

Neutral Citation No: [2021] NICH 1

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: COL11348

ICOS No: 2017/76530

Delivered: 2/2/21

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

ALAN CURRY

Plaintiff/Defendant to the Counterclaim;

-and-

HSBC PLC

Defendant/Counterclaimant.

**John Coyle (instructed by MKB Law Solicitors) for the Plaintiff
Keith Gibson (instructed by Cleaver Fulton Rankin Solicitors) for the Defendant**

COLTON J

Introduction

[1] The court gave judgment in the main action in this matter on 4 July 2019.

[2] In the action the plaintiff sought various declarations and relief in relation to six properties. The court ruled in his favour in respect of three of the properties. It dismissed his action in respect of the remaining three and refused any of the relief sought in respect of those properties.

[3] By way of counterclaim in the action the defendant sought various reliefs against the plaintiff.

[4] As a result of the court's findings in respect of the plaintiff's claim it must now determine the outstanding issues arising from the defendant's counterclaim.

[5] In particular the defendant seeks an order for possession in respect of premises at 1 Church Bay, Rathlin Island (“1CB”) and 3 Turnberry Terrace (“3TT”), together with mesne profits for the plaintiff’s alleged wrongful occupation of both premises.

[6] This judgment should be read in conjunction with the previous judgment delivered on 4 July 2019 for a full understanding of the issues between the parties.

[7] The matter is complicated by the fact that separate proceedings were issued by fixed charged receivers appointed by the bank seeking similar relief in respect of the same properties as that sought by the defendant by way of counterclaim in this action.

[8] It was agreed between the parties that the court would hear this action first to establish any entitlement of the plaintiff in respect of the said properties and having done so, in the absence of any agreement between the parties, would proceed to hear both the defendant’s counterclaim and the related actions in the name of the fixed receivers at the same time.

[9] All the remaining issues therefore were listed for hearing on 21 October 2020. At a review hearing on 15 September 2020 the plaintiff sought the adjournment of all proceedings because of an outstanding dispute in relation to discovery in the related actions. For various reasons it was not possible to have that issue resolved prior to the hearing date. At the review the court decided that the counterclaim could proceed and that the defendant could elect to seek the relief sought in the name of the bank as opposed to the receivers. After the review hearing it became clear to the court that an Order 24 Rule 7 summons had also been issued in this action on 9 July 2020 in which the plaintiff sought the same material as that sought in the related actions. In the application the plaintiff sought discovery of documentation relating to an agreement between the HSBC and the FCA dated 29 June 2012 relating to an issue concerning an interest rate hedge swap. In addition the plaintiff sought documents relating to the appointment of the receivers. The defendant argued that the plaintiff was not entitled to the documentation on the grounds of relevance. Further the defendant pointed out that the summons was issued years after the proceedings were initiated and after the court had part heard the matter.

[10] I will refer to the interest rate hedge swap issue later in this judgment. The court proceeded to hear the matter on the basis that if it considered that any of the documentation sought in the disputed discovery application was relevant to the court’s determination then it could revisit the matter.

The defendant/counterclaimant’s case

[11] At one point the plaintiff’s spouse, Ms Carmichael, was the legal and beneficial owner of 1CB and 3TT. She was registered as the owner of 1CB on 29 March 2002 and 3TT on 19 July 2006.

[12] On 17 November 2006 she executed charges on both properties to the defendant to secure various loans. These are referred to as the “second legal charges” in the court’s previous judgment.

[13] In that judgment the court rejected the plaintiff’s claims that he had any equitable or legal interest in these properties which had priority over the defendant’s validly executed charges in respect of both properties.

[14] By way of background, the plaintiff and Ms Carmichael have defaulted in respect of various loans associated with all the properties which were the subject matter of the dispute.

[15] Ms Carmichael was adjudicated bankrupt with effect from 23 April 2012. Receivers were appointed in respect of the properties on 2 July 2012. Since then there has been a complete breakdown in the relationship between the parties which has resulted in multiple claims and litigation.

[16] Returning to this action, put simply, the defendant has the benefit of a legal charge in respect of both properties. Its claim is based on the well-established rule that subject to contractual or statutory limitations a mortgagee under a legal charge is entitled to seek possession of the mortgaged property at any time after the mortgage is executed. Mr Gibson argues that the defendant in this case has an immediate right to possession in light of the court’s rejection of any valid interest enjoyed by the plaintiff which would take priority over that charge.

