Neutral Citation [2012] IEHC 138

**THE HIGH COURT**

**[2011 No. 238 S]**

**BETWEEN**

**ALLIED IRISH BANKS PLC**

**PLAINTIFF**

**AND**

**DARAGH HEAGNEY**

**DEFENDANT**

**JUDGMENT of Kearns P. delivered the 29th day of March, 2012.**

The plaintiffs claim herein is for the sum of €2.4 million on foot of three guarantees executed by the defendant on diverse dates between July, 2005 and 15th May, 2007 whereby the defendant guaranteed the repayment of monies advanced by the plaintiff bank to Balmain Ltd, a company of which the defendant was principal and director and which purchased the Bailey Court Hotel in Howth in 2003 for the sum of €3.1 million. In February, 2009 the plaintiff bank demanded repayment of sums due to it by Balmain Ltd which at that point amounted to a sum just under €7 million. Following the failure of Balmain Ltd to make repayment the bank made demand on the defendant for €2.4 million being the agreed capped sum due by him on foot of the guarantees. The hotel premises are a well known landmark property in the village of Howth which, when operational, had 20 bedrooms, a restaurant, 2 bars, a large outdoor function area and an off-licence outlet. In the initial period of operations following its acquisition by Balmain Ltd, the hotel had up to 30 people employed in the business. The defendant is by training a chef but has experience in the bar and restaurant trade. This, however, was his first hotel venture. After what the defendant described as "some good initial years of trading", the business went into significant decline. Efforts to sell the hotel were made in 2008 and in early 2009 without success. For some considerable time prior to its ultimate closure in June 2009 the premises had been open at weekends only and operated more as a bar than a hotel. As and from September, 2008 neither the hotel licence or seven day licence were renewed. No lodgements to the company's accounts were made after November, 2008 and no VAT returns were made after that month either. In March 2011 the defendant was disqualified from holding a directorship of a company under s. 150 of the Companies Act 1990 on foot of a finding that Balmain Ltd was insolvent from as early as 2006.

The company had executed a mortgage debenture in favour of the plaintiff bank on 4th June, 2004. Following the unsuccessful demand by the bank for payment of monies due both by Balmain Ltd and by the defendant under the guarantees, the plaintiff on 25th June, 2009 appointed a receiver and manager, Mr Jim Luby, accountant, pursuant to the terms of the said mortgage debenture. Balmain Ltd was put into liquidation by the Revenue, to whom it also had major liabilities, in the following month. Thereafter, for the reasons I will elaborate later, Mr Luby continued to manage the premises on behalf of the plaintiff as its agent, the bank having become a mortgagee in possession consequent to the liquidation. A statement of affairs was subsequently prepared by the liquidator in January 2010 wherein the hotel, the subject matter of the mortgage debenture, was valued at €2 million.

It is not in dispute between the parties but that the hotel premises have not since been sold and have deteriorated in condition, partially through acts of vandalism by unknown third parties and also by reason of the simple fact that the premises have remained idle and unoccupied since June/July, 2009. Both water and electricity supply were turned off in 2010.

Equally not in dispute is the validity of the guarantees executed by the defendant. His liability under these guarantees is limited in the sum of €2.4 million. It is also acknowledged that the indebtedness of Balmain Ltd to the plaintiff bank is approximately €7 million..

The application for summary judgment against the defendant was referred for plenary hearing to this court where it was intimated that the defendant proposed to raise a single ground of defence which is elaborated more fully in the defence dated 16th January, 2012. Paragraph 2 of the defence as delivered contends as follows:-

> "The plaintiff, its servants or agents committed waste to the extent that the premises, the Bailey Court Hotel, Main Street, Howth, Co. Dublin, occupied by them, has deteriorated to such an extent that it is now worthless on the open market and it is now more of a liability than an asset. The defendant is entitled to an allowance and/or set-off in equity against the liability on the guarantee arising out of the said waste."

Paragraph 3 of the defence further alleges:-

> "The plaintiff, its servants and/or agents are guilty of negligence and breach of duty to the defendant as the guarantor of a borrowing debt. The defendant is entitled in equity to an allowance and/or set-off against the liability in the guarantee arising out of the said negligence and/or breach of duty."

