, ie long before the plaintiff came into existence. The document identifies the level of authorisation required for the signature on various documents. For example, the authorisation of a new facility letter must be signed by two persons, one from Panel A, the other from Panel B. The levels — A or B — refer to the seniority of the individual. The point made by the first defendant is that the document before the court was prepared by the Governor and Company of the Bank of Ireland; that it cannot be the plaintiff's document; therefore, it could not authorise any person to sign on behalf of the plaintiff.

[52] The first defendant says that when it came to the appointment of the receivers, therefore, the plaintiff (as opposed to the Governor and Company of the Bank of Ireland) had never authorised the signatories. The appointment document (with which I will deal later in this judgment) was signed by Eamonn O'Neill and Nicholas Gracey. Mr O'Neill was Panel A; Mr Gracey, Panel B.

[53] I am satisfied that there is no merit in this point. The fact that the authority levels remained in existence, notwithstanding that they were created in 2006, does not in any way call into question the authority of the persons who signed the relevant documents. The plaintiff clearly continued to use the document after 2010 for the internal purpose of identifying who could sign relevant documents. It was simply adopted as a matter of expediency. Nothing in this point calls into question the authority for the appointment of the receivers.

[54] The first defendant also relies on the provisions of the Bankers' Books Evidence Acts 1879-1959 in support of her proposition that witnesses were neither "an officer of the bank or at the very least an employee of the bank" in contravention of the Acts. In this connection I note the judgment of Horner J in *Bank of Scotland PLC v Foster and Foster* [2014] NICh 18. Dealing with the same point he said, para [10]:

> "Further, it is alleged that the bank has failed to comply with the Banker's Book Evidence Acts. Authorities are relied on from the Republic of Ireland. However, the Civil

> Evidence (NI) Order 1997 has been passed since the Banker's Book Evidence Acts. This allows the court to act on hearsay evidence: see the decision of Deeny J in *Santander (UK) Plc v Thomas Anthony Carlin and Another* [2013] NICh 14. But in any particular case the court will decide what weight has to be given to that hearsay evidence. I consider the evidence adduced by the bank to be reliable and that the court can act upon it with confidence."

Having seen and heard the plaintiff's banking witnesses and considered the weight to be given to their evidence, I am satisfied that I can act with confidence upon the evidence given by the plaintiff's banking witnesses.

[55] I need at this stage to tidy up a further point arising from the same arguments, namely the appointment of the solicitors to act for the plaintiff. Initially C & H Jefferson were instructed by Mr Gracey (the firm is now DWF). For the reasons I have already explained about the effect of the Service Level Agreement, I am satisfied that Mr Gracey had authority to instruct the solicitors and I am satisfied that C & H Jefferson/DWF were, and remain, properly instructed in the action, as was, and does, counsel.

(ii) The facility letter issues

[56] I can deal with the first point quickly. In the Defence and Counterclaim the defendants merely put the plaintiff on strict proof of the terms of this document. They called no evidence on this point and, save for the 3-month point (see below), no witness was cross-examined on the content of the facility letter. In a skeleton argument of May 2016, it is admitted that the defendants signed the facility letter. At an earlier stage of the proceedings the defendants had denied that it was their signatures on the facility letter and engaged a handwriting expert. This expert found no evidence to suggest that the signatures on the facility letter were not those of the defendants, and this point was abandoned by the defendants. At the hearing before me the facility letter was proved in evidence by Mr O'Neill.

[57] As to the second point, under the rubric "Drawdown" the facility letter provides:

> "In the event of facilities approved herein not being drawdown (*sic*) within 3 months from the date of this Letter of Offer, Letter of Offer is to be considered null and void."

The facility letter is dated 6 March 2007 and was accepted and signed by the defendants on 12 March 2007. The first draw down did not occur until 15 June 2007, ie more than three months from the date of the letter and of acceptance. Therefore, say the defendants, the facility letter ceased to have effect on the expiration of the three-month period, no terms and conditions in the facility letter are binding on them and no liability arises thereunder. Another aspect of this is that the facility is described

as 'expired.' The first defendant asserts that this means that there is no relevant liability.

[58] There is, in my view, no substance in this point. By the defendants drawing down sums for the purposes of demolition and construction between June and December 2007 and by the plaintiff permitting such draw downs, the actions of both parties can only have been on foot of and subject to the terms and conditions in the facility letter. I am satisfied that both parties were — and considered themselves to be — bound by those terms and conditions at all material times. The reference to 'expired' was explained as simply meaning that the facility had expired. This had no effect on the liability for the debt, which remains.

(iii) The signature issue

[59] Ms McArdle gave evidence and was cross-examined. She was a solicitor in the firm of Tara Walsh in Newry in 2007. The other solicitors in that office were Tara Walsh, and Eamon Sloan. All three solicitors in the firm worked in what Ms McArdle described as 'general practice.'

[60] The defendants' case is (1) that Ms McArdle was never instructed by the defendants; (2) she did not meet them in the offices of Tara Walsh; (3) she did not witness the signatures of the defendants; (4) the second defendant is unable to read, being dyslexic, and the document was not read to him. The first three of these matters were put to her in cross-examination. In addition, it was put to her that although her attendance note records Mrs McKeever's name, it does not record that of Mr McKeever.

[61] Ms McArdle identified an attendance note, of which she was the author, recording a meeting on 18 April 2007. Unsurprisingly she agreed that she has no independent memory of the meeting and is wholly reliant on her attendance note.

[62] In my view the fact that McArdle was never instructed by the defendants is irrelevant. She was a solicitor in the firm of Tara Walsh, as was Eamon Sloan, who was, according to the first defendant, the solicitor instructed. It is not unusual for different solicitors in a firm to see clients from time to time if circumstances lead to the availability of one, but not another. Mrs McKeever, in her cross-examination, said that she was told that Mr Sloan was ill, which would be a perfectly good reason for her to see another solicitor in the practice. I am satisfied that there is nothing in this point.

[63] I am satisfied that both Mr and Mrs McKeever attended the solicitor's office on that day. I noted that when questioning Ms McArdle the first defendant used expressions such as "When we got there" [to the office of the solicitors]; "somebody would be with us"; an assistant put some papers "in front of both of us and we signed in her presence, but not in the presence of Ms McArdle." To the question "Are you saying you met us both, for the purpose of witnessing and signing the deed?", Ms McArdle answered "Yes." She told me, and I believe her and accept, that she would never sign a document as a witness to a signature without actually witnessing the signature. She denied that she added her signature later and not in the presence

of the McKeevers. Having heard her evidence, I am satisfied that she witnessed the signatures of the McKeevers in the office of Tara Walsh on 18 April 2007.

[64] Although there was an assertion in the Defence and Counterclaim, as recorded above, that Mr McKeever was unable to read, no medical evidence was drawn to my attention during the course of the case before me, and the matter was not referred to in cross-examination of Ms McArdle. If it had been an important part of the defendants' case I would have expected it to have been at least referred to any medical evidence drawn to my attention. I am satisfied on the evidence before me that there is nothing in this point. Further, I note that one of the defendants' points in an affidavit sworn by the first defendant in October 2013 was that the formalities of the mortgage were not explained to them, nor were the consequences of entering into the mortgage. This was the only evidence on the matter. However, I note the entry in Ms McArdle's attendance note (see para [72] below) which suggests that some matters were explained to the defendants. This issue was not dealt with by the first defendant in her cross-examination of Ms McArdle, so that Ms McArdle was not given an opportunity to comment on it. If this point is still being made, I reject it.