[17] At the review hearing on 15 September 2020 Mr Coyle on behalf of the plaintiff conceded that there was no answer to the order for possession. However, on reflection he argued that there was in fact a legal bar to the order sought by the defendant which turned on the legal effect and consequences of the bankruptcy of Ms Carmichael. In relation to the situation prior to bankruptcy he argues that the plaintiff had at a minimum a bare licence to occupy the properties which was granted by implication by his spouse who prior to her bankruptcy in April 2012 was the sole legal and beneficial owner of the legal interest in the property.

[18] He argues when she was adjudicated bankrupt her legal and beneficial interest in the properties, vested by operation of law [Article 279 of the Insolvency Order (Northern Ireland) 1989], in her trustee in bankruptcy, Ms Brigid Napier, Solicitor, who was appointed on 11 May 2012.

[19] Ms Napier, as trustee in bankruptcy, resultantly held the legal and beneficial interests in both the subject properties. This was from her appointment as trustee. She did so subject to the continuing security of the charges over the property held by the defendant/counterclaimant bank, pursuant to Article 11(5) of the Insolvency Order (Northern Ireland) 1989.

[20] In 2018 the trustee in bankruptcy disclaimed her interest in the properties, as being onerous to the estate under Article 288 of the Insolvency Order (Northern Ireland) 1989.

[21] Mr Coyle argues that the effect of the disclaimer, as trustee in bankruptcy of Ms Carmichael, was to vest the legal and beneficial interest of the properties in the Crown, by operation of the bona vacantia doctrine.

[22] In relation therefore to the bank's claim for possession he argues that the Crown holds the legal and beneficial interest and that the defendant is not entitled to possession against Mr Curry who he argues continues to occupy both premises as a licensee. He argues that the order for possession now sought against Mr Curry is premature. He submits that there is a requirement on the defendant to formally add the trustee in bankruptcy and now the Crown as a party to such a claim. He argues that a possession order should first be obtained against the Crown who now enjoy legal and beneficial ownership.

[23] I consider that such a submission is unmeritorious in terms of the claim for possession by the bank. The plaintiff continues to assert a claim in respect of both these properties and to resist an order for possession. The court has determined that he has no interest which would take priority over that of the bank. As outlined earlier the defendant is entitled to seek possession by virtue of its validly executed legal charge. There is nothing the Crown can say or do which alters that position.

[24] I am also satisfied that nothing turns on the appointment of the receivers in terms of the defendant's entitlement to seek an order for possession. I consider that the bank is entitled to seek such an order in its own right. Further, Clause 18 of the conditions upon which the receivers were appointed expressly provides that in addition to any powers arising under the mortgage the bank can exercise all the powers of a receiver under the mortgage. For this reason any issue about specific discovery of documentation relating to the appointment of the receivers is not relevant in this action.

[25] Accordingly, I grant an order for possession in favour of the defendant against the plaintiff in respect of the two properties namely 1 Church Bay and 3 Turnberry Terrace.

The claim for mesne profits

[26] Mesne profits are, technically speaking, damages for the tort of trespass. A claim for such profits is the traditional way of claiming money in respect of the unlawful use and occupation of land.

[27] The defendant says that the plaintiff in this case wrongfully occupied both premises and is entitled to the market rental value of the properties occupied or used during the period of wrongful occupation or user.

[28] The defendant's claim raises a number of issues for determination. Is the defendant entitled to mesne profits at all? If so, for what period? What is the value of any claim if entitlement is established?

[29] It was the plaintiff's evidence that he initially used 1CB as a holiday house in 2006. From 2007 onwards he spent more time in the property. He asserts that since 2008 onwards it has been his primary home. It was always his intention to develop the property into a business and to rent it out to friends or people who came to Rathlin Island. He now runs the property as a bed and breakfast business. He is open for business all year round.

[30] In relation to 3TT, he said that these premises have been let out by him and are currently occupied under a tenancy agreement by his sister-in-law.

