Neutral Citation: [2013] IEHC 522

THE HIGH COURT

[2012 No. 204 COS]

BETWEEN

JOHNNY MORAN

PLAINTIFF/APPLICANT

AND

DAVID HUGHES LUKE CHARLETON JRM HOTELS LIMITED (IN RECEIVERSHIP) BCGM (IN RECEIVERSHIP) CITYWIDE LEISURE LIMITED (IN RECEIVERSHIP) BLARNEY INN LIMITED (IN RECEIVERSHIP)

AND

ASPERE PROPERTY INVESTMENTS LIMITED (IN RECEIVERSHIP)

DEFENDANTS/RESPONDENTS

Judgment of Ms. Justice Laffoy delivered on 19th day of November, 2013.

The parties

1. When these proceedings were initiated by originating notice of motion filed on 13th April, 2012, the applicant described himself in the title to the proceedings as director, company secretary and beneficial shareholder of each of the respondent companies. A search in the Companies Registration Office (CRO) establishes that he is in fact a director and the secretary of each of the respondent companies. The first respondent and the second respondent (referred to hereafter collectively as the Receivers) are joint receivers of each of the respondent companies having been appointed by Anglo Irish Bank Corporation Plc (the Bank) to be joint receivers and managers thereover as follows:

> (a) over the third respondent (JRM), over the fourth respondent (BCGM) and over the fifth respondent (Citywide) by three separate deeds of appointment dated 14th January, 2011, on which acceptance of the appointment by the Receivers was executed on 17th January, 2011, the appointments being pursuant to a Composite Debenture dated 30th June, 2005 made between JRM, Citywide and BCGM of the one part, and the Bank of the other part;
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> (b) over the sixth respondent (Blarney) by a deed of appointment dated 14th January, 2011, on which acceptance of the appointment was executed by the Receivers on 17th January, 2011, the appointment being pursuant to a Debenture dated 30th June, 2008 made between Blarney of the one part and the Bank of the other part; and
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> (c) over the seventh respondent (Aspere) by a deed of appointment dated 1st July, 2011, on which acceptance of the appointment by the Receivers was executed on 5th July, 2011, the appointment being pursuant to a Mortgage Debenture dated 16th June, 2008 made between Aspere of the one part and the Bank of the other part.

2. The applicant appeared in person in these proceedings, although he has been legally represented by solicitor and counsel in other proceedings involving the respondents, which will be referred to later.

3. The Receivers, who are both accountants, are members of the firm of Ernst & Young. They are represented in these proceedings by Arthur Cox, Solicitors, who also represent them in other proceedings to which there will be reference later.

4. As the proceedings have taken up a considerable amount of Court and judicial time, I propose outlining the history of the proceedings in some detail.

History of the proceedings

5. As has been noted, the proceedings were commenced by an originating notice of motion which was filed in the High Court on 13th April, 2012. The notice of motion indicated that the applicant was applying for directions under s. 316 of the Companies Act 1963 (the Act of 1963), as amended, "in relation to matters arising in connection with the performance or otherwise by the Receivers . . . since their disputed appointment on 17th January, 2011". Specifically, in the notice of motion the applicant sought the following six directions, which, in the interests of clarity, will be referred to as Point 1 to Point 6 hereafter:

> (a) directions under s. 319 of the Act of 1963 in relation to "the failure of the Receivers to comply with delivery of filing of accounts of the Receivers to the Registrar of Companies" (Point 1);
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> (b) directions under s. 316 of the Act of 1963 on "the Receivers' interference with and prevention of the Directors carrying out their statutory powers and obligations" (Point 2);
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> (c) directions under s. 318 of the Act of 1963 to fix the remuneration of the Receivers (Point 3);
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> (d) directions to "deal with the Receivers' refusal to engage or provide any information to the Companies and the Company Directors since their appointment and request for order directing on specific information requests as set out" (Point 4);
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> (e) directions "that the firm and partners of Ernst & Young be removed by the Court as Receivers to the above Companies" (Point 5); and
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> (f) directions "that the firm and partners of Arthur Cox Solicitors be removed as solicitors to the Receivers" (Point 6).

6. The application was grounded on the affidavit sworn by the applicant on 13th April, 2012 (the grounding affidavit), the contents of

which from the outset have given rise to problems.