[65] In addition, in earlier submissions a point was made about there being different versions of the mortgage deed. In an unsworn affidavit the first defendant says that the document examiner instructed by the defendants says that the mortgage deed sent by the defendants is not the same as the deed in the Land Registry. The first defendant asserts that there are three different versions of the deed. Ms McArdle told me that it was common to have duplicates of the mortgage deed, one on the file and one sent to the Land Registry. Whatever import there was intended to be in this point, it was not the subject of any evidence called by the defendants. The report of the document examiner is in the papers, but the witness was not called to give evidence about the findings nor to be cross-examined. In those circumstances I consider there is nothing which has satisfied me that this point has any impact on the plaintiff's claim.

[66] There is a further aspect of this matter, which arises from the decision in *Shah v Shah* [2002] QB 35. In that case the defendants signed a document described as a deed which stated that they jointly and severally agreed to pay the plaintiff the sum of £1.5m. The signature of a witness attesting to their signatures was added shortly after they had signed but not in their presence. On the plaintiff's claim on foot of the deed the judge held that the deed was regular and complete on its face and duly executed, that the defendants were estopped from denying its validity on the ground that it was not signed in the presence of a witness who attested the signature within section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 and that the plaintiff was entitled to recover under it. The Court of Appeal dismissed the defendants' appeal. In the course of the judgment Pill LJ said (para [33]):

> "For the reasons I have given the delivery of the document, in my judgment, involved a clear representation that it had been signed by the third and fourth defendants *in the presence of the witness* and had, accordingly, been validly executed by them as a deed. The defendant signatories well knew that it had not been signed by them in the presence

> of the witness, but they must be taken also to have known that the claimant would assume that it had been so signed and that the statutory requirements had accordingly been complied with so as to render it a valid deed. They intended it to be relied on as such and it was relied on. In laying down a requirement by way of attestation in section 1 of the 1989 Act, Parliament was not, in my judgment, excluding the possibility that an estoppel could be raised to prevent the signatory relying upon the need for the formalities required by the section."
>
> [emphasis in the original]

[67] In the present case, following the signatures of the defendants on the Deed, it was delivered to the Bank in circumstances where it was clearly the intention of the defendants that the Bank should accept it as properly executed, as indeed they did, and advance moneys to the defendants, as they did. In my view, even if I was to be wrong about the evidence of Ms McArdle, I consider that the defendants are estopped from denying the validity of the Deed.

(iv) The date issue

[68] The thrust of this point is that the Deed of Charge is dated 15 June 2007 but since the defendants signed the document in the offices of Tara Walsh on 18 April 2007, the Deed has "been altered after execution which represents a material change in the purported mortgage deed …"

[69] This point was put to Ms McArdle in cross-examination by the first defendant. Her explanation was that it was not unusual for mortgagors to sign a deed before the completion date and for the completion date to be inserted later. In this case completion took place on 15 June 2007, when the defendants made the first drawdown, so this is the date on the Deed. She denied that this meant that the Deed was altered.

[70] I consider that the addition of the date of 15 June 2007 on the day on which the first moneys were drawn down represents the date of execution of the Deed. I consider, further, that there is nothing in this point which calls into question the validity of the Deed.

(v) The ownership issue

[71] Originally the property at 48/49 The Square, Crossmaglen was owned solely by the first defendant. She makes the point in an affidavit that the Bank required the property to be in the joint names of the defendants before they would provide finance for the project and that she reluctantly agreed to this.

[72] The attendance note prepared by Ms McArdle commences with the entry:

> "In her sole name transferring to joint names
>
> — Mortgage deeds

— Happy with mortgage

If don't keep up bank repossesses…"

[73] There is another attendance note dated 27 April 2007 and made by Mr Sloan. It records a further attendance with the first defendant and records:

"Michelle and John attended with MMcA 18/4/07

(1) executed Transfer Deed Michelle McKeever to Michelle McKeever & John McKeever. Folio 16777 Co Armagh"

[74] Although the first defendant says that this is hearsay, that does not mean it is inadmissible in evidence. As to the weight to be attached to it, I am satisfied that this is a contemporaneous attendance note made by the defendants' solicitor recording the events of a few days previously. There is no reason to impugn the contents of the note.

[75] I am satisfied from the attendance notes and the evidence of Ms McArdle that the transfer of ownership in the folio was done before the signature on the mortgage deed and that there is nothing in the point made by the first defendant.

[76] Arising from the above I am satisfied that the property is validly charged in favour of the plaintiff. Even if I am wrong, I find that the defendants are estopped from denying the validity of the charge.

(vi) The power to appoint a receiver issue

[77] Contrary to what is asserted by the defendants (see para 9 of the Defence and Counterclaim) the Deed contains in Clause 10 the right of the Bank to appoint a receiver:

> "The Bank may at any time … appoint at the sole risk and cost of the Chargeant a person to collect and receive such rents … and so that the statutory provisions respecting the appointment of receivers over property in mortgagee and the powers and duties of such receivers or otherwise in relation thereto shall apply to this security …"

[78] Section 19(1)(iii) of the Conveyancing and Law of Property Act 1881 provides:

> "1**9. Powers incident to estate or interest of mortgagee**
>
> (1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):
>
> …
>
> (iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof…"

[79] The first defendant raised a further argument, namely whether the power to appoint a receiver (singular) includes the power to appoint receivers (plural). Section 37(2) of the Interpretation Act (Northern Ireland) 1954 provides that "in an enactment — (a) words in the singular shall include the plural."

[80] I am satisfied that the plaintiff had the power to appoint as receivers Mr Best and Mr Kelly.

(vii) The appointment validity issue

[81] I have dealt (see in particular paras [52] and [53] above) with the issue of the authority of Messrs O'Neill and Gracey to appoint the receivers. The defendants' further point is that although the appointment document is described as a Deed of Appointment, in fact, it is not a deed, and the receivers were never validly appointed.

[82] It was accepted by the plaintiff's witnesses that the document is not a deed, notwithstanding its description, because the signatories on the appointment were not directors of the Bank.

[83] The Bank refers to the Irish case of *McCleary v Philips* [2015] IEHC 591 for the proposition that the receiver's authority to act is derived from the deed of charge and is to be appointed according to the terms of the deed of charge and, further, makes the case that there is nothing in Clause 10 of the Charge which requires the receiver to be appointed in writing. I agree that there is nothing in the Charge which requires the appointment to be in writing.

[84] However, in my view where the deed itself provides no particular mechanism for the appointment of a receiver, the fall-back position is to be found in section 24(1) of the Conveyancing and Law of Property Act 1881. This provides:

> "**24 Appointment, powers, remuneration, and duties of receiver**
>
> (1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

[85] It is clear from that section that all that is required is an appointment in writing. The formality of a deed is not a requirement for the appointment of a receiver under the Act.

[86] As to the phrase "by writing under his hand" which the first defendant relies on as supporting her argument that no valid appointment took place, I note that this matter was discussed in the decision of Lewison J in *Trustee Solutions Ltd v Dubery another* [2006] EWHC 1426 (Ch). He said:

> [32] … Curiously, *Chadwick v Clarke* is the only authority cited in Halsbury's Laws of England (4th ed) vol 13 para 138 in support of the proposition that:
>
> > 'An instrument under hand only is a document in writing which either creates or affects legal or equitable rights or liabilities, and which is authenticated by the signature of the author, but is not executed by him as a deed.'
>
> Although *Chadwick v Clarke* itself does not support the proposition in Halsbury, the proposition itself is, in my judgment, correct. As a matter of ordinary usage in the English language (and in particular ordinary English legal usage) an instrument under someone's hand is an instrument that he has signed."

