Neutral Citation No: [2018] NICh 17	*Ref:* **McB10689**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **28/06/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

No. 17/10654

BETWEEN:

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

Plaintiffs;

-and-

DECLAN QUINN

Defendant.

_____

McBRIDE J

Applications

[1] The two applications before the court are:

(a) The plaintiffs' writ action seeking:

> "(1) Damages in or about the defendant's trespass and unlawful interference with the plaintiffs' property,
>
> (2) An injunction to prevent further such trespass,

(3) Such further or other relief as this court deems fit,

(4) Costs."

(b) The defendant's originating summons issued on 21 July 2017 seeking:

"(1) An injunction restraining the plaintiffs and each of them their servants and agents until trial of this action or further order from entering into a contract for sale or selling the defendant's land situate at 60 Rockdale Road, Rock, Cookstown, County Tyrone until the said lands had been marketed by the plaintiffs on the open market.

(2) For such further or other relief as the court shall deem just.

(3) Costs."

[2] The plaintiffs were represented by Mr Gibson of counsel and the defendant was represented by Mr Hermon of counsel. I am grateful to both counsel for their carefully researched skeleton arguments and closing submissions.

Background and history of proceedings

[3] It is necessary to set out in some detail the extensive history of proceedings between the parties in order to determine the questions arising from the two sets of proceedings. The relevant background is as follows:

(a) On 19 July 2013 the defendant entered into a mortgage deed with Barclays Plc ("the bank") whereby he granted the bank a charge over lands comprised in Folios 13054, 13055 and TY7443 County Tyrone ("the subject lands") and also over other premises situate at 414 Ormeau Road, Belfast. The charge was registered as a burden on the lands on 10 September 2013. In September and October 2015 the bank formally demanded payment of the full amounts due by the defendant to the bank. By letter dated 10 November 2015 the bank indicated that the total sum due and owing was £652,761 before accrued interest. The defendant accepts that he entered into the mortgage deed and that he has not satisfied the bank's demand for the monies due by him.

(b) On 28 January 2016 a Restraint Order was made on the application of the Director of Public Prosecutions in Northern Ireland under the

Proceeds of Crime Act 2002, prohibiting the defendant from disposing, dealing with or diminishing the value of any of his assets. This prohibition specifically included the lands contained in Folio TY7443 and 13054 County Tyrone. It also included "all other realisable assets to which the alleged offender is entitled or in which he has a beneficial interest".

(c) On 10 February 2016 the bank appointed the plaintiffs as the receivers in exercise of the power contained in the mortgage deed, of the subject lands and also of premises situate at 414 Ormeau Road, Belfast. The plaintiffs confirmed acceptance of appointment as receivers on the same date. The defendant did not dispute that the bank was entitled to appoint receivers pursuant to Clause 6 of the mortgage deed.

(d) The receivers entered into discussion with the owner of the neighbouring property, Mr Kelso and agreed to sell the subject lands to him in the sum of £600,000. On 8 July 2016 the High Court varied the Restraint Order to permit the receivers to sell the lands and on 28 September 2016 the Restraint Order was further varied to allow the receivers to receive the sum of £600,000 following the sale of the subject lands, to partially satisfy the debt owed by the defendant to the bank.

(e) On 27 October 2016 the receivers were informed by the PSNI that the defendant had commenced laying a lane and services to a derelict building on the subject lands. The receivers instructed agents to attend the subject lands and they confirmed that works were being carried out which included demolition of a derelict property, laying new foundations and other construction work. The defendant refused, despite requests by the plaintiff, to desist from working on the subject lands. As a result the plaintiffs issued the writ herein on 1 February 2017 and sought an interim injunction. On 14 July 2017 the Lord Chief Justice granted an interim injunction restraining the defendant, whether by himself or by his servants and agents, from carrying out any further works to the subject lands.

(f) On 21 July 2017 the defendant issued the originating summons herein seeking an injunction restraining the plaintiffs from entering into a contract for sale of the subject lands until the said lands had been marketed by the plaintiffs on the open market.

(g) On 25 July 2017 Maguire J granted an interim injunction on foot of the defendant's originating summons.