When the matter first came before this court, it was contended on behalf of the defendant that a receiver owes a reasonable duty of care to a mortgagor both to preserve and maintain the asset - in this case the hotel premises - and to use his best endeavours to realise the best possible price in any sale thereof. In this context counsel for the defendant referred the court to the decision of the Court of Appeal in the case of *Standard Chartered Bank Ltd v. Walker & Anor*. [1982] 1 W.L.R. 1410. In that case the duties of a receiver were characterised by Lord Denning in the following terms at p. 1415:-

> "The receiver is the agent of the company, not of the debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the company, of which he is the agent, to clear off as much of its indebtedness to the bank as possible, but he also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor. It may be that the receiver can choose the time of sale within a considerable margin, but he

> should, I think, exercise a reasonable degree of care about it. The debenture holder the bank, is not responsible for what the receiver does except insofar as it gives him directions or interferes with his conduct of the realisation. If it does so, then it too is under a duty to use reasonable care towards the company and the guarantor.
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> If it should appear that the mortgagee or the receiver have not used reasonable care to realise the assets to the best advantage, then the mortgagor, the company, and the guarantor are entitled in equity to an allowance. They should be given credit for the amount which the sale should have realised if reasonable care had been used. Their indebtedness is to be reduced accordingly."

Amongst the particulars of conduct constituting waste and negligence it is alleged that the bank failed to provide the receiver with sufficient funds to upkeep, maintain and repair the premises. It is further alleged that the receiver failed to adequately secure the premises and caused or contributed to dampness in the building by turning off the water supply to the premises. It is also alleged that adequate steps were not taken to prevent trespass and damage by vandals. It is also claimed that the receiver failed to renew the various licences on the premises and allowed the contents, fixtures and fittings to degrade or be stolen or damaged.

However, upon the hearing of the matter, counsel on behalf of Mr Heagney conducted the case on the basis that the bank had become a mortgagee in possession following the liquidation, but nonetheless owed duties of a similar or even more stringent character to the borrower Mr Heagney. By reason of these alleged breaches of duty the defendant claimed to be entitled to an allowance against his liability on the guarantees of such sum as the court might deem appropriate.

This contention was resisted by the bank on the basis that, firstly, the bank and Mr Luby had exercised reasonable care in all the circumstances and, secondly, under no possible scenario could any supposed failure on the part of the receiver or the bank have had the effect of reducing the indebtedness of Balmain Ltd to a level where it could conceivably be of the slightest benefit to the guarantor. Under every imaginable circumstance, the €7 million indebtedness of Balmain could never have reduced to a figure which would afford any advantage or benefit to the guarantor.

It was further contended on behalf of the bank that in any event the terms of the guarantee dated 15th May, 2007 specifically out ruled any possibility of a set-off or allowance given that para. 16 of the guarantee provided as follows:-

> "All sums payable by the guarantor hereunder shall be paid in full without any deductions set-off counterclaim or withholding whatsoever and without any deduction for or on account of any present or future taxes, levies, imposts, duties, deductions or withholding or other charges of whatever nature impose levied withheld or assessed ...."

Having regard to the seriousness of the matters alleged by the defendant, the Court decided to hear and determine the factual basis of the contentions put forward by the defendant and to ascertain if a basis was thereby made out for the claims advanced on behalf of the defendant. Only a positive finding in favour of the defendant in this regard would warrant a further inquiry as to whether or not the guarantor could justifiably claim some allowance or set-off, notwithstanding the express terms of the written guarantee.

**THE EVIDENCE**
Daragh Heagney gave evidence that he was the principal of Balmain Ltd and the author of the three guarantees which were security for funds advanced by the plaintiffs in respect of the purchase by the company of the Bailey Court Hotel in 2003. While this was his first hotel venture, he had previous experience in running bars and restaurants and had operated a restaurant in Powerscourt Town Centre. He was a chef by trade. He told the court there was a large night club area to one side of the hotel and an off-licence which was fairly successful. When the downturn occurred in 2007, the off-licence was the first thing to go. Thereafter business just got worse and worse. He stated that the overheads in a 20 bedroom hotel were prohibitive when compared with the rates which a 200 hundred bedroom hotel in Dublin City could charge. By 2009, the hotel basically just opened at week-ends and there were only five or six employees left at that stage.

The receiver was appointed on 25th June, 2009 and he immediately went in and changed all the locks on the premises. As far as Mr. Heagney was concerned, the hotel was then in 'perfect' condition, with all beds made, and with significant stock in the licensed area. He dealt with Mr. Declan Coyle from Mr Luby's office and he drew up an inventory of furniture and effects that were in the premises at the time of the receivership. It did not include the stock on the premises.