[87] A further point was raised about the effect of section 44 of the Companies Act 2006. The first defendant argues that under section 44 neither Mr O'Neill nor Mr Gracey fell within the definition of a person who could validly execute a document. In my view, however, the document appointing the receivers is not a document which requires execution in the sense in which execution is intended in section 44. In any event, I am satisfied that the provisions of section 24 of the 1881 Act provide the proper statutory mechanism for the appointment, and that that mechanism was followed in the present case.

[88] The first defendant makes a further point, which she says arises from clause 6(c) of the Deed of Charge. She submits that "the provisions of s. 24 of the Act of 1881 were expressly disapplied, see section 6(c) of the mortgage indenture and therefore appointing the receiver by writing under the hand would not have been applicable to this mortgage." Clause 6(c) provides that "the power to appoint a receiver … shall be exercisable without the restrictions on its exercise imposed by Section 24 of the [1881] Act". Far from disapplying the provisions of section 24, this provision would seem to make it easier for the mortgagee to appoint a receiver, by ignoring the restrictions on when the power can be exercised which are referred to in section 24(1).

[89] In all the circumstances I am satisfied that the receivers were validly appointed. I deal below under the heading 'Counterclaim' with the actions of the receivers both before and after appointment.

(viii) The 1974 Act issue

[90] The first defendant asserts that the defendants are individuals within the meaning of Consumer Credit Act 1974 and asserts that the plaintiff has failed to comply with the requirements of the Act, "in particular sections 87 et seq" as a result of which the plaintiff is not entitled to enforce the loan, as it has not served a notice of default as required by the Act.

[91] Section 87 provided that service of a default notice "is necessary before the creditor or owner can become entitled, by reason of any breach by the debtor or hirer of a regulated agreement." Section 189 of the Act defined "regulated agreement" as "a consumer credit agreement which is a regulated agreement (within the meaning of section 8(3)."

[92] Section 8 of the Act provided, as originally enacted:

> **"8 Consumer credit agreement**s
>
> (1) A personal credit agreement is an agreement between an individual (" the debtor") and any other person (" the creditor ") by which the creditor provides the debtor with credit of any amount.
>
> (2) A consumer credit agreement is a personal credit agreement by which the creditor provides the debtor with credit not exceeding £5,000.
>
> (3) A consumer credit agreement is a regulated agreement within the meaning of this Act if it is not an agreement (an " exempt agreement ") specified in or under section 16.

[93] By the Consumer Credit (Increase of Monetary Limits) (Amendment) Order 1998 the figure of £5,000 in section 8(2) was increased to £25,000. Section 8 was substantially amended with effect from 2008, including the repeal of section 8(2). However, at the date of the signature of the facility letter, March 2007, section 8(2) (on which the defendants rely) provided that a consumer agreement was one in which the creditor advanced to the debtor a sum not exceeding £25,000. In the present case the advance was £450,000.

[94] Accordingly, there is no merit in the point being made by the first defendant in relation to the requirements of the 1974 Act.

[95] I am fortified in this view by the decision of Horner J in *Bank of Ireland v McLaughlin* [2015] NIQB 85 — see in particular para [48].

(ix) The bankruptcy issues

[96] The first argument is that the second defendant's overdraft was taken into account in his bankruptcy. Since the plaintiff's case does not involve any claim in relation to this account, I need not consider this matter further.

[97] The first defendant denies that the Trustee in Bankruptcy transferred his interest in the property to the first defendant. However, the relevant transfer documentation is in the trial bundles and clearly this transfer occurred. Not only that, but it is clear from a letter of 23 August 2010 that at the material time the first

defendant was represented by McNamee McDonnell Duffy Solicitors LLP, Newry ("MMD"). That letter, addressed to C & H Jefferson, enclosed the Transfer Deed (the transferor being the second defendant's Trustee in Bankruptcy; the transferee being the first defendant) for execution by the Bank. By a further letter dated 14 October 2010 the first defendant's solicitors, MMD, sent to C & H Jefferson a Land Registry acknowledgement of the Registry's receipt of the transfer documentation.

[98] There is no merit in the first defendant's denial.

[99] The first defendant further argues that since the defendants were joint tenants of the property, such joint tenancy was severed by the bankruptcy. Whether or not any joint tenancy was severed is immaterial since the liability to the plaintiff is a joint liability. The facility letter contains the following as one of its terms and conditions:

> "**8. JOINT BORROWINGS** - Where an advance is granted to two or more persons, the liability to the Bank shall be joint and several."

[100] There is, in my view, no substance to the bankruptcy points. Irrespective of the second defendant's bankruptcy, the first defendant remains liable to the plaintiff for the whole of the amount.

(x) The transfer and registration issue

[101] There are two aspects of the defendants' case under this heading. First, the defendants have pleaded (Defence and Counterclaim — para 18) that the Order of Henderson J "is foreign to the jurisdiction of Northern Ireland and was never registered in Northern Ireland as required by" the Civil Jurisdiction and Judgments Act 1982, citing particularly section 18 and Schedule 7. The first defendant says that this makes it unenforceable in this jurisdiction. The first defendant further relies on Order 71 Rules 34 and 35 asserting that (para 19) the Order of Henderson J should have been registered in Northern Ireland and a subsequent application made to the High Court in this jurisdiction "to vary the Order in respect of properties and assets held in Northern Ireland, to the effect that the law in Northern Ireland would apply for those particular assets."

[102] Secondly, the first defendant also relies on the Land Registration Act (Northern Ireland) 1970 and the Land Registration Rules (Northern Ireland) 1994 to support the proposition that there was a failure properly to register the charge and that this failure invalidates the action brought against her.

[103] Ms Addis gave evidence about this matter to the effect that following the transfer (see above) there was no need to register the Order of the English court in Northern Ireland because the Act under which the Order was made — the Financial Services and Markets Act 2000 — is a UK Act.

[104] The effect of the transfer was discussed in some detail by Burgess J in his judgment in *Doherty v Bank of Irelan*d (UK) PLC [2018] NICh 1. After setting out a

number of the provisions or the court's Order between paras [11] and [15] of the judgment he says:

> "The effect of these particular sub-paragraphs, supplemented by the provisions of the other sub-paragraphs operate to put the Transferee (in this case the Bank) in substitution for the Transferor (Gov Co) without any further documents or transfers. A copy of the Order is sufficient to show that the Transferee enjoys all of the rights, and obligations, of the Transferor without more."

[105] In *Doherty* it was argued that the debtor had grounds for disputing the debt because of the absence of registration of the Order in Northern Ireland. Following his analysis of the court's Order, the relevant provisions of the Civil Jurisdiction and Judgments Act 1982 and Order 71 of the Rules of the Court of Judicature in Northern Ireland Burgess J concluded that "Mr Doherty does not have an arguable case or a potentially viable defence … requiring investigation based on the non-registration of the Order in the High Court in Northern Ireland."

[106] In respectful agreement with Burgess J I am satisfied that the defendants' argument relating to non-registration in this jurisdiction has no merit.