7. First, at the beginning of the grounding affidavit the applicant averred that he was pursuing his application for directions under s. 316 notwithstanding the challenge of the validity of the appointment of the Receivers which was pending in proceedings in the High Court, the record number of those proceedings set out being incorrect. In fact, the proceedings in question are between Citywide and the other respondent companies, as plaintiffs, and the Bank, as defendant, and the record number of the proceedings is 2011/7023P. They were admitted to the Commercial Court and will be hereafter referred to as the Commercial Court Proceedings. An order for security for costs was made by the High Court (McGovern J.) in the Commercial Court Proceedings against the plaintiff companies and that order was appealed to the Supreme Court by the plaintiff companies. The position adopted by the applicant was that the order "effectively blocked" the challenge to the validity of the appointment of the Receivers. The reality, nonetheless, is that the issue as to the validity of the appointment of the Receivers is the subject of separate proceedings which are pending in the High Court and that issue cannot be pursued in these proceedings, as the applicant attempted to do during the course of the proceedings.

8. Secondly, in the grounding affidavit, having averred to certain facts in the first thirty five paragraphs thereof, the applicant set out "further details to support the directions he sought in the notice of motion". In fact, he elaborated on, and, in some instances, expanded the scope of the directions he was seeking. For instance, in relation to the directions sought under s. 318 to fix the remuneration of the Receivers, the applicant also sought a direction from the Court "for disclosure of all fees incurred/charged" by the Receivers and the Receivers' agent, named as Pembroke Hospitality, which was appointed by the Receivers to manage the hotel formerly known as the Holiday Inn Hotel in Pearse Street, Dublin, 2.

9. All of the affidavits filed in response to the application were sworn by the second respondent (Mr. Charleton). In a very comprehensive affidavit, running to seventy one paragraphs, which was sworn on 30th April, 2012, Mr. Charleton dealt sequentially with all of the factual matters raised by the applicant in the grounding affidavit. At that stage, a serious conflict of evidence had emerged. Mr. Charleton asserted that there was no proper factual basis for any of the directions sought by the applicant and he commented briefly on each of the directions. In conclusion, he sought that the application should be dismissed.

10. The applicant's second affidavit was sworn on 9th May, 2012. He also filed an affidavit sworn on his behalf by Richard McNamara, the objective of which was to demonstrate that Pembroke Hospitality had mismanaged that deponent's hotel, the Boyne Valley Hotel and Country Club in Drogheda, County Louth.

11. This led to Mr. Charleton's second affidavit, which was sworn on 7th June, 2012, which, once again, dealt comprehensively with the various averments made in the applicant's second affidavit. For instance, Mr. Charleton disputed averments made by the applicant in relation to the status of the borrowings of the respondent companies from the Bank when the Receivers were appointed. He averred that Blarney and JRM were indebted to the Bank in their own right in sums exceeding €500,000 and €17m respectively and that Citywide and Aspere had guaranteed the indebtedness of Blarney and JRM to the Bank. As regards Mr. McNamara's affidavit, Mr. Charleton averred that the hotel referred to by Mr. McNamara was not under his control but was under the control of a receiver, Jim Hamilton of BDO, who had engaged Pembroke Hospitality, and that Mr. McNamara's affidavit was of no relevance to the application.

12. The applicant swore and filed a further affidavit, his third affidavit, on 11th June, 2012. Towards the end of that affidavit the applicant summarised the directions he was seeking from the Court, which were in line with the directions sought in the originating notice of motion outlined earlier. That affidavit was responded to in Mr. Charleton's third affidavit sworn on 28th June, 2012, in which Mr. Charleton emphasised that the circumstances surrounding the appointment of the Receivers were the subject of the Commercial Court Proceedings and he properly desisted from making any comment on the issues involved.

13. That was the state of play when the matter was first listed for hearing on 25th October, 2012. The application was part heard on that day. However, the applicant produced a further affidavit, which had been sworn by him and filed in Court on 19th October, 2012. The position of counsel for the respondents to that development was that neither he nor Arthur Cox had been put on notice of the affidavit. In any event, given that the applicant in that affidavit was seeking to support directions which went considerably beyond the directions sought in the originating notice of motion, the matter had to be adjourned to give the Receivers an opportunity to respond to that affidavit.