(h) The defendant appealed the order of the Lord Chief Justice dated 14 July 2017. The Court of Appeal remitted this matter to be heard with the other proceedings listed before this court.

Evidence

[4] The parties agreed that the affidavits would stand as the pleadings. Mr Jennings filed affidavits, on behalf of the plaintiffs, dated 1 February 2017, 17 February 2017, 23 March 2017, 10 June 2017 and 25 August 2017. The defendant filed affidavits dated 10 February 2017, 17 July 2017 and 21 July 2017. Mr Kelso filed an affidavit dated 13 March 2018. The court heard oral evidence from Mr Jennings, Mr Thompson, registered valuer, the defendant and Mr Paudge Quinn, estate agent.

Questions for determination

[5] The defendant accepted that he entered into the mortgage and that he had not satisfied the demand for payment. He further accepted that the bank was entitled to appoint receivers. The case advanced on behalf of the defendant was as follows:

(a) The receivers were not properly appointed as they had a conflict of interest.

(b) The receivers were not entitled to enter into possession in the absence of a court order save with the consent of the defendant.

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

[6] Having regard to the proceedings before the court and the concessions made by the defendant, the following questions arise for determination:

(1) Is the bank entitled to appoint the plaintiffs as receivers?

(2) Are the plaintiffs, as receivers, entitled to enter into immediate possession of the subject lands in the absence of a court order?

(3) Is the defendant entitled to remain in possession of the lands or is he a trespasser?

(4) Are the plaintiffs entitled to injunctive relief to restrain trespass on the subject lands by the defendant?

(5) What duties do the plaintiffs, as receivers, owe to the defendant when selling the mortgaged property?

(6) Are the plaintiffs in breach of their duties on the basis that either:

(a) They did not market the lands on the open market and/or

(b) The proposed sale is at an undervalue.

(7) Should the court grant injunctive relief to the defendant to restrain the proposed sale to Mr Kelso?

Question 1 – Is the bank entitled to appoint the plaintiffs as receivers?

[7] In his affidavit and oral evidence the defendant stated that Lambert Smith Hampton, were engaged by him in June 2015 to rent his premises at 414 Ormeau Road. He submitted that as the plaintiffs were employed by Lambert Smith Hampton they had a conflict of interest and therefore could not be appointed as receivers. Mr Jennings in his evidence denied there was a conflict of interest. He stated that he worked in England and worked in an entirely different department from the department which had advised on the rental of Ormeau Road. He further averred that although Lambert Smith Hampton were engaged by the defendant in respect of the rental of Ormeau Road, this did not give rise to a conflict of interest as their duty as receivers was to realise the assets of the mortgagor in the interests of the mortgagee.

[8] Under Section 19 (1) (iii) of the 1881 Conveyancing and Law of Property Act ("the Conveyancing Act") the lender has a statutory power to appoint a receiver once the mortgage money has become due. Under section 20 of the Conveyancing Act this power is exercisable when the following conditions have been met:

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

[9] In light of the acceptance by the defendant that he had entered into the mortgage deed and had not satisfied the bank's demand for payment, I am satisfied

that the bank had a statutory power and a power under the mortgage deed to appoint receivers and in the circumstances which had arisen this power was exercisable.

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

> "When the statutory power is exercisable the mortgagee may appoint, in writing, such person as he thinks fit to be receiver … The mortgagee may owe a duty in the manner in which he exercises the right, for instance, to take reasonable care not to appoint an incompetent. Subject to that, there are in general, few restrictions on who may be appointed as receiver."

[11] The burden is on the defendant to show that the bank owed him a duty not to appoint a person who had a conflict of interest. The defendant was unable to point to any authority or jurisprudence supporting his proposition that the bank could not appoint a person as receiver if he had a conflict of interest and was unable to point to any authority that a mortgagor could obtain injunctive relief to prevent the appointment of a receiver who was not independent. I consider that this is because independence is not required to enable a receiver to carry out his duty to realise the mortgagor's assets in the interests of the mortgagee and therefore the fact a receiver may lack independence causes no prejudice to the defendant.