[107] The second major aspect in this section of the judgment is the contention of the defendants that there was a failure properly to register the charge with the Land Registry, and that this invalidates the action brought by the plaintiff. Ms Addis, in cross-examination, accepted that to transfer a charge from one entity to another would ordinarily require a deed of transfer. In this case the Order of the High Court in England & Wales formed the transfer document, and it was recognised by all Land Registries in England, Wales and Northern Ireland. She described how the Bank had meetings with the Land Registry, who required the Bank to lodge with the Land Registry a Form 100 to permit updating of the registration of charges in the Land Registry. Because of the numbers of charges involved forms were lodged in batches with the Land Registry, accompanied by schedules of properties affected.

[108] Having heard the evidence of Ms Addis, both her evidence in chief and in cross-examination, I am satisfied that the registration of the charge with the Land Registry was validly effected.

[109] If I am wrong about this then, as submitted by the plaintiff, section 11 of the Land Registration Act (Northern Ireland) 1970 puts paid to any point made by the first defendant. It provides:

> "**11 Conclusiveness of registers**.
>
> (1) Save as is otherwise provided by or under this Act, the register shall be conclusive evidence of the titles shown on that register and of any right, privilege, appurtenance or

> burden as shown thereon, and the title of any person shown thereon shall not, in the absence of actual fraud, be in any way affected in consequence of his having notice of any deed, document or matter relating to or affecting the title so shown.

[110] At this point I need to deal with an allegation made against Ms McArdle by the first defendant. I dealt above, under the rubric "the signature issue" with the circumstances of the meeting of 18 April 2007. Essentially the first defendant makes an accusation of fraud in this case. In her written submissions of 6 March 2023, under para 5, she says:

> "given the evidence of, and testimony to suggestion of same, throughout this most recent aspect of the proceedings … the Defendant says that there is indeed more than suggestion of fraud in this case and therefore the Register cannot be deemed conclusive evidence of the burden listed thereon, despite the Bank's claim to the contrary.
>
> Furthermore, given the aforementioned, it could be concluded that the mortgage deed has now been found to be wholly ineffective as a deed, and therefore no longer a document that can be relied on to create a charge in law, a fundamental aspect of these proceedings. Given too, that the court has been presented with what appears as intentional deception, from more than one of the witnesses put forward, there can remain no doubt that fraud has been committed throughout this journey of the 'deed.'"

[111] Having reviewed in detail all of the evidence given before me I am satisfied beyond doubt that there is no evidence of fraud in this case.

[112] A copy of the Register was produced in evidence. This records the transfer of the charge from the Governor and Company of the Bank of Ireland to the present plaintiff and records the registration of the charge in favour of the plaintiff on 20 January 2011.

[113] Accordingly I am satisfied that the plaintiff is the registered owner of the charge with all the rights thereunder.

(xi) The securitisation issue

[114] The thrust of the defendants' case is that the plaintiff has included the defendants' mortgage in a package of other debts and transferred these to a third party, so that the plaintiff no longer owns the debt. Alternatively, the mortgage was sold to the third party, so that the plaintiff now has no loss. The defendants assert that their loan was included in a package of loans used by the plaintiff for securitisation

purposes and that this was done without their knowledge or consent. They rely on a discovered document entitled "Bowbell No. 1 PLC."

[115] In *Herron v Bank of Scotland plc* [2018] NICA 11 the Court of Appeal described securitisation in the following terms (para [56])

> "'Securitisation' is a term of art in the financial world. The Court takes judicial notice that it denotes a financial practice whereby various types of contractual debt – residential mortgages and others – are pooled and their related cash flows are sold to third party investors as interest bearing securities. In this way the security holder secures the financial benefit from the payment of interest and principal by the debtor, while the financial institution concerned raises finance – in this case £4 billion in consideration of the equitable assignment of 29,500 mortgages – which can be devoted to investments of its choice."

[116] Mr Seamus O'Kane, employed as Treasurer for the plaintiff, was called to deal with the issue of securitisation of the loan. He explained the concept of securitisation, with specific reference to the document and what he described as the Bowbell project. He described how the plaintiff would pull together a group of assets and utilise them either to obtain funding from investors or as collateral. The assets, he said, all relate to *residential* properties. From the section of the document entitled "Underlying Assets" I note reference to "a portfolio of mortgage loans secured over *residential* properties located in England, Wales, Northern Ireland and Scotland …" He said that since the McKeevers' property consisted of a mixture of residential and commercial units, the loan to the McKeevers was never securitised.

[117] In cross-examination he was asked whether a property, which the first defendant described as 70% residential, would be included in the securitisation project. He said that it would be "incredibly unusual" for a mortgage loan to be included where the property had dual status — ie a mixture of residential and commercial units. He also said that a check of the McKeevers' mortgage account number against those mortgage account numbers included in the Bowbell project revealed no match.

[118] I find, on the balance of probabilities, that the McKeevers' mortgage loan was not included as part of the securitisation package in the Bowbell project, so there is nothing in this point.

(xii) The statements issue

[119] The defendants had with the plaintiff an account 20625534, which (para 6 of the Statement of Claim) was opened in September 1993. Part of the plaintiff's claim included the overdrawn sum on this account identified in the Statement of Claim as £1,392.30. The first defendant complained that no statements were received by the

defendants relating to this account until the proceedings had been ongoing for a very significant period. When she eventually saw a statement for this account it showed an overdraft figure in excess of £136,000 with further interest continuing to accrue, notwithstanding that, according to the first defendant's submission (and accepted by the plaintiff), this was a dormant account. In her closing submissions she made the case that the transactions being processed on this account were wilfully concealed from the defendants and described this as "something akin to money laundering."

[120] Although other witnesses were cross-examined about this point, the plaintiff's principal witness to this issue was Ms Ciara McQuillan. Ms McQuillan is a senior manager in the plaintiff's Customer Loans Solutions department. She has been managing the defendants' case since August 2017.

[121] The court was provided with a copy of a bank statement in the name of the defendants and dated 5 November 2017. It shows an overdraft balance at that date of £136,727.01. Ms McQuillan gave evidence that when the Bank appoints a fixed charge receiver it is a commonly used housekeeping measure that enforcement costs are debited to an account, purely as an administrative measure. As the account is still interest bearing, so the debit balance increases over time. Mr Gracey, in cross-examination described it as "internal housekeeping", to track and understand where the costs of the receivership fall.

[122] Ms McQuillan said that on a separate screen on the Bank's system appears the message: "Do not produce statements." This message appears because the Bank has no intention of passing the debt on to the account holder. She told me that the McKeevers have no liability for this account and that the expenses associated with the receivership will be borne by the plaintiff.

[123] Bank witnesses agreed that this was not good banking practice, but denied that there was any wilful concealment. The practice has been discontinued.

[124] The claim in respect of this account no longer forms part of the claim being made by the plaintiff and as Mr O'Neill made clear there is no question of the defendants being liable for the sum of £136,000 odd shown on the account. The first defendant complained that the plaintiff had made no attempt to amend the Statement of Claim to withdraw this claim, but since counsel has stated, and the relevant witnesses from the Bank have stated in evidence, that this claim is no longer made, there is nothing of substance in the first defendant's complaint.

[125] In the circumstances I see no way in which this practice can provide any defence to the plaintiff's claim.