For the first few months, there appeared to be adequate security on the premises which had an alarm system. However, there were constant break-ins and he was regularly notified when the alarm system went off. He would then ring the receiver and ask him to investigate as the alarms annoyed the neighbours. When he raised the adequacy of the security presence on the premises with Mr. Luby's representative, he was told that the bank were not paying the receiver for any other security.

He was aware that Italian glass partitions which he had constructed in the open area outside the hotel had been smashed by the security firm for some reason. Ultimately, the receiver withdrew security altogether from the hotel and bricked up all the windows and openings at ground floor level. On a recent visit to the hotel in December 2011 he found it was completely destroyed. On entering the premises he could see the sky through gaps and holes in the roof. Water was penetrating the building and the walls were damp.

On cross-examination, Mr. Heagney accepted that he had allowed the insurance on the premises lapse. When asked what he expected the receiver to do, Mr. Heagney replied that he expected the receiver to keep the property in perfect condition and the bank should have given the receiver sufficient monies to keep it in that state and provide adequate security for the premises. While a valuation of €10 million had been placed on the premises in 2007, Mr. Heagney accepted that this valuation was prepared in the context of a proposed redevelopment of the site which would have included demolishing the hotel, clearing the site and then building apartments. He accepted that when required to prepare a statement of affairs for the liquidator, a valuation of €2 million was placed on the premises. He also confirmed that he endeavoured, along with other parties, to buy back the hotel for the sum of €1.4 million in 2010. He accepted that if the receiver wished to resurrect the business in any shape or form, he would have to address the issues surrounding the lapsing of the off-licence and other irregularities associated with the other licence. He accepted that since September of 2008, none of the licences had been renewed. This was primarily because of the sum owed to the Revenue for arrears. He also accepted that if the hotel were to be resold, remedial work to bring it up to the requisite standard of compliance with fire regulations would also be necessary. He did not dispute a suggested estimate of €125,000 for this work. Mr. Heagney also accepted that there were outstanding rates due to Fingal County Council in excess of €100,000.

Mr. Gerard Hand is an architect in the firm of Douglas Wallace, architects. He visited the hotel premises in January 2012 and took photographs of various rooms in the hotel. He found evidence of damage, both through vandalism, water ingress and lack of services. In some rooms clear sky could be seen through the roof. There was detritus strewn around the floors and damp on the walls. In one area there was a major heave in the timber flooring which was corrupted from ingress of water. There was evidence of graffiti and

trespasser occupation, including empty wine and champagne bottles which presumably had been removed from stock in the premises. In certain areas the plaster had fallen out completely and there was mould growing in certain parts.

The remains of the Italian glass construction was strewn around the reception area along with bits of umbrellas and awnings from the outside area. The premises had been bricked up at ground level which would have reduced the ability of trespassers to gain access. He noted that radiators had been pulled off the walls and that the plumbing had been damaged. The heating had been turned off in the building for a very long time. In his view it would cost in excess of €1 million to put the premises back into a reasonably usable hotel premises.

Mr. Gerard Farrelly operates a company called Dampco Services Ltd which specialises in treating dampness in buildings. He also visited the premises in January 2012. He did not carry out any opening up works, but conducted his inspection with the aid of a moisturator. He found readings between 80% and 100% of moisture in many areas through ceilings, walls and roof valleys where water ingress had occurred. He found signs of growth and fungal growth on walls and ceilings. In his view all damp and damaged ceilings would need to be replaced. Damp plaster slabs and the damage rendering on walls would need to be removed. They would then require to be treated with a range of chemical products and further treated for dry and wet rot. All damaged timber flooring would require to be removed and replaced.

In cross-examination, he stated he was a regular patron in the hotel while it was open and had never observed any of these conditions during the time of Mr. Heagney's occupancy. While the premises were not brand new in June, 2009, they were in good condition.

Mr. Vincent Flood lives locally and gave evidence of witnessing an incident in July, 2011 when the security firm, K Tech, deployed its security men with a lump hammer to smash the facade of the Italian windbreaker outside the hotel premises. He had phoned Mr. Heagney to alert him to what was going on. Having smashed the entire length of glass, the security men gathered it with a brush and shovel into a big container and threw it in the front door of the hotel.