[12] Further, Clause 6 of the mortgage deed provides that the receiver is the agent of the mortgagor. *Fisher and Lightwood* notes that one of the peculiar incidents of this agency is that "the principal, the mortgagor has no say in the appointment or identity of the receiver and is not entitled to … dismiss the receiver". Consequently, the defendant, as the mortgagor has no control over who is appointed as a receiver. It appears from the relevant legal texts that the only bases upon which a person could be restrained from being appointed as a receiver is if; he is an undischarged bankrupt; is incompetent or his professional body prevents him from acting. Otherwise there appears to be no restriction on whom a mortgagee can appoint as a receiver. I am therefore satisfied that the bank was entitled to appoint the plaintiffs as receivers even if they were not independent.

[13] If I am wrong about that, on the basis of the evidence, I am satisfied that the plaintiffs do not have a conflict of interest. Lambert Smith Hampton was instructed by the defendant in respect of renting his Ormeau Road premises. The present proceedings relate not to Ormeau Road but to the subject lands. Further, even if the plaintiffs had knowledge of matters in respect of renting the Ormeau Road premises, I am satisfied that such knowledge would not conflict with their duty as receivers to

realise the mortgagor's assets in the interests of the mortgagee. I am therefore satisfied that the bank was entitled to appoint the plaintiffs as receivers.

Question 2 – Do the plaintiffs as receivers have an immediate right to possession of the subject lands in the absence of a court order?

[14] The defendant submitted that the plaintiffs as receivers were only entitled to enter into possession of the subject lands if they either had the consent of the defendant or had obtained a court order for possession. The plaintiffs submitted that they were entitled to enter into possession without a court order as Clause 6 of the Mortgage Deed stated the receiver had power to:

> "(i) Take possession of, collect and get in all or any of the mortgaged property …
>
> (iv) To sell by public auction or private contract …
>
> (x) To do all such acts and things as may be considered to be incidental or conducive to any of the matters or powers aforesaid …"

[15] When this matter was previously heard by the Lord Chief Justice he concluded at paragraph [19]:

> "Given that there was no challenge to the appointment of receivers or the validity of the deed under which they were appointed there is in my view no serious issue to be tried concerning the entitlement of the plaintiff to possession of the subject lands."

[16] Given that the defendant did not make the case before the Lord Chief Justice that the receivers could not take possession without a court order, I consider the issue is *res judicata*.

[17] If I am wrong about that, I am satisfied that the plaintiffs as receivers have an immediate right to possession of the subject lands upon their appointment without the need to first seek a court order for possession. The powers of a receiver are set out in section 24(3) of the Conveyancing Act. These powers can be varied or extended by the mortgage deed. *Fisher and Lightwood* note at paragraph 28.28:

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

[18] The defendant has not challenged the appointment of the receivers, save in respect of their independence. In light of my findings in answer to Question 1, I am satisfied that the receivers were validly appointed. Upon appointment they were, as appears from the provisions of the Conveyancing Act and clause 6 of the mortgage deed, entitled to immediate possession of the subject lands.

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

Question 3 – Is the defendant entitled to remain in possession or is he a trespasser?

[20] Mr Jennings gave evidence that the estate agent and the PSNI informed him that the defendant had carried out certain works of construction on the subject lands including:- clearing the site; laying a lane and services to a derelict building; and placing hardcore on the site.

[21] In his affidavit and oral evidence the defendant averred that Mr Jennings gave him permission to remain on the lands and in reliance upon this representation he carried out various works to the subject lands and spent money on the lands. In these circumstances he submitted that the plaintiff was estopped from withdrawing this assurance and estopped from treating him as a trespasser. Mr Jennings denied that he had ever given such permission.

[22] I am satisfied on the basis of all the evidence that if any assurance was given by Mr Jennings it was limited in time. This is because the defendant knew that the receivers intended to sell the lands to Mr Kelso. I am satisfied that the defendant knew and understood that such a sale would be on the basis of vacant possession. Accordingly, he knew that any permission given by Mr Jennings permitting him to remain on the subject lands would expire upon sale.

[23] Even if contrary to my findings, an assurance was given and even if the defendant spent monies on the lands in reliance upon this assurance I am satisfied that he either did not suffer any detriment or in the alternative any equitable interest he had has been satisfied. The defendant received profits from the lands, namely profit from sale of silage grown on the lands and the rent free grazing of his animals for a considerable period of time. For these reasons I am satisfied that no estoppel arises and I am therefore satisfied that the defendant's continued occupation of the subject lands amounts to a trespass.