(xiii) The default issue

[126] The defendants' case is that the loan account never fell into arrears so that there was no "justification nor jurisdiction in relation to any initiation to appointment of

Receivers." The Statement of Claim (para 11) sets out the state of the account as at the date of the plaintiff's letter of 10 January 2013 demanding repayment of the amounts due under the facility letter. It pleads that "As at 24 April 2013 the arrears on the Loan amounted to £120,779.34…" The mortgage deed (para 6) provides:

> "The Bank shall have the power of sale and all other powers conferred by the Conveyancing and Law of Property Act 1881 (hereinafter called; the Act') upon Mortgagees with and subject to the following modifications:
>
> (a) the monies hereby secured shall be deemed to have become due within the meaning of the Act and section 4 of the Conveyancing Act 1911 and for all the purposes thereof when a demand for payment of any part thereof shall have been made…"

[127] In her closing submissions the first defendant says:

> "Considering the fact that no such monies were ever requested from the bank account in question, it seems impossible that such non-requests would beget 'arrears' in the first instance, compounded by the fact that no such 'arrears' were ever advised of. Given further that it appears there was no operational 'Facility', it seems further impossible that there would be arrears to be gotten into in the first instance. It could be concluded that the reason for the lack of arrears notification was that there were no arrears could be gotten into (*sic*) in the first place, given the lack of authority, that would have come with live facility, to request monies in the first instance. It would only be with this authoritative action that there would arise any potential for accrual of arrears, therefore without the authority for this action there is no source upon which arrears could even be conceived.

[128] The first defendant also points to payments made into the account which were some £14,000 in excess of the payments out, as part of her case that there were no arrears, so no default. Mr Gracey, cross-examined on this point, disagreed. He pointed out that the repayments representing capital and interest, provided for in the 6 March 2007 facility letter, were never made by the defendants and are never shown to be coming into the account. Thus, there was default.

[129] The history of the parties' dealings is also relevant to this issue, so I set it out in some detail in this section. The principal evidence comes from Mr O'Neill, both in his oral evidence, in an affidavit of 27 March 2014 and from the contemporaneous

documentation. In 2007 Mr O'Neill was Manager of the Bank of Ireland Business and Corporate Banking Unit in Newry. He it was who sanctioned the original loan to the defendants. In January 2009 he moved to the Asset Restructuring Unit ("ARU") of the Bank based in Belfast.

[130] I note from internal Bank documentation that as early as April 2008 Ms Siobhan Nugent wrote:

> "Michelle [the first defendant] asked me to waive six months Int only payments as there is obviously no income being generated from the build and she also commented that Johns (*sic*) business is feeling the slowdown of the property market."

[131] Mr O'Neill explained that in June 2009 the original interest-only repayment period (24 months) came to an end. The defendants asked the Bank to extend this by six months and he referred to an internal credit application dated 17 June 2009. The recommendation in that application was "extension of IO [interest only] period for a further six months, with facilities to be re-priced in line with matrix at L [LIBOR] +3%…"

[132] On 19 June 2009 a further letter of offer was sent to the defendants based on the recommendation in the application. This facility letter was never signed as accepted by the defendants. Accordingly, the terms and conditions contained in the March 2007 accepted facility letter continued to govern the relationship between the parties. The effect of this was that the two-year interest only period had come to an end and the defendants were liable to repay on a capital and interest basis, the relevant amount identified in the March 2007 facility letter being £4,037.47 per month.

[133] On 16 July 2009 the loan account statement shows that it was overdrawn in the sum of £447,789.84. A standing order was recalled. The repayments representing capital and interest were not being paid; only some £1,029 being paid into the account monthly, rather than the £4,034.47.

[134] At that time the Bank wrote to the defendants indicating the loan account stood at the figure above, being in excess of the permitted limit of £444,842.85. The letter informed the defendants, where material:

> "As can be seen your loan account is overdrawn without an approved overdraft with the balance as quoted above.
>
> I would ask that you kindly make the necessary arrangements to have the … loan account brought up to date and ensure that future repayments are met going forward.

> Please note that as you have not returned the Bank's Letter of Offer dated 19th June 2009 loan repayments have reverted to full capital and interest."
> (emphasis added)

[135] On 2 December 2009 the Bank again wrote to the defendants notifying them that the loan account stood overdrawn at £450,411.60. The letter informed the defendants that the Bank was not satisfied with the conduct of accounts, including the loan account, and that it was not prepared to continue with them. It requested the defendants "to make arrangements for the closing of the accounts within thirty-one days from the date of this letter", failing which the management of the account will be transferred to the Asset Restructuring Unit in Belfast "to take whatever steps are necessary, including legal action, to realise security held to discharge all liabilities."

[136] This letter prompted a meeting between the defendants and the Bank at which the Bank was informed that the property was on the market with a local estate agent "at a reduced asking price of £500k (initially £775k in June 2009), but to date no potential purchasers." There was also discussion about potential rental income. The record of the meeting also notes the bankruptcy of the second defendant.

[137] On 29 January 2010 the Bank sent the defendants a further letter of offer. This was a cash advance facility in the sum of £452,102.41 at bank base rate plus 3% for a term of 12 months with repayment to be from the sale of the property. This letter of offer was not accepted by the defendants and was formally withdrawn by the Bank in a letter of 11 February 2010 following formal notification by the Insolvency Service of the second defendant's bankruptcy.

[138] On 30 April 2010 the Bank wrote to the defendants informing them that the management of the account was transferred to Mr O'Neill in the ARU.

[139] By letter of 13 May 2010 Messrs C & H Jefferson wrote individually to each of the defendants notifying them that the loan account stood at £454,515.12 overdrawn and that interest continued to accrue at 2.25% per annum, being base rate plus 1.75%. The letter went on to say:

> "The purpose of this letter is to make a formal demand for repayment of the aforementioned sums … within seven days from the date of this letter. In the absence of payment within the stipulated period, we are instructed to commence legal proceedings against you in the High Court for recovery of the above sum without further notice to you … Such proceedings will include an action for repossession of the Property."

[140] What appears to be an identical letter was sent to each defendant on 3 June 2010.

[141] I referred above under the heading "(ix) The bankruptcy issues" to the solicitors MMD. It is clear from the trial bundles that those solicitors acted for the first defendant in the period at least from October 2010. There were exchanges between Mr O'Neill and Cormac McDonnell of that firm in October 2010 about a potential meeting with the first defendant and the Bank. Subsequently a meeting took place, as it is referenced in a letter from the Bank dated 26 January 2011 enclosing a further letter of offer to the first defendant only. This was a 12-month on-demand loan facility of £452,500, interest being at base plus 1.75%. The purpose of it was specifically stated to be —

> "To facilitate the closure of existing Joint Cash Advance in the names of John & Michelle McKeever … at present balance £446,302.22Debit plus accrued interest at circa £2,000…." —

Plus, the closure of other accounts and costs of C & H Jefferson. The offer was to be accepted within 28 days of the date of the letter or it would lapse.

[142] There followed some email exchanges between Mr O'Neill and the solicitor for the first defendant, Mr McDonnell, after which, by letter of 28 February 2011, Mr McDonnell sent to the Bank the signed facility letter. However, the signature of the first defendant was dated 24 January 2011, two days before the date of the offer letter. This prompted further email exchanges between Mr O'Neill and Mr McDonnell as a result of which the latter indicated that there had been an error and asked for the letter to be re-issued.

[143] A further letter was issued on 7 March 2011. Mr McDonnell sent it back to the Bank by letter of 28 April 2011, received by the Bank on 11 May 2011, but both dates were beyond the 28-day period for acceptance of the offer. On 17 May 2011 Mr McDonnell was advised of this.