14. In the affidavit sworn on 19th October, 2012, which was his fourth affidavit, the applicant summarised the directions he was seeking, which comprised eleven directions, which, in the interests of clarity, will be referred to as Direction 1 to Direction 11. They were as follows:

> (a) A direction that the Receivers were invalidly appointed, advancing the same grounds as were being advanced in the Commercial Court Proceedings (Direction 1).
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> (b) A direction that the Receivers should be instructed by the Court to put the necessary funds on account for security for costs to allow the respondent companies to take the necessary action to challenge the Receivers' appointment and to hold the Receivers accountable (Direction 2). That direction related to the order for security for costs made in the Commercial Court Proceedings which was on appeal to the Supreme Court at the time.
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> (c) A direction from the Court to instruct the Receivers to pursue the Bank "overcharging on loans and SWAP Agreement and to put the company in funds to provide Security for Costs" (Direction 3), the overcharging issue having been briefly alluded to in the grounding affidavit.
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> (d) A direction that the Receivers seek clarification from the Court on the issues brought to their attention that loan facilities provided to Aspere and JRM breached s. 60 of the Act of 1963 and constituted funds lent to a company to buy its own shares (Direction 4). That issue had been first alluded to in the applicant's second affidavit, but only in relation to Aspere. The response of Mr. Charleton in his second affidavit had been that he believed the averments related to a transaction involving the acquisition of shares in Aspere and he averred that he had been advised by Byrne Wallace, Solicitors, who had acted for the Bank at the time of the transaction, that they "were satisfied that no such financial assistance issues arose". No further evidence on this allegation is discernible in the applicant's fourth affidavit.
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> (e) A direction on the conduct and role of Pembroke Hospitality, including that –
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> > (i) the Receivers pay out the statutory entitlements to the two directors who were full-time employees including redundancy, notice, holiday pay, outstanding wages plus interest from the date of the contrived redundancy, out of the cash reserves in the business as the necessary forms have not been submitted to date;

(ii) the Receivers are directed "on appropriate sanction and damages award to [the applicant] arising out of the interference and damage to the principal's other business interests, personal property" and

(iii) the Receivers pay the security charges due for Night Club security services provided by Concierge Security Limited (CSL), which the Receivers personally ordered and sanctioned.

The three matters specified in that direction (Direction 5) had been raised in the grounding affidavit and had been addressed in the affidavits subsequently sworn by Mr. Charleton in response. As regards item (i), the directors in question were the applicant and his co-director, Sonjia Maher (Ms. Maher). In his first affidavit Mr. Charleton averred that the matters of the termination of the employment of the applicant and Ms. Maher were the subject of separate proceedings before the Employment Appeals Tribunal (EAT). As regards item (iii), in his first replying affidavit Mr. Charleton had averred that the claim by CSL against the Receivers was the subject of separate proceedings in the Dublin Circuit Court.

(f) A direction to instruct the Receivers to comply with their statutory obligations for delivering and filing accounts and statements (Direction 6), which was the first direction sought in the originating notice of motion (*i.e.* Point 1). In his first replying affidavit, Mr. Charleton had averred that no statement of affairs was required to be filed by the Receivers, but that such was an obligation of the directors of the company, which had not been complied with. He further averred that the Receivers' abstracts had been prepared and would be filed within seven days. At the hearing on 25th October, 2012, the Court requested the Receivers to furnish Companies Registration Office (CRO) printouts showing that the relevant abstracts had been filed in relation to each of the companies. This was subsequently done.

(g) Directions on the Receivers' "interference with and the prevention of the directors carrying out their statutory powers and obligations to bring the affairs of the companies up to date prior to the Receivers' appointment" (Direction 7), which is a replication of the second direction (*i.e.* Point 2) sought in the originating notice of motion. In his first replying affidavit Mr. Charleton had averred that there was no basis for the allegation embodied in that direction, in that no such complaint had been received by the Receivers prior to receipt of the originating notice of motion. However, Direction 7 was expanded beyond what was claimed in Point 2 to include a direction that the Receivers "allow company audits prior to their receivership to be brought up to date and meet the cost of same".

(h) A direction that the Receivers release information requested as set out in the grounding affidavit (Direction 8). The response in Mr. Charleton's first replying affidavit to the request for the corresponding directions at Point 4 in the originating notice of motion was that the Receivers had been advised that they were under no general duty to report to the directors of the relevant respondent company, as requested, and that the applicant had not established any special circumstances which would entitle him to the information sought by him. Mr. Charleton further averred that the Receivers were concerned as to the applicant's motives in seeking the information and were concerned that he might attempt to use it to damage the receiverships.

(i) A direction to fix the remuneration of the receiverships "with due regard to overall lack of performance" (Direction 9), which was a variation on the order originally sought under s. 318 (at Point 3 in the originating notice of motion). There was a request to furnish full disclosure of all professional fees charged by both Arthur Cox and Ernst & Young to each of the companies arising out of the receiverships and full disclosure of all legal and professional fees "accrued by" the Bank in regard to the companies in receivership. The Bank is not before the Court in these proceedings.

(j) A direction on alleged conflicts of interest involving Arthur Cox (Direction 10), which differed from the directions originally sought at Point 6 in the originating notice of motion, in that the removal of Arthur Cox as solicitors to the Receivers was not specifically sought.