He was cross-examined on the basis that something had to be done as one of the panels had blown out two days previously. It was put to him that that event could have weakened the other glass panels causing them to come down and cause injury. In response, he stated that a pedestrian would not be walking adjacent to the panels. The panels could have been taken down and preserved.

Mr. James Luby is a chartered accountant with McStay Luby, practising in the area of insolvency and receivership for over 30 years. Following his appointment as receiver on 25th June, 2009 he attended with colleagues and a security company to take possession of the premises on the following morning. There was nobody on the premises at that stage and the locks were changed. He put in place a security arrangement with K Tech Security to do three patrols per week for the purpose of property security. On taking up his position, he had found that the alarm system was not operating and he arranged with the alarm company to re-activate it.

Mr. Luby said there was no evidence that there were any employees on the premises. Nor was there any evidence of trading activity. Having walked through the hotel premises on the day following his appointment he found some dampness in the wall towards the back of the hotel. In terms of its general condition, the hotel was untidy and there were records and papers strewn about the floor. He discovered there had been no liquor licence for the premises since September 2008. On making enquiry he discovered that a fresh application needed to be made to court to de-license the property because the licence which had been in force up to that date covered a ballroom which the company no longer owned. He made preparations for a licensing application, but was advised that the fire certification needed to be put in order to ensure that the property was fire compliant. Having engaged the services of FCC Fire Cert Ltd, they reported that there were significant deficiencies in the premises which had to be first addressed, costing approximately €125,000. The only funds available to him consisted of cash found on the premises on the date of appointment, amounting to approximately €116, apart from which he had funds only as dispensed to him from time to time by AIB. It was clear to him that there were no funds in the company, and his understanding was that the company owed the bank nearly €7 million. He had organised a firm called Total Stock Control to identify the amount of stock as of July 2009. It was worth about €11,000 but had been kept on the premises. He had directed and paid for roof repairs in November, 2009 when it was noted that there was a problem.

Immediately following his appointment the receiver instructed Morrisseys to try and find a buyer for the premises. In July 2009 Tony Morrissey placed a valuation on the hotel and premises of €2 million. However, despite the fact that a number of interested parties visited the hotel, none were interested in buying the hotel having regard to the amount needed to be spent to bring the hotel back to a proper condition for trading and to resolve fire certification issues. All expressions of interest came from publicans, because the premises effectively were a pub.

In May, 2010, an offer of €1.45 million was received from Loomes & Co., solicitors, on behalf of a group of persons involving Mr. Heagney and others. This offer was made subject to the licensing issues being resolved. The bid of €1.45 million was not acceptable to the bank although it had been his view at the time that the offer should have been accepted.

He agreed that there were a number of minor break-ins to the premises in the latter part of 2009, which resulted in the gardai being notified. In January, 2010 a significant incident occurred when intruders got into the premises and remained there for several nights. In this incident considerable damage was done to doors, light fittings and a general mess had been created. Graffiti had been daubed on the walls and alcohol had been brought up from the store downstairs to bedrooms.

Following that incident, a static security guard was placed on duty on nights between Thursday to Sunday at the premises and this continued from February to October 2010. From October 2010 up to March 2011, the security patrols reverted to one per week and from March onwards to one per fortnight. Since the blocking up there had been no further incidents of note.

When the final offer to purchase the premises in May 2010 was rejected by the bank, various discussions then ensued to decide the future of the property. The instructions he received from the bank at that stage were to the effect that any further marketing efforts be deferred and the property be blocked up and treated as a site for site development into the future. As a result, the windows were blocked up and similar permanent security arrangements put in place in terms of restriction of access to the building.

The property was still on Morrissey's books, but no worthwhile offers of any sort had since been forthcoming for the premises.

Mr Luby's arrangement with the bank was that the bank provided an overdraft facility for him as receiver and authorised all expenditure through that account. His fees, and those of the security company, had amounted to €175,000 by the summer of 2010 and had been discharged from this account.

He had also arranged for the water to be turned off for insurance purposes.

In cross-examination, he accepted that turning off the water would interfere with the heating of the premises and that would contribute to dampness. While it might have been desirable to have a caretaker stay on the building, the cost was something which the bank were not prepared to countenance on a 24 hour basis.

The only parties involved in the decision to convert the premises into a site for later development were the bank and himself. Effectively the property was mothballed in the hope it might be of value later as a site.