Question 4 – Are the plaintiffs entitled to injunctive relief?

[24] The defendant accepts that the plaintiffs have made out a *prima facie* case for an injunction but submits that the court should exercise its discretion not to grant an injunction because the plaintiffs are estopped from treating the defendant as a trespasser because of his detrimental reliance on assurances given by Mr Jennings and because the plaintiffs are going to sell the subject lands at an undervalue and without marketing them on the open market.

[25] The defendant made it clear in his replies to interrogatories that he intended to remain on the land. In such circumstances damages are not an adequate remedy as the plaintiffs, without the benefit of vacant possession, would be unable to sell the lands to realise the security. I am therefore satisfied that the defendant correctly conceded that the plaintiffs have made out a *prima facie* case for the grant of an injunction.

[26] In these circumstances the only question which remains is whether the court should in the exercise of its discretion grant an injunction. The court can refuse injunctive relief if one of the equitable bars exist such as acquiescence, delay or laches. In the present case the defendant submits that the estoppel should be a ground upon which the court ought not to exercise its discretion to grant an injunction.

[27] For the reasons already set out I am satisfied that no estoppel arises. The only other issue is whether the court should refuse to grant an injunction on the basis that the defendant alleges the plaintiffs propose to sell the subject lands at an undervalue. That issue relates to whether the court should restrain the plaintiffs from entering into a contract for the sale of the subject lands. It has no bearing upon the question whether the defendant is a trespasser and whether the court should grant an injunction to restrain him entering the lands so that the plaintiffs obtain vacant possession. I consider that the granting of the injunction is a necessary first step to enable sale of the lands to take place. Thereafter the court will have to consider whether it should grant an injunction on foot of the defendant's application to restrain a sale of the lands.

[28] Given that I have already found that the plaintiffs are entitled to possession and the defendant is a trespasser I exercise my discretion to grant an injunction in the following terms:

> "An injunction restraining the defendant, whether by himself or by his servants and agents or by anyone whomsoever from
>
> (a) Carrying out any works to property situate and known as 60 Rockdale Road, Cookstown being all the land and premises comprised in Folio 13054 County Tyrone, 13055 Country Tyrone and TY7443 County Tyrone.
>
> (b) Trespassing on or entering into the lands contained in 60 Rockdale Road, Cookstown being all the land and premises comprised in Folio 13054 County Tyrone, 13055 County Tyrone and TY7443 County Tyrone."

[29] The plaintiff claims nominal damages for trespass and I therefore grant damages of £1 in respect of the defendant's trespass to the subject lands.

Question 5 – What duties do the receivers owe to the defendant?

Relevant legal principles regarding duties of receivers to mortgagors in respect of sale of the mortgaged lands

[30] I distil the following principles from the wealth of jurisprudence and academic commentary on the duties owed by a receiver to a mortgagor in the exercise of the power of sale of mortgaged property:

(a) In the exercise of the power of sale receivers owe the same duty to the mortgagor and those interested in the equity of redemption as is owed by a mortgagee – See *Silven Properties Limited v Royal Bank Of Scotland Plc* [2004] 4 All ER 484.

(b) A receiver is under a duty to the mortgagor and those interested in the equity of redemption to act in good faith and take reasonable care to obtain the best price reasonably obtainable – see *Silven Properties Limited*. In this context the best price normally equates with "the true market value of the mortgage property" – see Salmon LJ in *Cuckmere Brick Company Limited v Mutual Finance Limited* [1971] Ch 949 at 969.

(c) It is a matter for the receivers how their general duties are to be discharged in the circumstances of any given case. The extent and scope

of the duties are not inflexible. What a receiver must do to discharge them depends on the facts of each case – see *Medforth v Blake* [2000] Ch 86. The duty imposed on a receiver is to exercise his judgment reasonably.

