Neutral Citation: [2013] IEHC 572

THE HIGH COURT

(2013 No. 162 COS)

IN THE MATTER OF MOORMAC DEVELOPMENTS LIMITED (IN RECEIVERSHIP)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 316 OF THE COMPANIES ACTS 1963 - 2012

BETWEEN

ARDFERT QUARRY PRODUCTS

APPLICANT

AND

MOORMAC DEVELOPMENTS LIMITED (IN RECEIVERSHIP)

RESPONDENT

Judgment of Ms. Justice Laffoy delivered on 13th day of December, 2013.

The application

1. The applicant's application, which was initiated by an originating notice of motion dated 10th April, 2013, invoked s. 316 of the Companies Act 1963 (the Act of 1963) and sought orders in the following terms:

> (a) an order directing the receiver of Moormac Developments Limited (the Company) to return the applicant's materials pursuant to the applicant's retention of title clause; and/or
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> (b) an order directing the receiver to permit the applicant to access the site upon which its materials have been placed in order to recover its materials; and/or
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> (c) an order directing the receiver not to mix the applicant's materials with any of the assets over which the receiver has been appointed.

2. There are a number of unusual features of this application.

3. The first unusual feature is the nature of the applicant's "materials". In the grounding affidavit of Michael Higgins, the Financial Manager of the applicant, sworn on 3rd April, 2013, the materials are described as "various building materials". In the various items of *inter-partes* correspondence exhibited, the property to which the applicant claimed title was described as "material", although it was clear from photographs exhibited by Mr. Higgins that the material was, in fact, small stones which were spread on the ground of a part-completed residential development, which counsel for the applicant aptly described as a "ghost estate". On its procedural voyage through the Chancery 2 List, the case became known as the "rubble" case. However, while so describing the case may have given rise to an element of light relief, the reality is that the applicant, like many other suppliers of building materials and other sub-contractors, has a genuine grievance. Whether it has a remedy of the type sought, however, is a very difficult question.

4. The second unusual feature is that, while the person named by the applicant as respondent is the Company to which it supplied the material, which is now in receivership, it appears that the Company does not own the land over which it is now spread. However, the receiver of the Company, Gearoid Costelloe (the Receiver) of Grant Thornton, Chartered Accountants, Limerick, was also appointed receiver and manager of all of the assets of an individual, Michael McKenna (Mr. McKenna) comprised in and charged by a mortgage dated 19th December, 2005 made between Mr. McKenna and Anglo Irish Bank Corporation Limited (the Bank), having been so appointed by deed of appointment dated 7th May, 2010. At the hearing of the application issue was taken with the fact that the Receiver had exhibited in his replying affidavit sworn on 6th June, 2013 a copy of his appointment as receiver and manager of the assets of Mr. McKenna, rather than the deed by virtue of which he was appointed as Receiver of the Company. I do not think it would serve any useful purpose to attach any significance to the omission to exhibit the deed of appointment of the receiver as Receiver over the assets of the Company, which, at the hearing, was put before the Court. Mr. Higgins himself was aware of the position because in his grounding affidavit he had averred that the Receiver was receiver of the Company by virtue of a deed of appointment dated 7th May, 2010 on foot of a debenture dated 1 ih September, 2006 made between the Company and the Bank. Further, he had averred that he also understood that the Receiver had also been appointed as receiver over the lands of Mr. McKenna. Therefore, there is no sense in which the applicant or its legal advisers were misled as to the status of the Receiver in relation to the land on which the material is spread.

5. However, the dual role of the Receiver undoubtedly is a complicating factor. It appears that it is over land owned by Mr. McKenna that the applicant seeks access, whereas Mr. McKenna is not before the Court. As I understand the position from the totality of the documentation before the Court, Mr. McKenna was the owner of land at Lixnaw, County Kerry comprised in Folio 5553F of the Register, County Kerry. That land was being developed from at least 2008 by the Company, of which Mr. McKenna was a director, presumably under some development agreement or licence agreement with Mr. McKenna. In any event, for present purposes I consider it appropriate to assume that Mr. McKenna was at all material times the owner of the land and that, under agreement with him, the Company was developing the land as a residential development, and that the respective interests of the Company and Mr. McKenna were charged in favour of the Bank, whose interests the Receiver is protecting. Against that background I will now summarise the relevant facts.

