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Appointment of Receiver Formalities – Update

Case: *McCarthy v Langan and Gilroy*[1]

A recent High Court decision has considered once again the requirements for compliance with the terms of the underlying security documents when drafting deeds of appointment of receivers or of receivers and managers.

Background

In February 2016 ACC Loan Management Limited (**ACC**) appointed the plaintiff as receiver over two properties belonging to the first and second named defendants.

The plaintiff subsequently brought injunctive proceedings seeking interlocutory relief against the defendants to prohibit them interfering with the sale of the properties.

The loans were subsequently transferred from ACC to Rabobank and the plaintiff's appointments were novated. Both properties had been sold by Rabobank, selling as mortgagee in possession, prior to the hearing of the action.

Issue

The issue to be determined was whether or not the plaintiff had been validly appointed over the two properties. Although the properties had been sold, the Court (Allen J) found that the issue of the validity of the plaintiff's appointment as receiver was not moot because, if the plaintiff had not been validly appointed, an issue might arise as to whether the defendants had suffered loss arising from the sales in those circumstances.

[1] Shane McCarthy v Gregory Langan, David Langan and Ben Gilroy 2019 No. IEHC 651

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The underlying security documents on foot of which the plaintiff was appointed allowed for the appointment of *"…any person to be receiver and manager or receivers and managers".* The deeds of appointment however referred only to the appointment of the plaintiff as:

> *"..(the "Receiver") to be receiver of all assets of the Chargor referred to and comprised in and charged by the Security Document..".*

The defendants' argument, simply put, was that the failure to use the words "and manager" in the deeds of appointment was fatal to the validity of the appointment.

Both sides relied on the case of *Merrow Ltd v. Bank of Scotland* [2] in which it was held that a failure to observe the formalities of appointment, as prescribed in the underlying security on foot of which a receiver is relying on to ground his/her appointment, would be fatal. The case of *McCleary –v- McPhillips*[3] was also relied upon by both sides given its similar facts to that of the *Merrow* case.

The defendants relied heavily on the decision of McDonald J in the case of *McCarthy –v- Moroney*[4] in which the court, at interlocutory stage, held that a plaintiff, in very similar circumstances to this case, would have an "uphill battle" at trial to persuade a court that the appointment of receiver was valid when the formalities of the underlying security document had not been followed.

In the present case the Court noted however that the decision of McDonald J in *McCarthy –v- Moroney* was made at interlocutory stage and that McDonald J did not dismiss the plaintiff's arguments in that matter, but merely said he did not have a sufficiently strong and clear case to warrant the granting of an interlocutory injunction.

Counsel for the plaintiff argued that the *Merrow* and *McCleary* cases related to flaws in procedural requirements of execution rather than the "terminological flaw" in the current case. The Court was not convinced by this argument and held that the principals set down in the *Merrow* and *McCleary* cases were not confined to procedural failures in how the deeds of appointment were executed.

The Court went on to find that whether the deeds of appointment of a receiver validly reflected the power of the security holder in the underlying security was an issue of substance and not drafting. He considered the authorities and case law which have examined the distinction between an appointment as receiver and an appointment as receiver and manager and noted[5] that there has been a blurring of the terms in recent years, given that many underlying security documents now confer on receivers the powers of a manager.

Decision

It was held that despite the blurring in the distinction between receivers and receivers and managers, it is well established that a power to appoint a receiver and manager cannot be used to appoint a receiver who is not a manager, and vice versa. The distinction is substantial and cannot

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[2] The Merrow Ltd v. Bank of Scotland Plc & Anor [2013 IEHC 130]
3 McCleary –v- McPhillips (Unreported, High Court, Cregan J 31 July 2015 IEHC 591
4 McCarthy –v- Moroney (Unreported, High Court, McDonald J 29 June 2018 IEHC 379
5 Picarda The Law Relating to Receivers, Managers and Administrators

be dismissed as mere "terminology" or "drafting technique". The Court agreed with the reasoning of McDonald J in the *Moroney* case, that no power was granted by the underlying security documents in this case to a "receiver" and that plaintiff must be appointed as a "receiver and manager" to avail of the powers conferred by the underlying security documents in this case.

The deeds of appointment in this case referred to the plaintiff as "the Receiver", which is the description applied by the underlying security documents to a receiver and manager. The Court was also of the view that under the terms of the deeds of appointment, the plaintiff was to be vested with all of the powers conferred by the underlying security documents and, as such, has the power to manage as well as receive income such that he was a receiver and manager despite being named only as a receiver in the deeds of appointment. Accordingly, the omission of the words "and manager" from the deeds of appointment were not fatal to the validity of the appointment.

Commentary

This case once again addresses a question that had been raised in a number of cases previously as to whether the description of the appointee in the deed of appointment will prove fatal to the appointment if there is a divergence from the provisions in the underlying security relating to the appointment of receivers or receiver and managers, as the case may be.

In this case the Court found that a substantive view of the deed of appointment is necessary and that it should be looked at as a whole and what the deed purports to do, as opposed to focussing on the omission of any word or words. To that extent it cannot be seen as a major departure from the decisions in the *Merrow* and *Moroney* cases mentioned above, but rather a practical and sensible approach to the construction of a deed of appointment of receiver. The Court was quick to add that even though there has been a trend toward the blurring of the terminology, the distinction between receivers and receiver and managers is substantial and that issues of drafting techniques or terminological inconsistencies should be no less acutely scrutinised than the procedural flaws highlighted in the *Merrow* case, for example. This judgment is currently under appeal.

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