[31] The defendant argues that it is entitled to mesne profits from July 2012 onwards. Mr Gibson submits on behalf of the defendant that as of 24 April 2012 after Ms Carmichael was made bankrupt this was an act of default under the terms and conditions of the charge which entitled the defendant to possession of the premises. This is clear from the provisions of the mortgage deed conditions which provide, inter alia, at Clause 11 that the mortgage shall become enforceable if:

"... you, or if there is more than one of you, any of you, or the borrower, enter into any composition or arrangement with the creditors or are made bankrupt ..."

BDO were appointed as receivers and managers over both premises on 2 July 2012. It seems to me that the defendant could argue for mesne profits from 24 April 2012 but in these proceedings it has confined its claim to a claim from 2 July 2012 onwards and I will deal with the case on that basis. The Deed of Appointment provides:

*"**Now** the bank in pursuance of the power given to them by the legal charge and conferred on them by the Conveyancing and Law Property Act 1881 and the Conveyancing Act 1991 and all other powers conferred upon the bank by statute or otherwise, hereby appoints the receivers to be the receivers of the property comprised in the legal charge and of the rents and income thereof with a power to sell the property and to exercise these and all other powers conferred on the receivers by the said legal charge and by law to the intent that the receiver shall apply all monies received by them (other than insurance monies) first in discharge of all rents, taxes, rates and outgoings whatsoever affecting the property; secondly in keeping down all annual sums or other payments in the interests of*

all principal sums having priority to the monies and liabilities secured by the legal charge ..."

[32] Under the relevant mortgage deed conditions relating to the defendant's legal charge it can appoint receivers for this purpose. Crucially, as referred to earlier, under Clause 18 of the conditions the defendant has powers of receiver:

"At any time after the mortgage has become enforceable, and whether or not a receiver has been appointed, the bank may, in addition to any other powers arising under the mortgage, exercise all the powers of a receiver under the mortgage."

[33] Thus, in the same way as it is entitled to possession the defendant is entitled to pursue this remedy by way of counterclaim independent of the actions issued by the receivers seeking the same remedy.

[34] After the receivers were appointed, on 4 July 2012 the plaintiff sent a letter of claim indicating that he had an active interest in 1CB and 3TT.

[35] On 6 July 2012 the plaintiff sent a further letter indicating that the property at 3TT was occupied by holiday tenants. Included with the correspondence were copies of inhibitions to be registered as burdens on the property, thus inhibiting any potential sale.

[36] On 9 July 2012 correspondence was sent from Cleaver Fulton Rankin, Solicitors, on behalf of the receivers in respect of 1CB and 3TT. In respect of 1CB the receivers asked the plaintiff to vacate the property and in respect of 3TT that all rental receipts be remitted to the receivers.

[37] Since that time there has been correspondence and disputed actions between the parties culminating in these proceedings.

[38] Whilst I will return to some of these disputes later the fact remains that since the appointment of the receivers and their correspondence to the plaintiff on 9 July 2012 he has continued to assert an interest in the properties and to resist the defendant's claim for possession or remittal of any rents received in relation to the properties. The defendant therefore claims that it is entitled to mesne profits from July 2012 to date.

[39] Mr Coyle makes a number of points in resisting the claim. Fundamentally, he returns to the legal position in relation to the legal and beneficial ownership of the property. He says that this was initially Ms Carmichael, subsequently the trustee in bankruptcy and after she disclaimed the interest in the property on behalf of the estate in 2018, the Crown, under the operation of the bona vacantia doctrine. His argument is that throughout all this time the plaintiff at a very minimum was a

licensee in both premises and not a trespasser. The defendant can only pursue any remedy, be it for possession or profits against the plaintiff, when it obtains either the consent of the beneficial owner (previously, the trustee in bankruptcy and now the Crown) or obtains an order of the court.

[40] For the reasons set out earlier in this judgment I do not accept this submission. I conclude that the defendant is entitled and has been entitled to an order for possession since July 2012. In addition, I note that under Clause 9 of the mortgage deed conditions Ms Carmichael “... *must not, without the bank’s written consent; (i) agree to, or give, any licence or tenancy affecting the property.*” This clause was expressly drawn to the attention of Ms Carmichael in a letter from the bank dated 5 February 2013. In that correspondence the defendant pointed out that a tenancy agreement purported to be entered into on 5 April 2012 in favour of Lorraine Carmichael (the plaintiff’s sister-in-law) for a period of 5 years commencing on 31 August 2012 at a monthly rent of £415 in respect of the property at 3 Turnberry Terrace, Portstewart, had been made without the defendant receiving a request for consent for creation of this alleged tenancy agreement and had not provided consent in relation to the formation of the agreement. The correspondence pointed out that the defendant regarded the alleged tenancy as void as against the interests of the defendant in this property pursuant to the terms of its security.