Relevant facts

6. In April 2008 the applicant supplied the materials in issue to the Company under Conditions of Sale, which provided in Clause 11 as follows:

> "All goods supplied by the [applicant] to the [Company] shall remain the property of the [applicant] until all amounts outstanding in respect of the said goods have been paid to the [applicant]. The Company hereby grants an irrevocable right and licence to the applicant through its servants or agents to enter with or without vehicles upon all or any of the said premises or sites on which the goods may be for the purposes of recovering the same."

The Company did not pay for the material supplied and in summary proceedings in the High Court (Record No. 2010/645S) between the applicant, as plaintiff, and the Company, as defendant, by order of the Master dated 5th May, 2010, the applicant was given liberty to enter final judgment for the sum of€121,335.75 with interest on the said sum pursuant to the Courts Act 1981 from 1st January, 2009 until judgment or prior payment together with the costs of the suit when taxed and ascertained. The applicant obtained an order of F.I.F.A. from the Court on 27th August, 2010 to which there was a return *nulla bona* on 27th October, 2010 by the Sheriff for County Kerry.

7. By letter dated 22nd September, 2010 to the Bank at its Limerick Street branch, the solicitors for the applicant indicated that the applicant had a retention of title clause in relation to the materials on the development at Lixnaw. It would appear, although the relevant correspondence has not been exhibited, that the line taken by the Bank was that the applicant's retention of title clause had been defeated due to the "mixing of the materials". In any event, by letter dated January 2013 from the solicitors for the applicant to the Receiver, the applicant's solicitors contended that the material was clearly identifiable and had not been mixed in any process with any other materials and was recoverable. Access to the site by the applicant was requested, so that it could recover the materials it had provided to the Company, which had not been paid for. The request was not acceded to and that led to this application, which was grounded on the affidavit of Mr. Higgins referred to earlier.

8. In his replying affidavit sworn on 6th June, 2013, the Receiver did make the case that the materials supplied by the applicant to the Company, which he described as "stone fill, gravel and rubble" were mixed with other materials. He made the following points:

> (a) that the stone fill material supplied by the applicant is now attached to the lands where it has been used for construction of roads and housing foundations and he expressed the belief that it had become mixed in during the construction process such as it is not possible or practicable to separate it out;
>
> (b) that the material has no commercial or economic value if taken away, because it has been used on site and mixed in with other materials and could no longer be sold or used in another construction site;
>
> (c) that having been on site for at least four years, an attempt to remove the materials from the site would cause significant damage to the works on site; and
>
> (d) that the materials supplied were "unmarked primary building materials consisting of stone, gravel and rubble" and, because certain invoices received by the Company from the applicant were paid and others were unpaid, it would be impossible to identify the precise materials to which the applicant claims to have retained title.

9. In a supplemental affidavit sworn on 17th June, 2013, Mr. Higgins addressed those points. First, he averred that a mixture of materials had been supplied by the applicant to the Company between April and August 2008, which consisted of crushed limestone, concrete blocks and infill, and the materials were used by the Company in the building of the housing estate at Lixnaw. Mr. Higgins made it clear that the applicant is not seeking to recover any stone fill material or concrete blocks which would have been mixed in the construction process. Rather, the applicant is seeking to recover crushed limestone, which was used as a base for roadway construction. In particular, the applicant contends that it is entitled to crushed limestone used to begin a new roadway shortly before the development works ended, which it is contended was not mixed with any other materials and is not permanently attached to the land. Secondly, Mr. Higgins averred that the crushed limestone has a resale value of €30,000 and it could be used again. Thirdly, Mr. Higgins averred that the material could be removed without causing any damage to the land and, further, he indicated that the applicant is willing to provide an undertaking to the Company in receivership as to any damage which may be caused by it in removing the crushed limestone. Finally, he addressed the assertion by the Receiver that it would be impossible to identify the precise materials to which the applicant claims to have retained title very convincingly. He exhibited a statement furnished to the Company setting out the unpaid invoices aggregating €121,335.75. Only one invoice out of just short of one hundred invoices was marked and designated "Part-Paid", all of the others having been designated "Not Paid". In addition, Mr. Higgins exhibited the unpaid invoices in relation to crushed limestone and summarised them in tabular form, showing an aggregate amount, inclusive of VAT, due of €47,648.49.