[144] On 20 May 2011 a further letter of offer was sent, this time the sum being £449,500, and Mr McDonnell was asked to have it returned to the Bank as soon as possible. It was signed by the first defendant on 13 June 2011 and returned by her solicitor to the Bank by letter of the same date. The Bank required security over the property now in the sole name of the first defendant (following the second defendant's bankruptcy) but there was a problem with the registration of the transfer in the Land Registry and this seems not to have been effected at the time, so that the required security has never been in position, so no new facility was ever granted.

[145] In October 2012 (some 17 months later) because of the way in which the account was being operated, Mr Gracey (who had become the relationship manager in 2011) and Mr O'Neill met the defendants and their accountant, Mr John McGinn, to receive a proposal. In cross-examination of Mr Gracey the first defendant asserted that Mr McGinn did not represent her. However, I am satisfied from the circumstances of

the meetings that Mr McGinn was, at least ostensibly, acting for both defendants, and the plaintiff was entitled to assume so. There is no contemporaneous complaint from the first defendant that Mr McGinn was not acting on her behalf in the negotiations with the Bank. On the contrary, I note that in her affidavit of 21 October 2013 the first defendant said: "John [the second defendant] and I arranged through accountant John McGinn to meet with Mr Eamonn O'Neill…"

[146] The defendants' proposal involved, inter alia, a new loan set-up of some £220,000 to the 19-year-old son of the defendants to be secured by a floating charge over an existing asset in the name of the son. Apparently, at this time the defendants had been presented with a tax bill of some £56,000 and there was a potential rates bill of some £15,000 which was why the defendants sought restructure of their borrowings into a new company in the name of their son to avoid those liabilities. A Statement of Affairs had been obtained from the defendants which showed them to be in negative equity. The proposal also sought debt write-off in the sum of £210,000.

[147] By November 2012 the total gross exposure of the Bank was £431,000 and it was concerned about the non-lodgment of rental receipts directly into the loan account, which lodgments had started to decline over the previous months. A detailed internal email from Mr Gracey sets out the position in full. The recommendation contained in the email is as follows:

> "Given the profile now presented I feel FCR [fixed charge receiver] is the best option/strategy for Bank to adopt. The profile of borrowers (unsophisticated), history of broken promises, significant negative equity evident and in my view that part historical rents have been diverted to fund personal living requirements does not form part of a viable or creditable plan in agreeing to such a proposal at this stage. Furthermore, the Bank are also being asked to forego c. £210K in the immediate term. It is now likely that M McKeever will self-petition her own Bankruptcy and therefore approval is sought to commence appointment of FCR via Bank protocol. This way Bank will have full sight over all rental receipts/tenancy agreements and will be in control of its own destiny with a future decision to be taken on whether a sale or hold strategy should be adopted once precise details on tenants have been obtained."

[148] On 14 November 2012 the defendants' accountant was informed by email that the proposals made had been declined by the Bank and informing him that the statement of affairs and the income and expenditure statements provided did not depict a sustainable position. It informed the accountant that the Bank "will now engage a receiver over the management of the property…" and that the "receiver will be in contact with [the defendants] to formally advise of appointment over same."

[149] On 15 November 2012 Mr Gracey, on behalf of the plaintiff, wrote to the defendants calling for "repayment in full of all Bank liabilities" and informing them that the plaintiff was exercising its right to terminate its agreement with the defendants. It went on to say:

> "If immediate payment is not received, it is also the Bank's intention to bring proceedings against you for the sum as detailed above plus accruing interest and to take steps to enforce security held either jointly or severally in your name."

[150] As noted above, C & H Jefferson wrote to the defendants on 10 January 2013 making a formal demand for repayment of the then outstanding sums.

[151] None of the events in the above narrative was challenged by the first defendant. The picture which emerges is of problems with the operation of the account since mid--2009, various attempts made to accommodate a restructuring of the loan facilities, which were either not accepted by the defendants or in relation to which the appropriate security was not in position, and the involvement of both defendants in negotiations with the Bank. No payments representing capital and interest, as required in the original facility letter, were being made, and had not been made since the liability arose in 2009 to make repayments of capital and interest. The first defendant complains that no arrears were ever demanded, but it is clear from the history of dealings between the parties that there were significant problems with the operation of the loan account and that the defendants were fully aware of the problems at all material times.

[152] The first defendant in submissions says that there was no proper basis on which formal demand letters could be sent. I reject this, as there were substantial arrears on the account for the reasons stated in the above paragraph and clear evidence of default.

[153] The first defendant also makes the case that neither letter calling in the loan has any effect. In relation to the letter sent by Mr Gracey, she says this refers to three accounts:

> "one of which was not my account also my husband had been made bankrupt in 2009 and had no outstanding amounts due and owing to the plaintiff and it was signed by Nicholas Gracey who is not an employee of the plaintiff and has no authority to sign on behalf of the plaintiff leaving this demand invalid …" (*sic*)

[154] I have already held that Mr Gracey was entitled to act on behalf of the plaintiff, and I am satisfied that he was entitled to write this letter on behalf of the plaintiff. The

other reasons given by the first defendant are not reasons which in any way invalidate the letter of demand.

[155] As to the letter sent by C & H Jefferson, the first defendant says that it "is not from the plaintiff and mentions an account which is not even in my name, leaving it invalid." I am satisfied that the letter is not invalid. The plaintiff is entitled to instruct its solicitors to write such a letter, and the fact that it mentions an account not in the first defendant's name is irrelevant to the validity of the letter.

[156] It is clear from all of the above that the account was being operated in such a way that the plaintiff was entitled to appoint fixed charge receivers, and I reject the first defendant's argument that the plaintiff was not so entitled.

(xiv) The zero balance issue

[157] The screen print-out of the loan account which shows the overdrawn figure of £477,622.91 on 5 September 2017 (see para [26] above) shows an entry dated 18 December 2017 which reads under the column headings

"NARRATIVE CREDIT GBP BALANCE GBP"

the following

"CACS WRITE OFF 477622.91 0"

Below those entries appears, in red: "Caution: This Account is Closed."

[158] It is the first defendant's case that this shows a zero balance on the account and, therefore, there is no money owing on foot of the account. She said if it is not proved anywhere, it does not exist. Accordingly, she argues, she has no liability to pay the moneys claimed by the plaintiff.

[159] The witnesses for the Bank who dealt with this matter, Ms McQuillan and Mr Gracey, described this as an internal accounting procedure utilised by the Bank for impairment charges. In an affidavit sworn on 1 July 2022 Ms McQuillan described this as being "akin to a bad debt provision. It has no effect on the borrower's liability to pay the debt."

[160] I am satisfied that the accounting exercise in relation to the account does not imply that the *liability* is written-off. It does not mean that there was no money owing to the Bank on foot of the borrowings. I am satisfied that the defendants are still jointly liable for the amount of £477,622.91.

Counterclaim

[161] The thrust of the defendants' counterclaim is that following the appointment of the fixed charge receivers, locks were changed in the property "unlawfully excluding the tenants" and as a result of the disturbance tenants left the property. The defendants assert that the plaintiff became a mortgagee in possession but failed to manage the property appropriately, failed to take steps to re-let the property, failed to collect rents, including arrears of rent, failed properly to maintain or repair the property — all of which led to the defendants suffering loss and damage. In her final submission the first defendant stated:

> "That the unfounded appointment of Receivers, and their subsequent dishonest and lawless actions, to include trespass, has caused to this point, immeasurable damage by virtue of, but not limited to:
>
> loss of rent and potential rent; physical damage to locks at property; depreciation of the value of the property owing to abandonment; committal and attachment compensation; and all other consequent costs, as yet to be ascertained."