[41] For similar reasons I reject any submission to the effect that only the receivers can seek profits. In my view, clearly, the defendant is entitled to assert this claim independently of the receivers who as a matter of practice would normally seek enforcement of such claims.

[42] Mr Coyle further submits that as a result of a dispute which arose between Ms Carmichael and the defendant concerning the appointment of the receivers and a complaint in respect of interest rate hedging, the defendant cannot sustain a claim for mesne profits.

[43] Ms Carmichael’s complaint related to the selling of interest rate hedging products. As a result of the complaint which was referred to the Financial Services Agency (FSA) the bank concluded that no further steps could be taken in respect of “*any possession or other enforcement action*” against any of the properties because of this complaint.

[44] On 19 February 2013 the defendant wrote to Ms Carmichael confirming that until the FSA had conducted its review into the selling of the relevant products to her that:

“(a) *The Fix Charge Receivers will take no further action to:*

...

- (iii) *remove the tenant from 3 Turnberry Terrace, Portstewart;*
- (iv) *take possession of 3 Turnberry Terrace, Portstewart;*
- (v) *market 3 Turnberry Terrace, Portstewart, for sale;*
- (vi) *take possession of 1 Church Bay, Rathlin Island;*
- (vii) *market 1 Church Bay, Rathlin Island, for sale;*

..."

[45] On 15 December 2016 the receivers took physical possession of 3TT. On the same date Cleaver Fulton Rankin, on behalf of the receivers, wrote to Ms Carmichael in the following terms:

"Dear Madam

We refer to the above matter and confirm that it has come to the receivers' attention that there was a disturbance at the property of 3 Turnberry Terrace, Coleraine Road, Portstewart, Co Londonderry ("the Property") yesterday evening. The receivers are aware the occupiers of the property vacated the property yesterday evening and accordingly, the receivers have already taken possession of and secured the property.

Should any attempt be made by you or any member of your family or any of your associates to gain access to or interfere with the property in any way whatsoever, we write to put you on notice that the receivers will issue injunctive proceedings at the High Court immediately and use will be made of this correspondence to affix the offending party with the costs of any necessary proceedings."

[46] This was disputed in subsequent correspondence when it was asserted by Ms Carmichael that the receivers did not take possession of the property but that *"this tenant will be back in that property."*

[47] On 18 December 2016 there was further correspondence between the defendant's solicitors and the plaintiff's solicitors and latterly the plaintiff himself in which he reiterated his assertion of an interest in respect of 1CB and 3TT.

[48] On 17 February 2017 a writ was issued by the fixed charge receivers to restrain the plaintiff's interference with 1CB.

[49] On 10 March 2017 the plaintiff responded by maintaining that he continues to reside at 1 CB and that he lives there on his own.

[50] On 23 May 2017 the plaintiff sent a letter of complaint in respect of the conduct of BDO (the receivers).

[51] In the course of that correspondence the plaintiff takes issue with the factual matters set out in the affidavit supporting the legal proceedings brought by the fixed receivers and he continues to assert his entitlement to an interest in 1CB where he says he resides.

[52] In relation to 3TT the plaintiff also asserts his claim to an interest and acknowledges that he rented the property from 2012 to 2016 and received rent. He asserts that the tenancy ended in December 2016 and that he thereafter arranged for his son to attend and secure the property.

[53] In his evidence to me at this hearing he confirmed that the premises are currently let to his sister-in-law.

[54] In the course of the correspondence he also asserts that he spent significant sums on maintaining and managing the property. He asserts that the actions by the receivers in taking possession was unlawful and he formally advised the defendant that he had changed the locks so as to continue in possession of the property.