(d) The mode of sale calls for an informed judgment. It is for the receiver to decide on the mode of sale and whether the sale should be by public auction or private contract. In some cases the appropriate mode is by public auction, in others it is by private treaty. In other cases a receiver may act reasonably by accepting an offer in advance of an auction or a sale by private contract – see *Michael v Miller* [2004] EWCA Civ 282. It is for the receiver to decide how the sale should be advertised and how long it should be left on the market. Such decisions inevitably involve an exercise of informed judgment on the part of the receiver in respect of which there can, almost by definition be no absolute requirements. Thus there is no absolute duty to advertise widely and what is proper will depend on all the circumstances of the case – see *Michael v Miller* [2004] EWCA Civ. 282 at paragraph [132].

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

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

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

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

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

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

[31] Mr Jennings in his affidavit and oral evidence stated that after his appointment as receiver he had a meeting with the defendant. The defendant informed him that he had previously agreed to sell the lands to Mr Kelso for £600,000 and that solicitors had been instructed. He pressed Mr Jennings to advance that transaction. Mr Jennings then instructed Savills to value the lands as he wanted to ensure that the proposed sale was not at an undervalue. Savills initially placed a valuation of £380,000 on the lands. As this valuation was significantly lower than the proposed sale price Mr Jennings felt able to proceed. He then contacted Mr Kelso and informed him that he needed to have the Restraint Order varied to enable the sale to proceed. The defendant advised Mr Jennings of two third party offers to purchase the subject lands. In particular the defendant advised that Mr Peter O'Donnell offered to buy the lands for £1M and Mr Francis Connolly had agreed to purchase lands for £800,000. Mr Jennings attempted to follow up these third party offers. He stated he was unable to contact Mr O'Donnell as the defendant failed to provide any contact details despite requests by him. Mr Jennings was able to speak to Mr Connelly on 8 March 2017 and Mr Connelly advised that he required finance to purchase the lands. Despite further follow up correspondence Mr Connelly expressed no further interest in purchasing the lands. Mr Jennings averred that after investigating the third party offers he was satisfied that there was no willingness or ability by these persons to purchase the subject lands. He stated that Mr Kelso remained willing to buy the lands provided he obtained vacant possession. Given that no other person expressed any interest in buying the lands he was satisfied that £600,000 represented the best achievable price. When cross-examined he stated that exposing the lands to the open market may have put the offer by Mr Kelso at risk. According to Savill's valuation Mr Kelso's offer was 60% above market value and therefore Mr Jennings felt that going to open market may have prejudiced this sale.

[32] Mr Quinn averred that he was unable to pay the debts due to the bank due to illness and family circumstances. He indicated that he could now pay the debt by refinancing. This would involve the sale of other assets he owned. He stated that he wished to remain on the subject lands and farm them because he had an attachment to the lands. When cross-examined he accepted that the terms of the Restraint Order meant that he was unable to sell, mortgage or charge his lands without the consent

of the court. He accepted that although the Restraint Order had been in place for over two years he had never made such an application. He stated that the subject lands were being sold at an undervalue and referred to expert valuation reports which placed a value on the lands of between £800,000 and £1M. He stated that the plaintiffs acted in breach of the duties they owed to him because they failed to market the subject lands on the open market and simply sought to sell the subject lands to a neighbour at an undervalue in what he characterised as "cheap sale done on the quick". He further stated that third parties had expressed an interest in buying the lands and gave evidence that Peter O'Donnell was willing to buy the lands at £1M and Mr Francis Connolly had offered him £800,000 for the lands in November 2016. When cross-examined he confirmed that he had originally agreed to sell the lands to Mr Kelso for the sum of £600,000 but stated this was on the basis of a quick sale.

[33] Mr Kelso also filed affidavit evidence in which he confirmed that he was willing to buy the lands at £600,000. In his affidavits he referred to a valuation by Burns & Co in which they valued the subject lands at £555,000 on 4 February 2016.

[34] The court also had the benefit of a valuation report by Savills dated 24 May 2016 and a valuation report by Mr Paudge Quinn dated 21 December 2017. Although the valuers met on 30 January 2018 no agreement was reached. The court heard evidence from Mr Thompson of Savills and Mr Paudge Quinn, estate agent.