10. A colleague of the Receiver, Ray Egan, swore a further affidavit on znd July, 2013, the purpose of which was to prove that it would not now be possible to remove the crushed limestone without causing significant damage to the lands and the construction on the lands. He pointed out that the material was not in containers, silos or piles awaiting use but had actually been used in the course of road construction. He averred that, given that the stone material is "unmarked primary construction material, it is impossible now to determine with precision whether the materials used in road construction that the applicant seeks to possess form part of the materials that were paid for or part of the materials which were not paid for". In this connection, Mr. Egan averred that he had sought the assistance of Mr. McKenna, a former director of the Company, who is of the opinion that, while certain invoices were unpaid as claimed, certain other invoices were discharged by the Company prior to it entering into receivership. Of course, as counsel for the applicant pointed out, that is hearsay evidence, although it does point to the fact that Mr. McKenna, the owner of the land, was made aware of, and became concerned in relation to, the defence of the application by the Receiver.

11. In any event, on the basis of the evidence adduced, I think it is reasonable to conclude, on the balance of probabilities, that the crushed limestone which the applicant seeks to recover was not paid for and I so find. However, Mr. Egan went on to aver that he was further informed, he did not say by whom, and that he believed that the material "has no commercial or limited value if taken away due to the fact that it is mixed in and weathered". He asserted that the application is vexatious.

12. The final affidavit filed was a further affidavit of Mr. Higgins sworn on 13th August, 2013 and the purpose of that affidavit was to exhibit a report obtained by the applicant from an engineer, Ger O'Keeffe of Ger O'Keeffe Consulting Engineers Limited. The report in question was dated 25th July, 2013. The report has a comprehensive range of photographs appended to it. Mr. O'Keeffe had obtained permission from the Receiver to inspect the site, which he did on 24th July, 2013. He recorded that there was no free access to the property and one of the metal railings had to be removed to provide access for himself and his assistant. The report contains a detailed and comprehensive description of the unfinished roadways on the estate. As it has not been challenged by any other expert, I think it is appropriate for the Court to rely on Mr. O'Keeffe's conclusions as to whether the material in issue could be removed without causing damage. He stated:

> "In my opinion the crushed limestone and screenings is placed on excavated subsoil ground. In part and on other parts it is raised above the natural ground level. There is no difficulty getting machinery in to remove the crushed limestone and

> screenings without causing any damage to services. Different machines can be used -large excavators or mini-diggers are appropriate."

Mr. O'Keeffe concluded that the value of the hardcore available to be removed is €24,000.

The legal issues
13. The Court has had the benefit of helpful outline written submissions and oral submissions from both sides. I propose outlining first what is not in issue between the parties.

14. It has not been contended on behalf of the Receiver, properly so in my view, that the Court does not have jurisdiction under s. 316 of the Act of 1963 to determine the ownership of the material supplied to the Company having regard to the retention of title clause. Indeed, counsel for the applicant pointed out that the construction of a retention of title clause on an application under s. 316 is not without precedent, citing the decision of the High Court (Barron J.) *In Re WJ Hickey Limited* [1988] I.R. 126.

15. Nor was there any controversy as to the scope of the Court's jurisdiction under s. 316. Sub-section (1) of that section provides that where a receiver of the property of a company is appointed under the powers contained in any instrument, various interested parties identified, including a creditor of the company,-

> "... may apply to the court for directions in relation to any matter in connection with the performance or otherwise by the receiver of his functions ... and on any such application, the court may give such directions, or make such order declaring the rights of persons before the court or otherwise, as the court thinks just."

However, subs. (1)(a) provides that, except where the application is made by the receiver, it-

> "... shall be supported by such evidence that the applicant is being unfairly prejudiced by any actual or proposed action or omission of the receiver as the court may require."

