



May 2017

## ***Welcome clarity on receiver appointments – Woods v Ulster Bank Ireland Limited, Meagher and Trueick [2017] IEHC 155***

### **Introduction**

The decision of Ms. Justice Baker, delivered on 21<sup>st</sup> February, 2017, in *Woods v Ulster Bank Ireland Limited, Meagher and Trueick* has provided some welcome clarity around issues relating to the appointment of a receiver by lenders.

This judgment considered four key legal questions, namely:

- a) whether the standard form mortgage and charge documents (collectively referred to as the **Security Documents**), as used by Ulster Bank Ireland Limited (**UBIL**), contained a power on the part of UBIL to appoint a receiver;
- b) whether the power to appoint a receiver is dependent upon the continuation in force at the date of appointment of the relevant provisions of the Conveyancing and Law of Property Act 1881 (the **1881 Act**);
- c) whether UBIL was entitled to appoint a receiver before it was registered as owner of the charge on one of the properties; and
- d) whether the deeds of appointment were properly executed.

For the purposes of this note we will focus on the questions raised at (a), (b) and (c) above.

For further information on any of the issues discussed in this article please contact:



**Jamie Ensor**

DD:+ 353 (0)1 673 1722

[jamie.ensor@dilloneustace.ie](mailto:jamie.ensor@dilloneustace.ie)



**David O'Shea**

DD:+ 353 (0)1 673 1718

[david.oshea@dilloneustace.ie](mailto:david.oshea@dilloneustace.ie)

## Background

Mr. Patrick Woods (the **Plaintiff**) owned three properties in Ireland. Each property was secured in favour of UBIL. During 2013 UBIL appointed joint receivers (the second and third named defendants) over the three properties.

The Plaintiff issued proceedings seeking various reliefs, to include, *inter alia*, an order to set aside the appointment of the joint receivers. He also sought damages against UBIL for breach of contract and against all three defendants for breach of fiduciary duty.

## The High Court Decision

In reaching her decision, Ms. Justice Baker found as follows:

- a) the Security Documents did not contain any express provision for the appointment of a receiver or any express incorporation by reference of the relevant provisions of the 1881 Act. However, on a proper construction of the Security Documents, she found that the Security Documents contained a contractual power on the part of UBIL to appoint a receiver. The Court made reference to the fact that the Security Documents contained a number of references to “*any receiver appointed*”;
- b) the exercise of the contractual power to appoint a receiver was not dependent on the continuation in force of section 19 of the 1881 Act (section vests a statutory power in the holder of a mortgage to appoint a receiver). It was also noted that while the 1881 Act was repealed on 1 December 2009 it was later restored by the Land and Conveyancing Law Reform Act 2013;
- c) UBIL did not require, as a matter of law, to be registered as owner of the charge in order to exercise the contractual right to appoint a receiver; and
- d) the deeds of appointment were properly executed.

In relation to points (a) and (b) above, Baker J. referred to the earlier High Court decision of *Dowdall & McNamara v O'Connor & O'Connor*<sup>1</sup> in which Mr. Justice McDermott noted that on the proper construction of the mortgage agreement, the provisions of section 19 of the 1881 Act applied. McDermott J. also held that the provisions of the 1881 Act contained in the mortgage agreement continued to apply to the agreement, notwithstanding the fact that the 1881 Act had since been repealed, where the power is a contractual one. This line of reasoning was upheld by the Supreme Court *Kavanagh & Bank of Scotland plc v McLaughlin*

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<sup>1</sup> [2013] IEHC 423

& *McLaughlin*<sup>2</sup>.

In relation to point (c) above, Baker J. followed the earlier decision of Mr. Justice Feeney in *McEnergy v Sheahan*<sup>3</sup> where he considered the operative date for the registration of a charge. Mr. Justice Feeney held in *McEnergy* that the registration is deemed effective from the date of application for registration. In the present case, Baker J. also pointed to Rule 63 of the Land Registration Rules 1972, the effect of which is that registration is deemed to be completed “*as of day on which the instrument or application is received for registration*” and not the date on which the charge is registered. Furthermore, it was noted that the joint receivers were appointed under a contractual power and, therefore, it was not required that at the time of the exercise of that power that the UBIL charge be registered.

As regards point (d) above, Baker J. concluded that the execution of deeds of appointment under powers of attorneys where the donees were authorised “*to sign or otherwise execute and deliver*” a range of documents, including all documents relating to the exercise of the powers of UBIL on foot of any security held, complied with the execution requirements prescribed by s. 24(1) of the 1881 Act (i.e. “by writing under ...hand.”).

## **Significance of the Decision**

This is an important decision that will provide some helpful clarity to lenders considering the appointment of a receiver. This judgment affirms the position set out in *Kavanagh* and resolves any confusion that resulted following the High Court decision in *Harrington v Gulland Property Finance Limited & Stephen Tennant*<sup>4</sup>, in that if a lender (including, for example, a loan portfolio acquiring special purpose vehicle) appoints a receiver under the contractual powers to do so in a mortgage / charge, then that appointment of the receiver is valid even where the charge itself may not have yet been registered on the folio. By necessary extension, the same contractual right would entitle an appointer (including a special purpose vehicle) to validly appoint a receiver before its ownership of the charge on the folio has been completed at the time of the appointment of the receiver.

From a lender’s perspective, this case also highlights that in the appointment of a receiver the requirements for making such appointment, as contained in the relevant security documents, should be strictly followed.

It should be noted however that, in respect of a property comprising registered land, for any chargeholder seeking to avail of the rights conferred by the Section 62 of the Registration of Title Act, 1964 (e.g. to sell as mortgagee for the purposes of overreaching judgment mortgages) it is necessary that the entity holding the debt is registered as the charge holder on the relevant folio if that charge holder wishes to have the benefit of the powers to a chargee under the Registration of Title Act, 1964.

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<sup>2</sup> [2015] IESC 27

<sup>3</sup> [2012] IEHC 331

<sup>4</sup> [2016] IEHC 447

**Dillon Eustace**  
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DILLON  EUSTACE

**Dublin**

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

**Cayman Islands**

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

**New York**

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

**Tokyo**

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

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