In further cross-examination, he accepted that he would have liked to have obtained the bank's approval to accept the offer of €1.45 million in May 2010. He was not in a position as a receiver to accept that offer without the bank's approval and such approval was not forthcoming.

He accepted that his agency on behalf of the mortgagor ceased with the appointment of the liquidator. Thereafter, he accepted there was no change in his day to day responsibilities and he continued to take his instructions from the bank.

It was put to him that Mr. Heagney had tried on dozens of occasions to contact his office to which Mr. Luby indicated that he met Mr. Heagney a few days after appointment and again in early August 2009. As far as he was concerned the purpose of those meetings was to establish information regarding the hotel and the business and to ask him for a direct restatement of affairs which he never submitted.

The blocking up of the premises took place in or around October, 2010. At that stage, the electricity supply was also discontinued. Shortly afterwards a representative from Fingal County Council inspected the property and found it to be derelict within the meaning of the Derelict Sites Act. He thereafter contacted the Council and agreed certain works with them so as to ensure that the premises were not listed on the sites register. This would have incurred a further charge which was in the event avoided at relatively small cost.

Mr. Tony Morrissey, is the managing director of Daniel Morrissey & Sons, auctioneers where he has worked for over 30 years specialising in licensing and leisure premises. He visited the premises at Mr. Luby's request at the end of June, 2009. It was clear that the premises were not trading and that some remedial work was necessary. He felt the maximum value of the premises as of that time was €2 million. While the premises were described as a hotel, it was in reality trading as a bar and night club. "Our advice to the receiver in terms of disposing of the asset was to proceed by means of private treaty rather than auction or tender. This reflected our concern about the depressed state of the market." He told the Court that only five licensed premises changed hands in the Dublin market in 2009. He contacted several parties who were active in the licensed trade and in August and September 2009 a number of potential purchasers were brought through the premises with their builders and architects. Various letters from these parties were referred to by Mr. Morrissey wherein those parties referred at length to the poor state of the roof, and the severe dampness evident throughout the entire property. In short, none of these potential purchasers came forward with any concrete offer. Mr. Morrissey was aware that over and above these requirements was the requirement to address the fire compliance issues.

Subsequently the offer made of €1.45 million was subject to four conditions, including a condition that the contract was subject to a full public and seven day on-licence being currently in force and attached to the premises. Mr. Morrissey was of the view that the offer of €1.45 million should be seriously considered and he attended a consultation with the bank and with Mr. Luby to discuss it. He felt it should be accepted, but the receiver later indicated to him that they had opted instead to treat the premises as a site instead. He was not asked to give any valuation of the premises as a site. The premises are still on the books of Morrisseys, but are no longer on the website.

Mr. Bruce Campbell gave evidence of valuing the site in February 2012 and concluded that its value today was about €940,000. Its site value would be even less. It was his belief that the only long term realistic potential of the premises was as a redevelopment site. In the context of approaching the property as a site, he stated that there was little point in the receiver expending money in maintaining or repairing the premises.

Mr. Declan Crilly is a fire safety consultant working on behalf of FCC Fire Cert Ltd. He carried out an inspection of the premises at the end of 2009. He found there was no active working fire alarm system within the building and the emergency lighting system was not functioning. In terms of means of escape, there was inadequate provision for the doors: they were missing smoke brushes, hinges and so on which would allow the corridors to be protected. The previous fire certification for the hotel dated back to 1994/1995 and there had been no recent applications made for any alteration works. He could not have given a certificate without the installation of a fire alarm system, emergency lighting and general upgrade works. He certainly could not certifY the building as it stood at the time of his inspection.

Mr. Michael Wiseman is an AIB staff employee who was part of the management of the Balmain account since March 2006. He stated that at a meeting in July 2008 the defendant indicated that his intention was to form a partnership with a developer to sell the site where the Bailey Court Hotel stood. A further meeting occurred in March 2009 at which Mr. Heagney advised the bank that he now did not intend putting the hotel on the market based on advice from the firm CBRE that there was no market for it at that time. Subsequently the bank issued a demand letter to Balmain on 26th January, 2009 and on the defendant as guarantor on 3rd February, 2009. At the time of Mr. Luby's appointment, a €20,000 current account overdraft facility was set up for him to secure the premises and discussions took place with Mr. Luby about the next step going forward which was to employ Morrisseys to sell the premises. In cross-examination Mr. Wiseman accepted that it had been the bank's intention for some time to sell the property because Mr. Heagney had no way of repaying the capital sum due and interest payments had not been met for years going back to 2003.