I have absolutely no doubt that the applicant in this case has demonstrated that it is being unfairly prejudiced if, as a matter of law, it is entitled to go on to the site at Lixnaw and recover the material. The applicant has an unsatisfied judgment for the material against the Company which pre-dates the appointment of the Receiver.

16. Nor is there any issue as to whether the Receiver is bound by a valid retention of title clause in relation to the goods supplied to the Company. On this point there is a useful summary of a receiver's position in Lynch-Fannon and Murphy on *Corporate Insolvency and Rescue* (2nd Ed.) at para. 7.50 and para. 7.51 and also at para. 9.47 *et seq*. The position is stated by the authors (at para. 7.50) as follows:

> "The receiver, when appointed, has the exclusive right to control and realise the property charged by the debenture. However, this will not affect property in the company's possession which belongs to someone else, such as goods where the title remains with a supplier under a *valid* retention of title clause".
>
> (Emphasis in original)

No issue arose in this case as to the validity of the retention of title clause.

17. I have already addressed the controversy as to whether, on the facts, the material the subject of the retention of title clause is identifiable and I have found in favour of the applicant.

18. As to the controversy between the parties, counsel for the respondent submitted that, ultimately, the key issue is whether "the goods" have become attached to the land, thus losing their identity as "goods" and so defeating the retention of title clause relied on by the applicant. In this connection he submitted that the maxim *quicquid plantatur solo, solo cedit* (whatever is affixed to the ground, becomes part of it), which, it was submitted, was confirmed to exist in Irish law by the High Court (Keane J.) in *Re Galway Concrete Limited* [1983] ILRM 402, applies. Counsel for the applicant also identified the issue as to whether the goods remained chattels or had become fixtures. In fact, in identifying the legal principles, counsel on both sides for the most part relied on the same authorities.

The legal principles to be derived from the authorities relied on
19. The earliest authority relied on by both parties was a decision of Blackburn J. in *Holland v. Hodgson* [1872] L.R. 7 C.P. 328. In that case, the contest was between a mortgagee, on the one hand, and the trustees under a deed of arrangement entered into by the mortgagor, on the other hand. The mortgagor had mortgaged a worsted mill, at which he carried on the business of "a worsted spinner and stuff manufacturer", to the mortgagee in fee. The trustees seized certain looms in the mill. As stated in the headnote of the report, these looms were attached to the stone floors of the rooms of the mill by means of nails driven through holes in the feet of the looms, in some cases into beams which had been built into the stone, and in other cases into plugs of wood driven into holes drilled in the stone for the purpose. It was necessary that the looms should be so attached for the purpose of steadying them and keeping them in a true direction, perpendicular to the line of the shafting, by means of which steam was applied to them. It was impossible to remove the looms without drawing the nails, but it could be done easily and without serious damage to the flooring. It was held that the looms passed by the mortgage of the mill as part of the realty.

20. In his judgment in *Holland v. Hodgson*, Blackburn J. stated (at p. 334 *et seq*.):

> "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then (*sic*) by its own weight it is generally to be considered a mere chattel . . .. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt v. Gregory*. Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land.... Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the

> circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

21. The "true rule" test posited by Blackburn J. was applied by the High Court (O'Hanlon J.) in *Maye v The Revenue Commissioners* (Unreported, 3rd May, 1985). The issue there was whether the installation of a television aerial in a private dwelling house amounted to "the installation of fixtures" for the purposes of VAT. Having quoted from the judgment of Blackburn J. and having cited other authorities O'Hanlon J., having regard to the facts as set out in the Case Stated before him, stated:

> "I have no difficulty in deciding in the present case that the television aerials in question should be regarded as fixtures, having regard to the very substantial means used to secure them to the premises ... and also having regard to the purpose and intention with which they were erected. They were installed for the better enjoyment of the premises as dwelling houses in order to ensure successful reception of programmes on any television sets that might be brought on to the premises for the benefit of the occupants."