[55] On 7 June 2017 the defendant's solicitors, Cleaver Fulton Rankin, write reminding Mr Curry of what they describe as his unlawful acts in changing the locks at 3 Turnberry Terrace. The correspondence goes on to say:

"We write to put you on notice that unless the keys of the property have been voluntarily surrendered with vacant possession to our office within 7 days from the date of this letter, together with a written undertaking from you that you will not interfere with the receivers' powers and duties in respect of the property, then the receivers will issue proceedings in the High Court seeking an order for possession and sale of the property and such proceedings may seek an order of injunction restraining you from interfering with the receivers' powers and duties in respect of the property. ...

We confirm that we have written to the occupiers of the property today to confirm that they are unlawfully occupying that property, and seeking for them to vacate within 7 days. ..."

[56] On 14 August 2017 the plaintiff issued the writ in these proceedings which resulted in the court's judgment on 4 July 2019 and this subsequent hearing.

[57] In relation to 3TT on 17 August 2017 the receivers issued proceedings by way of originating summons pursuant to Order 113 Rule 6 of the Supreme Court Rules (Northern Ireland) 1980 against the plaintiff seeking possession of the premises.

[58] The plaintiff has used 1CB and 3TT for his own benefit since the defendant sought to enforce its rights against Ms Carmichael in July 2012. He has resisted the defendant's attempts to assert its interests. Since that time he has continued to assert an interest in the properties and has retained the profits from their use. By so doing he has frustrated the defendant's ability to reduce the indebtedness of Ms Carmichael. Subject to the matters discussed below I consider that the defendant is therefore entitled to an award of damages against the plaintiff in respect of his occupation and use of the properties from July 2012 onwards.

Valuation

[59] The measure of the defendant's claim for mesne profits is the market rental value of the property occupied or used for the period of wrongful occupation or user. In this regard the defendant relies on the expert report of Brian Turtle dated 12 March 2020. Mr Turtle gave evidence in support of his report at the hearing. Mr Turtle is a RICS registered valuer in the firm of OKT, real estate agents.

[60] In relation to 1CB he provided a report setting out the location and description of the premises, although he did not have an opportunity to carry out an internal inspection. The property comprises an end town house in a relatively modern terrace. It is a three storey design and has a parking area to the front/garden. There are impressive views over the island to the north Antrim coastline. He assessed that the area of the island upon which the property is situated is ideal for capitalising on passing tourist trade, predominantly over the summer months. Mr Turtle proposes to estimate a rental value on the basis that the premises is used for holiday accommodation/or seasoned lettings. He notes that it is currently used as a bed and breakfast facility. In terms of approaching the rental value as a whole over the period claimed by the defendant he factors in the fact that the premises can only be accessed via a ferry from Ballycastle six miles away. The ferry crossing in winter is very weather dependent and the service can at times be cancelled for days at a time. Against that he suggests that there is likely to be a spike in demand over the late spring/summer months and into autumn with occasional demand for winter longer term lettings.

[61] As is the custom in carrying out such a valuation exercise he sought to identify a comparable premises. He identified Rathlin Coach House for this purpose. This is an Airbnb house with two bedrooms and two bathrooms with space for up to five guests. During the summer season the rental for this premises is £800/£819 per week and during the winter £550 to £649. His valuation approach was as follows. He suggested:

12 weeks of spring/autumn lettings multiplied by £400 per week multiplied by 50% occupancy.

8 weeks of summer lettings multiplied by £600 per week multiplied by 80% occupancy.

30 weeks for winter lettings by £300 per week multiplied by 20% occupancy.

Based on this approach he assessed the gross market rental value potential of the property to be £8,160 per annum. He factored some assumed management costs against this to include an estimated rates per annum at £800, building insurance at £500 per annum, cleaning costs including laundry and letting arrangement fees 28% of gross income ie £2,285 per annum and the costs of renewals, redecoration, maintenance and reinvestment of approximately £1,000 per annum. This led to his conclusion that the nett achievable market rental value of the subject premises is fairly represented by the sum of £3,575 per annum.