[162] There is in the papers an expert report from Thomas Smyth, Director of Smyth Surveying Ltd, Chartered Quantity Surveyors. Mr Smyth is a Member of the RICS. His report dated 5 December 2022, describes the condition of the building and estimates that to put the property into "a lettable condition" would cost some £69,600 inclusive of vat. The defendants also claim that there is lost rent amounting to some £260,000 by reason of failures to let the property.

[163] A consideration of the counterclaim requires an examination of the events around and after the appointment of the receivers and the evidence of Mr Gerard Kelly.

[164] Mr Kelly is a Chartered Surveyor and is employed by Best Property Services, Newry. He is one of the fixed charge receivers appointed by the plaintiff, the other being Mr Garry Best. In his evidence he identified the document described as the Deed of Appointment. This records, in his handwriting, that it was received on 21 February 2013 at 11:00am. The document shows that the acceptance of the appointment was signed by him and Mr Best on 22 February at 10:00am.

[165] In cross-examination it became clear that some of his actions pre-dated his (and Mr Best's) acceptance of their appointment as fixed charge receivers. He was very vague about this but certainly accepted that he had no authority to carry out any actions prior to the acceptance of the appointment. He said that when he was first instructed by the plaintiff, he contacted the defendants with a view to arranging a meeting. He identified a handwritten note dated 24 January 2013 in which he

recorded that Mr McKeever had advised him that Mrs McKeever was not willing to meet.

[166] He then dealt with a chain of correspondence and emails in the early part of 2013. On 29 January 2013, prior to his appointment, he wrote to the defendants indicating that he and Mr Best were to be appointed and asking for a meeting. The letter advised the defendants that — "If we do not hear from you by Tuesday 5th February [ie before they ever accepted appointment] we will assume that you are not willing to discuss the process and we will proceed with contacting the individual tenants to advise that we will be acting as FCR and we will be responsible for collection of rents."

[167] In an email of 11 February 2013 he informed Mr Gracey that the first defendant had contacted him that morning to "advise that she was unwell and couldn't make it" [ie to a meeting]. The email went on to say:

> "I have advised her that we have to meet her Wed or Fri morning this week failing that we will be proceeding and contacting tenants with a view to inspecting the premises and collecting rental monies."

[168] He then wrote to each of the tenants, by letter of 21 February — again before acceptance of appointment — indicating that rent monies from the date of the letter should be paid directly to Best Property Services.

[169] The first defendant made much of the actions of Mr Kelly prior to the date of his acceptance of his appointment accusing the receivers of dishonesty and criminal activity ("demanding money with menaces") and making references to the Fraud Act 2006. I reject these submissions. I find nothing in the activity of the receivers prior to their acceptance of appointment which could amount to dishonesty or criminal behaviour. The first defendant also sought to cast slurs on the receivers implying that they were in some sort of conspiracy with the plaintiff's solicitors to backdate the date of the appointment, essentially to cover earlier activities. Having looked closely at the various issues raised by the first defendant — in her cross-examination of Mr Kelly and in her closing submissions (particularly under the heading "Mr Kelly's evidence") — I find that there is nothing sinister in the behaviour of Mr Kelly or the solicitors.

[170] By an email of 1 March 2013 in the name of both defendants they indicated that they had received no evidence of the appointment of the receivers. The email continued:

> "… unless you can prove your appointment beyond any doubt whatsoever, we will have no option but to take legal action against you and the company you work for. We do not consent to you or the company you work for or any agents or contractors working on your behalf contacting

> our tenants and if there is any effect whatsoever on any of our tenants due to you contacting them by letter, phone or in person we will take legal action against you and the company you work for which will result in a £20,000 fine per occurrence. Please also take note that we Remove (*sic*) your right of implied access to our property and if you or anyone that is employed or contracted by Best Property Services (NI) Ltd. Trespass (*sic*) on our property we will take legal action against you and the company you work for."

[171] The document described as the Deed of Appointment was sent to the first defendant by email of 5 March 2013. This prompted the following response from the defendants:

> "Further to your email of yesterday, please be aware that your alleged 'Deed of Appointment' does not give you any authority whatsoever to involve yourself in our business.
>
> We give you the opportunity to withdraw immediately as it seems you have been misled by whomever has instructed you to act. However, that can and will not grant you immunity from the consequences of your actions.
>
> Any attempt to enter, seize, damage, vandalise, trespass or otherwise molest my property or my clients you will be deemed as accepting our offer from the previous letter and any actions taken by yourself in either letter form or the actions of anyone working on your behalf will result in a fee (*sic*) of £20,000 per occurrence.
>
> Please be advised that this will be followed by swift legal action.
>
> I hope this clarifies our position."

[172] Mr Kelly identified a handwritten note prepared by him on 5 March 2013. It recorded, inter alia, that he had been contacted by one of the tenants, BC, who told him that the defendants had called with her over the weekend and suggested to her that if she did not co-operate with the fixed charge receiver that would be beneficial to the McKeevers. It also recorded that another tenant had been talking to BC about leaving. Mr. Kelly had spoken to Mr Gracey and "suggested holding off marketing - collecting rents for a period and providing a strategy report in due course."

[173] On 8 March he wrote again to the tenants informing them, inter alia, that from 22 February 2013 all rents were to be paid directly to Best Property Services and providing bank account details.

[174] On 21 March 2013 Mr Kelly arranged for the locks to be changed in the property.

[175] His email to Mr Gracey and the Bank's solicitors of 22 March 2013 explains what occurred next.

> "Further to our conversation this morning I can confirm that following the changing of the locks yesterday by Quaypoint John McKeever has changed them again and issued tenants with new ones. As a result, and following conversations with two of the tenants the general consensus is that they have had enough hassle and intend vacating at the earlier opportunity. They have advised they were happy to pay rent to us and stay on however the continued interference from McKeevers has left them with little option.
>
> As discussed, marketing of the property with McKeevers in the background is going to be extremely difficult in terms of viewing etc. and it is our opinion that possession would be the best option with a marketing period thereafter. In all likelihood any future sale will be on the basis of vacant possession and not an income producing investment. I presume McKeevers would still attempt to hinder a sale in any event?"

[176] A further handwritten note authored by Mr Kelly records events between 19 February 2013 and 10 April 2013. The first two entries record contact with tenants prior to the date of his acceptance of appointment as receiver. The entry of 21 March records the locks being changed, and then changed again, and contact from a tenant, MC, to advise that "she and other tenants were moving out."

[177] The date of the next entry is indecipherable, but it is clearly sometime between 21 March 2013 and 26 March 2013, probably 22 March. It records the tenant BC having phoned to say "she is moving out - is happy to pay us the rent but too much hassle" and that she will leave the keys with the agent. Further entries refer to the predicament one tenant feels herself to be in. This is referenced in an email from Mr Kelly to himself, presumably as an aide memoire, referring to this tenant (DH) who said "still no wiser as to who to pay rent to and McKeevers are threatening eviction if they are not paid." Following his discussion with the Bank's solicitor Mr Kelly advised DH to pay the money to her own solicitor until the matter is sorted out.