22. Both sides also referred to a more recent English authority, namely, the decision of the House of Lords in *Elitestone v. Morris* [1997] 1 W.L.R. 687. The contest in that case was between the plaintiffs, who were the freehold owners of the land on which a number of wooden bungalows were erected, and the defendants, who occupied one of the bungalows pursuant to an agreement described as a "licence" and in return for an annual payment. The terms of the agreement permitted the defendants to enter upon the piece of land and "to keep thereon a bungalow and to reside" in it. The main structure of the bungalow rested on concrete pillars which were attached to the ground. The plaintiffs issued proceedings seeking possession from the defendants. It was held at first instance that the defendants were protected tenants under s. 1 of the Rent Act 1977, which provided that "a tenancy under which a dwelling-house ... is let as a separate dwelling is a protected tenancy for the purposes of this Act". The Court of Appeal allowed the plaintiffs' appeal, holding that the ownership of the land was vested in the plaintiffs, although the bungalow was a chattel, ownership of which vested in the defendants, and that the plaintiffs were entitled to possession. That decision was reversed on appeal by the House of Lords, which held that the answer to the question whether a structure became part and parcel of the land itself depended on the degree and object of annexation to the land. It held that, assessed objectively, a house built in such a way that it could not be removed except by destruction could not have been intended to remain a chattel and must have been intended to form part of the realty.

23. In his speech in *Elitestone v. Morris*, Lord Lloyd of Berwick, having referred to *Holland v. Hodgson*, stated (at p. 692) that the answer to the question whether the materials out of which the bungalow was constructed remained chattels when they were built into the composite structure, as Blackburn J. had pointed out, depended on the circumstances of the case but mainly on two factors, namely, the degree of annexation and the object of the annexation. In considering the degree of annexation he quoted from an authority of a US Court, which counsel for the respondent highlighted in this case, to the effect:

> "A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend upon the object of its erection."

In relation to the purpose of annexation, Lord Lloyd stated, in a passage referred to by counsel for the applicant (at p. 692):

> "A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty."

Lord Lloyd found, by analogy to the dry stone wall example given by Blackburn J. in *Holland v. Hodgson*. that, when the defendants' bungalow was built, and as each of the timber frame walls were placed in position, they all became part of the structure, which was itself part and parcel of the land. The object of bringing the individual bits of wood onto the site seemed to be so clear that the absence of any attachment to the soil (save by gravity) became an irrelevance. Lord Lloyd made it clear that the subjective intention of the parties cannot affect the question whether the chattel has, in law, become part of the freehold.

24. In his speech, Lord Clyde, addressing the fact that the bungalow was not attached or secured to any realty, that it was not joined by physical link which would require to be severed for it to be detached, stated (at p. 697):

> "But accession can operate even where there is only a juxtaposition without any physical bond between the article and the freehold. Thus the sculptures in *D'Eyncourt v. Gregory* ... which simply rested by their own weight were held to form part of the architectural design for the hall in which they were placed and so fell to be treated as part of the freehold. The reasoning in such a case where there is no physical attachment was identified by Blackburn J.: ... 'But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land'."

Lord Clyde, having quoted further from the judgment of Blackburn J., including the passage in which Blackburn J. suggested what the true rule is, stated (at p. 698):

> "It is important to observe that intention in this context is to be assessed objectively and not subjectively. Indeed it may be that the use of the word intention is misleading. It is the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there. The question is whether the object is designed for the use or enjoyment of the land or for the more complete or convenient use or enjoyment of the thing itself."

25. Counsel for the respondent also referred the Court to the commentary in McCormack on *Reservation of Title* (2nd Ed., 1995) on "Fixtures versus Chattels", where the author stated (at p. 192):

> "The applicable test is usually talked of in terms of the degree and purpose of the annexation. Over the years the importance ascribed by the courts to the purpose part ofthe test has increased. As Lord Macnaghten put it in *Leigh v. Taylor* [[1902] A.C. 157 at 162], 'Its relative importance is probably not what it was in ruder or simpler terms'. In those days anything substantially attached to the realty became part of the realty. Nowadays, the test appears to be whether the chattels are affixed for the more convenient use and enjoyment of the chattel as a chattel, or to enhance the enjoyment of the realty as realty."