[62] In terms of 3TT Mr Turtle indicates that the house is mid-terrace two storey four bedroom townhouse with a covered arched carport. It is part of a development situated just off the A2 approach road from the direction of Coleraine on the outskirts of Portstewart which was constructed in the early 2000s. He indicates that the location and the town in general is popular for both local residents and holiday lettings alike. It is about a 15 minute walk to the promenade and has potentially overland views of Bann estuary to the rear. He did not get an opportunity to actually examine the view. The Land and Property Services website confirms that the capital value for this property is £135,000. From a rental perspective it was his opinion that the house over the period in question in this action is in an area of strong and consistent demand. His opinion was that it would let with ease if in good repair. In terms of comparables he was able to point to 4 Turnberry Terrace which is an identical property close to the subject property, currently on the market to lease. However, that particular property is likely to have better views to the rear compared to 3TT. The rental per month for that property is £695. In terms of market value he therefore assumed a rent of £550 per month between 2012 and 2016 which leads to a rental of £6,600 per annum gross. For the period 2017-2020 he assumed a minimum of £600 per month which led to a figure of £7,200 per annum gross.

[63] In terms of costs he suggested an adjustment of the figures to allow £1,050 per annum for annual rates payments on current rates; building insurance £500 per

annum and renewals and decorations between tenancies (assuming unfurnished) £800 per annum. Making the appropriate reductions he therefore valued the nett rental value for the period 2012-2016 at £4,250 per annum and for the period 2017-2020 £4,850 per annum.

[64] In cross-examination Mr Coyle tested the comparable relied upon by Mr Turtle in relation to 1CB. It emerged, to the obvious embarrassment of Mr Turtle, that in fact this premises was not in Rathlin Island at all but was located in mainland Scotland. Clearly the comparable was of absolutely no value to the court in attempting to assess the rental value of 1CB.

[65] In terms of 3TT, Mr Turtle accepted that he had not an opportunity to examine the view to the rear of the premises. Mr Coyle pointed out that in fact there was a graveyard behind the premises.

[66] The plaintiff gave further evidence at the resumed hearing. Focusing on the issue of rental value he referred to the remoteness and inaccessibility of the property at 1CB. The ferry was frequently interrupted in the winter months and the potential for renting the property during this period was limited. He was someone who was a qualified electrician and a decent tradesman who was able to carry out much of the maintenance work to the property. He had run the premises as a bed and breakfast business. The premises were open all the year round but it was a struggle to maintain the property and make a profit. He questioned whether or not the premises would work well if let on a self-catering basis. In any event he pointed out that significant amounts of any profits he made from this premises and rent obtained from 3TT went to repaying loans he and his wife had obtained from the defendant. This is a matter to which I will return later.

[67] In respect of 3TT he confirmed that the premises were let to his sister-in-law at a rent of £500 per month.

[68] A constant theme of the plaintiff's evidence, both at the resumed hearing and at the initial hearing, was that the profits he made from his properties (and indeed other monies) were actually paid to the defendant during this period in efforts to pay off the loans that he and his wife had obtained from the defendant.

[69] In the course of the discovery in these proceedings the plaintiff has produced his financial accounts.

[70] In cross-examination Mr Gibson pointed out that the relevant accounts did not support the suggestion that in fact monies were being repaid to the defendant. By way of example in 2012-2013 he declared rental income from properties totalling £27,891.33. After deductions for expenses etc the accounts suggest a profit of £14,340.55 in respect of rental property. In relation to property expenses the accounts report a figure of £1,215.07 in respect of loan interest and other financial costs. These figures are not broken down in the accounts. From an examination of

the accounts from 2012/2013 until 2017-2018 it appears that 1CB is run as a B&B from 2013 onwards. The income from the rental properties is not broken down but Mr Curry indicated in his evidence that there were a total of five properties involved.

[71] For the year 2013/2014 the total rents are recorded as £7,355; the profit at £1,722.63 and loan interests and other financial costs £536.04.

[72] For the year 2015/2016 the total rents and income is reported at £19,372; profit at £12,364 and loan interest and other financial costs at £2,349.

[73] For the year 2016/2017 the income is recorded at £19,372; profit at £12,364 and loan interest at £2,369.

[74] For the year 2017/2018 the income is recorded at £18,860; the profit at £9,248 and loan interest at £1,213.

[75] In cross-examination the plaintiff accepted that he was not in a position to comment on the detail but accepted that the figures were accurate and as provided to his accountants.

[76] In short Mr Gibson submits that the accounts simply do not support the suggestion that profits from the properties in dispute in this action were being paid to the bank during the relevant period.