[35] Mr Thompson MRICS, RICS registered valuer, gave evidence that he had prepared a valuation report in respect of the lands dated 24 May 2016 at the request of the plaintiffs. In his letter of instruction he was asked to undertake a formal red book valuation of the property and the plaintiffs indicated that his report would be used to demonstrate to the mortgagee and the Public Prosecution Service that the sale of the property was at market value. The definition of market value given by Savills was as follows:

> "The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller at an arm's length transaction after properly marketing and where the parties had acted knowledgably, prudently and without compulsion."

[36] In assessing the value of the subject lands, subject to a number of assumptions, Mr Thompson had regard to comparable transactions and the key attributes and risks of the subject lands.

[37] To complete his valuation assessment Mr Thompson visited the subject lands on 29 April 2016, walked the lands and took photographs. Mr Thompson noted that the subject lands comprised a range of piecemeal fields located on the northern side

of Shivey Road and on the southern side by Rockdale Road at Tolvin Hill, Cookstown. The subject lands comprised agricultural lands and a small portion of rough shrub totalling approximately 55 acres. He also noted there was a shed on the lands which he noted was in a dilapidated state.

[38] Mr Thompson also conducted a planning search in respect of the subject lands. This search did not reveal planning permission for a residential site. Mr Thompson accepted that planning permission had been granted on 21 December 2005 which required certain works to begin within 5 years otherwise the planning permission lapsed on 31 October 2011. When he attended the site Mr Thompson did not note that works had begun and therefore took the view that the subject lands did not have the benefit of planning permission for a residential site and valued them accordingly.

[39] He split the holding into 4 parcels. Parcel one comprising 38.43 acres and parcel two comprising 16.10 acres. These lands were described as good quality grazing lands. Parcels three and four comprising 0.77 acres were planted in dense trees and surrounded by bog lands which appeared to be landlocked. The key attributes of parcels one and two were that the lands were good quality grazing/silage land, were well accessed, well fenced and in a good location. Mr Thompson identified the following risks in respect of the lands, namely that part of the lands were in the flood plain and therefore at risk of flooding, only one field had road prominence, builders rubble remained in part of one field and the lands would have to be sold by way of a Fixed Charge Receiver which Mr Thompson opined can have an adverse impact on value.

[40] Mr Thompson as part of his assessment of market value obtained details of relevant transactions of agricultural land in the immediate locality and of lands in nearby towns and villages. He then gave evidence of a number of such 'comparators' which he used to bench mark value. After referring to a number of comparators he indicated the best comparator was the sale of lands at Drumillard, The Rock. This was because these lands were sold recently and shared similarity in terms of location, quality and size of holding. This was a sale of 35 acres of land in November 2015 of good quality agricultural land close to Rock village. It yielded a sale price of £265,000 which reflected a price of £7,571 per acre.

[41] After consideration of the key attributes and risks of the land and having regard to the comparators he valued the subject lands in May 2016 at £360,000. This figure was broken down into four parcels of land. Parcel one comprising 38.43 acres was valued at £6,500 per acre. Parcel two comprising 16.10 acres was valued at £7,000 per acre and Parcels three and four comprising less than ½ acre each were valued at a nil value because they consisted of landlocked wooded bog.

[42] Parcels one and two were described by Mr Thompson as consisting of reasonably good quality arable land, although part of these lands were subject to a

risk of flooding. He placed a lower value on the lands in Parcel one as they were hilly land and therefore only suitable for grazing and unsuitable for arable crops.

[43] When it came to Mr Thompson's attention that works had been done to keep the planning permission for one residential site 'live' he notified the Fixed Charge Receiver by email and advised that the valuation of the subject lands should be amended to include a value for the site at £50,000. In addition he re-valued the three acres surrounding the site at £20,000 per acre. He rounded up these figures to value the site and surrounding 3 acres at total value of £100,000. This gave a new total valuation for the subject lands of £440,000.

[44] When the experts met on 30 January 2018 Mr Thompson brought more recent comparators to the meeting. In particular he brought details of a sale of lands at Moneygaragh Road, Rock of 17.74 acres sold in October 2017 at £146,000 which equated to a valuation of £8,230 per acre. These lands were described as reasonable grazing lands. All the other comparators he relied on indicated valuations below £8,000 per acre.