Application of the legal principles to the facts
26. It is probably not an exaggeration to say that this Court's task in applying the legal principles to the factual scenario here is more difficult than even Blackburn J. could have envisaged. Indeed, it is complicated by the assumed fact that it is Mr. McKenna, not the Company, which owns the land on which the material sought to be recovered lies.

27. Applying what Blackburn J. suggested is the "true rule", the first question is whether the material supplied by the applicant to the Company is now attached to the surface of the residential estate at Lixnaw only by its own weight. On the basis of the evidence and, in particular, having regard to the report of Mr. O'Keeffe, I think it is appropriate to find that it is attached only by its own weight.

28. Therefore, the second question which arises is whether the circumstances are such as to show objectively that the material was intended to be part of the land. Put another way, the onus being on the respondent, the question is whether it has discharged the onus that the material has ceased to be in the nature of chattels. Counsel for the respondent attached considerable weight to the fact that Mr. Higgins in his affidavit sworn on 1ih June, 2013 averred that the crushed limestone "was used to begin works on the roadway". Mr. O'Keeffe's comprehensive report reveals that the crushed limestone was primarily placed along the line of the intended roads on the estate. Moreover, he has measured the quantum of crushed limestone which he considers to be available for removal and assessed its value primarily by the length and width of the roadway, although he has also factored in an area of a building, which he found had substantial hardcore and screenings in it, and which he considered was being prepared for a radon barrier inclusion. In the light of the evidence it is impossible to conclude, as was submitted on behalf of the applicant, that it is not clear that the crushed limestone had any function on the site as placed. On the contrary, it seems to be clear that it was the first step in the creation of roads and of the building to which Mr. O'Keeffe referred. Even though the works did not go beyond the first step, I think that the respondent has discharged the onus of showing that the material was intended to be part of the land, albeit Mr. McKenna's land.

29. Even if one looks at what happened from the contrary scenario pointed to by Blackburn J., that the material was slightly affixed to the land by gravitation, the applicant has not discharged the onus of showing that it was intended all along that the material would continue to be a chattel. The evidence, considered objectively, shows that the manner in which the material was placed on the ground indicates that it was intended to be the first step in a roadway and a building and, as such, was intended to be part of the land.

30. In arriving at that conclusion, I have given consideration to the true nature of the contest here, on the basis of the assumption as to ownership of the land on which the material is spread. The land at Lixnaw is owned by Mr. McKenna but it is subject to the mortgage given by Mr. McKenna to the Bank in 2005. The Receiver was appointed by the Bank over Mr. McKenna's freehold interest. Therefore, on a proper analysis of the contest, the Receiver stands in the shoes of the Bank, as mortgagee of the freehold interest owned by Mr. McKenna. On the other side of the contest, is the applicant, which retained title to the material when it was delivered to the Company, which subsequently, obviously by agreement with Mr. McKenna, placed it on the ground owned by Mr. McKenna, which is subject to the mortgage given by Mr. McKenna in favour of the Bank. Notwithstanding the manner in which the matter was brought before the Court, namely, for directions under s. 316 of the Act of 1963 on the basis that the Receiver was standing in the shoes of the Company, I am satisfied that the true contest is as I have outlined. In the final analysis, what is at issue is the extent of the security of the Bank and, in particular, whether it extends to the material on the ground. As appears at the end of the judgment of the Court of Common Pleas in *Holland v. Hodgson*, Blackburn J. implicitly recognised that what was at issue before that Court was what was the security of the mortgagee. By analogy, I find that, on the assumption, which I consider it is appropriate to make, that Mr. McKenna could not prove otherwise if he was before the Court, the material supplied by the applicant to the Company is now part of the Bank's security and the applicant has no title to it.

31. Although I have felt constrained to arrive at an outcome which is unfavourable to the applicant, it is important that it be made clear that the application brought by the applicant was in no way "vexatious", as contended in Mr. Egan's affidavit, even though by the time the application was brought, the Bank had been for two months in statutory liquidation by virtue of the provisions of Irish Bank Resolution Corporation Act 2013. The applicant and its legal representatives sought a fair resolution of the dispute between the applicant and the Company. However, I am satisfied that the Court must find that the law is against the applicant and that the Court cannot afford it the relief it seeks.

Order
32. There will be an order dismissing the application.