The court's assessment

[77] The assessment of the potential market rental value of 1CB is problematic. The court cannot rely on the figures put forward by Mr Turtle on behalf of the defendant. In the circumstances the court proposes to award nominal damages to in effect compensate for the tort of trespass. It has concluded that a reasonable figure is one of £500 per annum from 2 July 2012 to date.

[78] In relation to 3TT the court considers that the figures put forward by Mr Turtle are a reasonable effort at assessing the appropriate market rental value. The court does take into account the evidence from Mr Curry that the premises are currently let at £500 per month as opposed to the figure of £600 being suggested by Mr Turtle. However the current tenant is a sister-in-law of the plaintiff and on the basis of the relevant comparables has in my view obtained a favourable rent.

[79] I do however propose to adjust Mr Turtle's figures downwards to one of a net value of £4,000 per annum from July 2012 to date. I consider this to be a fair attempt at the appropriate valuation.

[80] An issue that arises is whether or not the defendant is entitled to mesne profits for the period between 19 February 2013 and 15 December 2016 during which

time the FSA conducted a review in relation to the selling of the relevant products to Ms Carmichael.

[81] It will be recalled that during that period the receivers on behalf of the defendant confirmed that it would take no further action to take possession of the properties or market them for sale. In those circumstances should the defendant be entitled to profits whilst this issue was examined?

[82] In this regard it is important to state that the hedge fund swap issue or the appointment of the receivers has no bearing on the ultimate outcome of this action or the determination of the issues between these parties. It did not have any impact on the legal entitlement to the properties or the relevant interests of the parties in the properties.

[83] On this issue Mr Gibson on behalf of the defendant says that at no stage did it waive its entitlement in law to take possession of the properties. It was simply indicating to Ms Carmichael that it would not take any steps to enforce removal or possession. He draws a distinction between the existence of the right and the temporary decision not to enforce that right.

[84] He points to Clause 33 of the mortgage agreement with Ms Carmichael which states under the heading –

“Dealings with you, the bank and others

33 The bank may, at its discretion, whenever it wants, without releasing or otherwise affecting the debt or the mortgage the surety of the debt;

...

(d) make any arrangement in respect of the debt, or any other security for it, with you, or if there is more than one of you, any of you, any borrower for whom you have given the mortgage or any other person (whether by way of giving time or other indulgence, variation, exchange, release, modification, refraining from perfection or enforcement or otherwise); or

(e) do, or omit to do, anything which might otherwise discharge or affect the mortgage as security for the debt.”

[85] The court considers that there is merit in Mr Gibson’s submission. At no stage has the defendant accepted or agreed that it did not have the right to possession of the two premises in question. The court has determined that throughout the relevant period it did have the right to possession and throughout the relevant period the plaintiff has challenged the defendant’s entitlement and has asserted and continues to assert that he has a legally enforceable interest against the

defendant in respect of the properties. Throughout that time he has retained the profits from their use. The defendant's agreement not to seek enforcement of possession for a particular period does not create a legal interest in favour of the plaintiff enforceable against the defendant. In my view, neither does it constitute any legal waiver on behalf of the defendant in respect of its claim for mesne profits.

[86] In the circumstances therefore the court does not consider that any reduction should be made for mesne profits for the period between February 2013 to December 2016.

[87] Finally, as Mr Gibson accepted when put to him, the plaintiff should be credited for any monies he paid to the defendant from the profits he received at 1CB or 3TT from July 2012 onwards. Such an amount should be deducted from the figure for the award of mesne profits calculated in accordance with this judgment. The parties agreed that it ought to be possible to establish definitively from the documents what, if any, such payments were made by the plaintiff to the defendant.

[88] In respect of the defendant's counterclaim the court therefore determines as follows:

- (a) The defendant is entitled to an Order for possession against the plaintiff in respect of the premises 1 Church Bay, Rathlin Island and 3 Turnberry Terrace, Portstewart.
- (b) The defendant is entitled to damages against the plaintiff to be calculated in accordance with this judgment from 2 July 2012 to date and on an ongoing basis of £500 per annum in respect of 1CB and £4,000 per annum in respect of 3TT until the date upon which the plaintiff gives up possession to the defendant.