[45] When giving oral evidence Mr Thompson indicated that the valuation in his 2016 report valuation needed to be adjusted upwards to reflect recent transactions in land. He indicated that generally the value of agricultural land had increased by 5%-10% from 2016 to 2018. He opined that the lands in Parcel one would now attract a value of £8,000 per acre and the lands in Parcel two would attract a valuation of £8,500 per acre. He further stated that the site and surrounding three acres would attract a value of £100,000. This gave a total figure of approximately £520,000 as the three acres surrounding the site had to be deducted from the lands originally comprised in Parcels one and two. He stated that the total value of the subject lands would now be £500,000.

[46] Under cross-examination Mr Thompson accepted that Mr Kelso as a neighbour was a special purchaser and consequently he would be willing to pay an additional figure for the lands. He further stated that he felt the comparators relied upon by Mr Paudge Quinn were not as good as they either referred to - different locations, different size of holdings, different quality of lands and or to sales which had taken place some time ago.

[47] Mr Paudge Quinn gave evidence on behalf of the defendant. He had prepared a report in which he had valued the land in two parcels. The first parcel consisted of the site, yard and outbuildings which he valued at £150,000. The remaining 52 acres he described, "as good a quality of land as ever I saw" and saw no need to differentiate the lands. He also had regard to a number of comparators but chiefly relied on the fact that there was a high demand on good quality land in this area and business men with money would "go head to head". On that basis he valued it at £13,500 per acre giving a total valuation of the subject lands of £700,000. In evidence he opined that the lands could attract a price of up to £1M. He accepted

under cross-examination that he had no formal qualification but had 40 years' experience and considerable local knowledge. He stated that prices, on average for agricultural land, had gone up by 20% in the years between 2013 and 2018. He also accepted that the defendant had purchased the subject lands in 2013 and had paid £7,272 per acre. With a 20% uplift, he accepted that that would mean the lands were now worth in the order of £8,726 per acre. It was put to him that this was the best comparator as it involved the actual subject lands. He rejected this on the basis that this sale had been a forced sale by a Fixed Charge Receiver and he opined that the subject lands were worth, at a conservative estimate £800,000 and could fetch up to £1M.

[48] The defendant contended that the receivers acted in breach of their duties to him by failing to place the subject lands on the open market for sale and further submitted that the proposed sale to Mr Kelso at £600,000 represented a sale at an undervalue as expert evidence indicated the subject lands were worth in the order of £800,000 - £1M. The defendant therefore submitted that the receiver was acting in breach of his duties and the court should restrain sale by granting the injunction sought.

[49] In response the receivers submitted that they had exercised their judgment reasonably by obtaining an independent valuation of the lands and as the offer by Mr Kelso was far in advance of this independent market value there was no obligation upon them to market the lands on the open market. In addition they submitted that the expert evidence indicated that the offer of £600,000 did not represent an undervalue and was close to the true market value of the property.

Consideration of Question 6

[50] Two questions arise for consideration:

(a) Did the receivers act in breach of their duties by failing to place the subject lands on the open market for sale?

(b) Did the receivers fail to take reasonable care to obtain the best price reasonably obtainable for the subject lands?

[51] In respect of the mode of sale, the burden is on the defendant to establish that the receivers exercised their judgment unreasonably in not marketing the lands on the open market for sale. The evidence of all the parties was that the defendant had agreed a sale of the lands to Mr Kelso. The uncontroverted evidence of Mr Jennings was that the defendant wanted him to pursue this sale to Mr Kelso. In circumstances where Mr Kelso made an offer before the receivers had an opportunity to consider sale by auction or private treaty I consider in line with *Michael v Millar* that the receivers were obliged to consider the offer made by him. When Mr Jennings received the valuation from Savills which indicated that the proposed purchase price

by Mr Kelso was 60% above market value, I consider that in those circumstances the receivers were not obliged to advertise on the open market. Indeed, as Mr Jennings indicated there was a real risk that if they went to open market this may have prejudiced the sale to Mr Kelso. In light of the peculiar circumstances of this case and given that there is no absolute requirement that lands are to be sold at auction or advertised for sale, I am satisfied that the receivers exercised their judgment reasonably in not placing the subject lands on the open market for sale.