He was unable to recall any discussions with the receiver about turning off water to the premises, but he did discuss the need to secure the premises and to have them patrolled by security guards. While the bank initially sanctioned €20,000 for Mr Luby's work, that had increased over time to €175,000 having regard to the additional expenditure which devolved on the bank up to the time when the decision was made to mothball the premises. This sum covered all of the bank's outlay in respect of the receiver's fees and expenses, security costs and repairs. If a decision had not been made at that point to convert the premises effectively into a site, the bank would have had to continue funding security and various other outlays indefinitely.

Mr. Conal O'Regan is a manager within AIB group which specialises in cases of receivership. In relation to the offer of €1.45m made for the hotel in May 2010, he stated that the bank's view was that the offer was unacceptable. That was because the debt level was in the range of €7 million and the credit committee took the decision that the offer should not be accepted. The market at the time was extremely depressed and this offer was significantly below what the bank was expecting. He did concede, however, that if such an offer were to be made in today's circumstances it would be very likely that the bank would accept it.

The decision to break up the windows and to bolt down the property was made with a view to minimising costs and outlays

associated with the particular property in which the bank was going to suffer a significant loss. The bank continued to hope that the value of the property and the market itself might recover at some stage in the future. He confirmed that an updated alarm system was not installed despite being requested by Mr. Luby but it was subsequently agreed to engage K Tech Security Ltd and the bank agreed to fund that arrangement. It also funded insurance cover for the building on the basis that the same required only one security patrol per fortnight to be provided by K Tech Security.

**DECISION**
I may state at the outset that I accept the defendant's proposition that the bank became mortgagees in possession following the liquidation of Balmain Ltd and that from that time onwards Mr Luby became an agent of the bank. The evidence of his continued management of the asset is open to no other interpretation.

The duties of a mortgagee m possession are set out in *Fisher Lightwood's Law of Mortgage* (Butterworths, 11th ed., 2002) at p 737:

> "A mortgagee in possession is not liable for waste as such. He is, however, under an equitable duty to give back the property uninjured on redemption. Thus the mortgagee must take reasonable care of the property: he will be liable to the mortgagor for negligence resulting in damage to the mortgaged property arising out of his possession of it. For example, he will be liable if mortgaged mines are flooded by improper working; if water pipes are negligently allowed to freeze; if mortgaged chattels are injured by negligent removal; or if loss is caused due to alterations injurious to the value of the property, such as the pulling down of cottages on an estate. As regards agricultural land under cultivation, a mortgagee is liable for damage caused by his own gross negligence. He will be liable if, after an order for possession has been made in his favour, he fails to take reasonable steps to protect the premises (for example, against vandals pending sale) and damage to the premises ensues...Any loss caused by deliberate injury to the property, or by the negligence of the mortgagee, will be charged on the accounts with interest, either as a capital loss or the lost rents or profits."

In *Holohan v Friends Provident and Century Life* [1966] I.R. 1 O'Dalaigh C.J. at p. 18 cited with approval the passage from the judgment of Sir John Stuart in *Robertson v. Norris* [1 Giff. 421] where he outlined the duties as follows:-

> "...this Court requires that he will exercise the power of sale in a provident way, with a due regard to the rights and interests of the mortgagor."

O'Dalaigh C.J. also cited with approval the statement of Sir Stewart in *Jenkin v. Jones* [2 Giff. 99) that "the mortgagee must take all reasonable means to prevent any sacrifice of the property"

Continuing at p. 19 the Chief Justice, quoting and adopting the law as stated by Lindley L.J. in *Kennedy v. De Trafford* [1896] 1 Ch. 762, stated:-

> "A mortgagee is not a trustee of a power of sale of the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: that is all."
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> The relevant test was then outlined as follows by O'Dalaigh CJ at p. 21:-
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> "The trial judge, I am satisfied, applied too lenient a test in judging the conduct of the defendants. The question he should have asked was: Did the defendants act as a reasonable man would in selling the plaintiffs property?"