[178] The Writ of Summons endorsed with the Statement of Claim in this case was issued on 16 May 2013. Among the relief sought was an injunction to restrain the defendants from trespassing on the property.

[179] According to the subsequent judgment of Deeny J dated 9 January 2014 (DEE9123), on 18 June 2013 "the plaintiff bank applied for injunctions restraining the defendants from trespassing on the property … [because the bank] are unhappy at interventions by Mr and Mrs McKeever with regard to the property which on foot of their contractual rights they had instructed to the receivers." The application first came before Deeny J on 26 June. The judgment of 9 January 2014 relates to two preliminary points raised by the defendants.

[180] In due course, by an agreement dated 9 February 2015 the parties settled the injunction application proceedings. Essentially the agreement provided for the joint management of the property by the defendants and the receivers, with the parties to use their best endeavours to find tenants and with any rental monies to be held in an account in the name of C & H Jefferson, Solicitors and any relevant expenses to be deducted therefrom. Mr Kelly told me that following that agreement a local estate agent, Mr Keenan, had been appointed to let the property.

[181] Most of the property has largely been unoccupied since about 2013, except for one of the commercial units which was occupied until around 2019. It is clear, from the above agreement, that the receivers and the defendants have been responsible for the joint management of the property since February 2015. There was no evidence from Mr Keenan as to the events following his appointment. No evidence was called from any tenant or prospective tenant to support the case being made by the defendants. There is no cogent evidence before me to lead me to be satisfied on the balance of probabilities that any actions, or inactions, on the part of the Bank or their solicitors was the cause of difficulties with prospective tenants or recovery of any outstanding rental sums. On the contrary, as to the latter, such correspondence as there is shows efforts on the part of DWF to recover outstanding rental monies.

[182] As noted above, the first defendant asserts that the plaintiff has become mortgagee in possession of the property and is responsible for the losses and that the receivers are the agents of the plaintiff so that any losses caused by the receivers are the responsibility of the plaintiff. I consider this assertion to be incorrect. First, the mortgagee deed itself (clause 10) provides that the plaintiff would be entitled to enter into possession, or to enter into the receipt of rents and profits or to put the property into good and tenantable repair "without becoming liable as mortgagee in possession."

[183] Secondly, although the first defendant, in cross-examination of Mr Kelly, obtained from him an admission that he was acting as agent for the plaintiff, whatever Mr Kelly may have thought is not the legal position. Clause 10 of the mortgage deed makes it clear that any receiver appointed is at the "sole risk and cost" of the

mortgagor. Further, section 24(2) of the Conveyancing and Law of Property Act 1881 provides that a receiver appointed by a mortgagee "shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides." The mortgage deed in this case does not provide otherwise. Further, the instrument of appointment of the receivers specifically provides: "It is declared that the Receivers shall be the agent of the Chargor [the defendants] for all purposes and that the Chargor shall be solely responsible for their acts and defaults."

[184] Thirdly, I note what Mann J said in A*merican Express Int Banking Corporation v Hurley* [1985] 3 All ER 564, 571g:

> "I propose to proceed on the basis that the following propositions represent the law … (iii) The mortgagee is not responsible for what a receiver does whilst he is the mortgagor's agent unless the mortgagee directs or interferes with the receiver's activities."

I agree with the proposition that for a mortgagee to be liable for the acts of a receiver there would need to be clear evidence on which the defendants, as mortgagor "'must establish that the receiver was acting at the bidding of the mortgagee in respect of the specific matters that are called into question." (See *Bicester Properties Ltd v West Bromwich Commercial Ltd*. [2012] 10 WLUK 301 — para [16]).

[185] I have found no such evidence in this case. The most that was elicited from Mr Kelly in cross-examination was that the plaintiff was making all the decisions and that he took his instruction from the Bank. Those matters were not probed in any detail so there is no evidence from which I could be satisfied that the plaintiff is responsible for any actions or inactions of the receivers which caused or contributed to any losses claimed.

[186] In all the circumstances, I consider that there is no merit in the defendants' counterclaim, and I dismiss the counterclaim.

Further matters

[187] I note that there is included in the Core Bundle a report from one Cormac Butler, commissioned by the defendants, and dated 16 March 2020. Insofar as it is included in the documentation before the court, I assume that I am to deal with the content. The introduction to this report states that it "focuses on the legal issues arising from the attempts by Bank of Ireland (UK) plc to recover from Michelle McKeever who with her husband John McKeever between them received a term loan facility of approximately £450,000 from the Governor and Company of Bank of Ireland to fund the development of a rental property."

[188] I make a number of points about this report. First, the court does not require a report purporting to comment on legal issues. Legal issues are a matter for the court. Secondly, in any event it is wholly unclear what Mr Butler's legal qualifications are, if any, as he sets out no qualifications in his report. A search online reveals his description of himself in written evidence to the UK parliament in August 2012:

> "For 20 years I have acted as an advisor and consultant on risk management, and have trained over 100 Central Bank regulators around the world. I am a former consultant with Lombard Risk Systems London and have also worked with Peat Marwick and Price Waterhouse Coopers. I graduated from the University of Limerick, Ireland with a degree in Finance and have published two books on financial risk management (Financial Times) and accounting for financial instruments (Wiley). I have just completed research with a Dublin professor examining the combined effectiveness of the new Basel rules with the International Financial Reporting Standards (IFRS) to be published in November 2012."

[189] There is no evidence before me that he has any legal qualifications, and he appears to claim none.

[190] Thirdly, I cannot consider the report to be an expert report, as it does not include the appropriate, or any, expert's declaration.

[191] In all the circumstances I reject all of the conclusions in this document.

[192] The first defendant also complained of the redaction of a bank statement. I directed that I be provided with an un-redacted statement, which was done. Having seen it, and having considered the test in the *Peruvian Guano* case (see above) I am satisfied that there is no requirement to furnish the defendants with an un-redacted copy.

Conclusion

[193] Accordingly:

(i) I give judgment for the plaintiff against the defendants for £477,622.91;

(ii) I declare that Garry Best and Gerard Kelly were validly appointed as receivers over the property 48/49 The Square, Crossmaglen;

(iii) I order that the defendants yield up possession of the property 48/49 The Square, Crossmaglen forthwith to the plaintiff. In view of the likelihood of an appeal, I will stay the execution of the order for possession for six weeks from today's date, 30 March 2023;

(iv) Consequential to the order for possession, I discharge the agreement made on 9 February 2015 between the defendants and the receivers;

(v) I do not consider it appropriate, having made an order for possession, to grant any injunction. There is no present behaviour of which I am aware requiring to be enjoined and I have no evidence, and cannot predict, what might happen in the future if the Bank takes possession;

(vi) Although I am satisfied that by changing the locks on the property the defendants committed a trespass, I consider that in the particular circumstances of this case there is no need for an award of damages. In any event, there has been no evidence of any consequential loss or damage, and I note that in its closing submissions of June 2015, the plaintiff does not seek an award of damages for trespass;

(vii) I dismiss the Counterclaim;

(viii) The defendants have lost comprehensively. In the circumstances I order that the defendants pay the plaintiff's costs of the plaintiff's claim and the plaintiff's costs defending the Counterclaim — those costs to be taxed in default of agreement;

(ix) I note that the issue of costs of the interim injunction proceedings was reserved to the trial judge. In view of the way in which those proceedings were compromised by the agreement to which I have referred above, I make no order as to costs of the injunction proceedings.