[52] The burden is on the defendant to establish that the receiver has failed to take reasonable care to obtain the best price reasonably obtainable. This is a different question from whether the best price has been obtained as it requires the receiver only to demonstrate that he took reasonable care to obtain the best price reasonably obtainable. Obviously where there is large disparity between the true market value and the price obtained it will be difficult for the receiver to demonstrate that he acted reasonably. Normally a receiver can demonstrate that he had acted reasonably if he takes appropriate valuation advice, follows up the possibility of sale at a higher price and achieves a price which falls within an acceptable bracket.

[53] In this case the receivers engaged Savills who are expert valuers and Mr Thompson in particular set out details of his experience and qualifications in respect of valuing agricultural lands. In addition Mr Jennings followed up offers made by third parties. I am satisfied that in all the circumstances he was entitled to conclude that the third parties were either unwilling or unable to purchase the lands.

[54] In determining whether the proposed sale price fell within an acceptable bracket I have considered the expert evidence as set out in the various reports and the oral evidence given by Mr Thompson and Mr Paudge Quinn. I consider that Mr Quinn erred in assessing market value by having regard to a price which may be obtained when "two men go 'head to head' ". His valuation of £800,000- £1M which is based on such a scenario is therefore in my view not a proper assessment of market value. I further consider that his valuation of £13,500 per acre does not accurately reflect market value for the subject lands. This is because such a valuation per acre is far above that obtained for truly comparable lands. All of the comparators provided to the court which related to similar lands in the locality in terms of quality and size of holding commanded a price, at most, of £8,000 per acre. Consequently, I do not accept that Mr Paudge Quinn's valuation of £700,000 based on £13,500 per acre is an accurate assessment of market value. Similarly, I also consider that Mr Thompson's assessment of market value at £500,000 is too low. This is because I am satisfied that the best comparator to value the land is the sale of the subject lands which took place in 2013 to the defendant. This is because it related to the subject lands. Therefore the only factor which now needs to be taken into account is any change in the market since 2013. In 2013 the defendant paid approximately £7,272 per acre for the subject lands. If I accept Mr Paudge Quinn's evidence that land prices have increased by 20% since 2013 to date, that gives a valuation of the subject lands of £8,726 per acre. 52 acres at this price gives a total valuation of £435,752. If I

also accept the valuation for the site and surrounding 3 acres provided by Mr Paudge Quinn that gives a total valuation of the subject lands of £603,752.

[55] Therefore, accepting the evidence of the defendant's expert in respect of increase in land values from 2013 to date and his valuation of the site and surrounding 3 acres, the proposed sale figure of £600,000 falls within an acceptable bracket and in all the circumstances represents a fair and reasonable price. Hence a sale at this figure cannot be characterised as a sale at an undervalue.

[56] Given that the proposed sale would not be at an undervalue on the basis of the evidence of Mr Paudge Quinn relating to price increases from 2013 to date and his valuation of the site and surrounding 3 acres, it is unnecessary for me to determine whether I preferred the expert evidence of Mr Thompson or Mr Paudge Quinn on these two specific matters.

[57] In all the circumstances therefore I am satisfied that the receivers have not acted in breach of their duties to the defendant in proposing to sell the subject lands to Mr Kelso for £600,000 as they took expert valuation advice, followed up on offers by third parties and achieved a price which falls within a reasonable bracket.

[58] In addition I am satisfied on the basis of *Lloyds Bank Plc v Cassidy* that the receivers were not obliged to accept any proposal made by the defendant in this case to repay the sums due to the bank and thereby end the receivership. Further I am satisfied that the defendant was not in a position, in any event, to make good his proposal to repay the sums due. This is because his proposal involved the sale of lands belonging to him and he was restrained from selling his lands due to the Restraint Order. Despite the considerable passage of time he had not applied to vary the Restraint Order to enable him to sell his lands. In these circumstances I am satisfied that the receivers were entitled to proceed with the sale of the subject lands.

Questions 7 – Should the court grant injunctive relief to the defendant?

[59] In light of my conclusions above I am satisfied that there is no basis upon which the court should grant injunctive relief to the defendant.

Conclusion

[60] I grant injunctive relief to the plaintiffs as set out at paragraph 28 above. I dismiss the defendant's originating summons. I will hear the parties in respect of costs.