I have dwelt at considerable length on the evidence given that my findings on factual issues will determine whether or not there was any breach of the duty of care owed by either the plaintiff bank or its agent to the defendant in this case. Given that at different times Mr. Luby was both a receiver and an agent of the bank, I am treating the relevant duty as being the higher of the two insofar as they may differ. While I have not been referred to any statutory duty so stating, I am also taking it that Mr. Luby's duty was to obtain the best price he could in the context of any sale, be it as receiver or agent of the bank.

I have come to the conclusion that there was no breach of duty by the plaintiff bank or Mr. Luby, either in his capacity as receiver or as agent of the bank. I do not accept Mr. Heagney's contention that this hotel was in "perfect" condition in June 2009. I accept Mr. Luby's evidence that he found evidence of damp on his walk- through of the premises the day after his appointment as receiver. Similar findings were reported from the would be purchasers who decided not to proceed further in negotiations with Mr Morrissey in late 2009. I find as a fact that these premises were in a less than good condition at the time of the commencement of Mr. Luby's stewardship. This is hardly surprising, given that for some considerable time the premises had ceased to operate as a hotel and functioned on some sort of ad hoc basis at weekends only.

I am satisfied that following his appointment as receiver Mr. Luby carried out his duties in a responsible fashion. He secured the premises. He arranged for an inventory of contents to be prepared. He retained the services of Mr. Tony Morrissey to report on the possibility of a sale of the premises as a going concern. He explored and made preparations for rectifying the multiple problems associated with the licences in the hotel. Later, in his capacity as agent of the bank, he responded swiftly when notified of a number of trespass incidents in late 2009 and reacted similarly following the major trespass incident in December of that year with increased security measures in early 2010. Through the agency of Messrs. Morrisseys, he engaged with potential purchasers in 2009. He is not to be faulted because the state of the market combined with the reported condition of the hotel made a sale virtually impossible.

I am not satisfied that the bank failed to fund Mr. Luby adequately as has been contended by Mr. Heagney. He was provided with sufficient funds to carry out his work and has not complained that he was left short. By the time the hotel was bricked up and put "into mothballs" in 2010 a sum of €175,000 had been expended on receivership fees, security fees and repairs to the roof of the hotel. Against a backdrop where the bank were already out of pocket to the tune of €7 million, I do not believe it can seriously be suggested that they had an obligation to continue clocking up expenses under these various headings in the clear knowledge that they would never recover them, either from the defendant or in the context of any sale of the hotel premises.

Insofar as the breaking of the glass panels outside the hotel is concerned, I do feel that Mr. Heagney has a valid ground of complaint, because there was evidence to suggest that these panels could have been removed without being broken up. This was an act of waste perpetrated by the security company, but in the overall context it cannot avail Mr. Heagney in any meaningful way.

Nor can I hold that Mr. Luby was obliged to expend the sum of €125,000 in order to renew and reconfigure the licences attaching to the premises. It is clear from the evidence that a very considerable expenditure of this nature would have been necessary for the purpose of obtaining a certificate of compliance with fire regulations.

Equally I am satisfied that neither Mr. Luby or the bank were negligent in refusing to accept the offer of €1.4 million offered for the premises in May 2010. This offer was conditional on compliance with a number of conditions, including the resolution of the difficulties surrounding the alcohol licences. Having regard to the valuations so recently obtained by the plaintiff bank through the receiver, it might have been wiser to have accepted the offer given that the advice to this effect was given by both Mr. Morrissey and indeed with the view of Mr. Luby himself. However, I cannot possibly hold that the failure to sell for that figure was negligent or in breach of any duty of care in all the circumstances.

Accordingly, I am satisfied in an overall way that both the bank and the receiver did take reasonable care as regards the interests of Mr. Heagney in this case.

Quite apart from that conclusion, I also accept the submissions made by the bank to the effect that no allowance would exonerate the defendant from liability for the amount of his guarantee having regard to the amount of debt due by Balmain Ltd to Allied Irish Banks. Even were I to have held that the bank should have accepted the offer of €1.4 million for the premises made in May 2010, the debt would have remained close to €6 million after the costs associated with the receivership had been deducted.

Finally, I must also take into account that the terms of the guarantee specifically preclude any set off howsoever arising and I am compelled to accept as correct the plaintiff's submissions to this effect.

In all the circumstances, the defendant has failed to make out the case elaborated in his defence and in circumstances where the amount covered by the guarantee is agreed, it seems to me I have no alternative but to give judgment for the plaintiff in the sum of €2.4 million.