(k) A direction on alleged conflicts of interest involving Ernst & Young's position (Direction 11), which again differed from the directions sought at Point 5 in the originating notice of motion, which referred to the removal of Ernst & Young. In support of the request for that direction, the applicant referred to an exhibit which was in his grounding affidavit, not his third affidavit, as stated. That exhibit included a letter of complaint dated 12th April, 2012 from the applicant to the Chartered Accountants Regulatory Body (CARB). In his fourth affidavit he exhibited a response from CARB dated 29th June, 2012. In effect, in that letter it was made clear that the only complaint being investigated by CARB was the applicant's assertion that Ernst & Young "may have acted in a perceived and/or actual conflict of interest situation in allowing its partners to accept the role of receivers of the [applicant's] companies on their appointment by [the Bank]". The applicant also exhibited a further letter from him to CARB dated 28th August, 2012.

15. In response to the affidavit sworn by the applicant on 19th October, 2012, Mr. Charleton swore his fourth affidavit on 2nd November, 2012. Once again, Mr. Charleton pointed to the existence of the Commercial Court Proceedings dealing with the challenges to the validity of the appointment of the Receivers. He also reiterated that the employment matters were being dealt with by the EAT. Further, he averred that there was no legal authority by which the applicant was entitled to seek a direction that the Receivers fund the security for costs in the Commercial Court Proceedings.

16. A further affidavit, his fifth, was sworn by the applicant on 22nd November, 2012. That affidavit was, in turn, responded to by Mr. Charleton's fifth affidavit sworn on 4th December, 2012.

17. That was the state of play on the evidence when the hearing was resumed by the Court on 27th February, 2013. The totality of the documentation generated in connection with these proceedings raised a multiplicity of factual and legal issues which are being addressed in other proceedings, some of which have been alluded to earlier.

18. On 25th February, 2013, the applicant sought and was given leave by the Court to file an amended notice of motion claiming reliefs in the terms of Direction 1 to Direction 11 inclusive set out in the applicant's fourth affidavit of 19th October, 2012. The reliefs sought in the amended notice of motion were the subject of submissions on both sides at the subsequent hearing and will be addressed in this judgment. However, before doing so, it is necessary to consider the impact of the other related proceedings on the Court's jurisdiction on this application.

19. The Court's position in relation to other proceedings which were, or are, in existence and which were, or are, factually connected with and, in a general sense, overlap with these proceedings, are set out below.

Other proceedings
High Court proceedings Record No. 2011/1285P

20. Shortly after their appointment, the Receivers instituted proceedings in the High Court in which Citywide and the other four companies in receivership were plaintiffs and the applicant, Ms. Maher and the four companies were defendants (Record No. 2011/1285P), in which the Court was involved as follows:

> (a) On 10th February, 2011 an order was made by the Court (Laffoy J.) on the plaintiffs' application for interlocutory relief. The defendants, including the applicant, had been represented by counsel on that occasion. The order was made by consent and it included, *inter alia*, an order that the defendants vacate the premises known as the Blarney Inn Limited, Kildare Street, Dublin, 2 and the Holiday Inn, Pearse Street, Dublin, 2.
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> (b) Subsequently, the dispute involved in those proceedings was the subject of mediation and, again, the applicant was represented by solicitor and counsel. The matter was back before the High Court (Murphy J.) on 14th July, 2011. Once again, the applicant was represented by counsel. What happened on that occasion was that the application for injunctive relief was refused, but the Court noted the "continued undertaking" of the applicant to, *inter alia*, vacate the premises the subject of the order of 10th February, 2011. As regards costs, the question of costs as between the plaintiffs and the applicant was reserved. An order was made that Ms. Maher recover her costs against the plaintiffs to that date. Directions were then given as to pleadings.
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> (c) Two weeks later, on 28th July, 2011, Arthur Cox filed notice of discontinuance on behalf of the plaintiffs, which referred to a further order of the High Court (Murphy J.) of 27th July, 2011 to the effect that there be no order for costs in respect of such discontinuance.

Those proceedings have been terminated. It would be wholly inappropriate for this Court in these proceedings to address the issues raised by the applicant in relation to the discontinuance of those proceedings.

CSL proceedings in the Circuit Court

21. As has been recorded, the claim of CSL against the Receivers was initiated in the Circuit Court. It is not clear what has happened to those proceedings. In any event, it would be inappropriate for this Court to express any view on the proceedings.

Winding up petitions

22. The Receivers, in the names of two of the respondent companies, petitioned to wind up two companies with which the applicant had a connection in 2012, namely:

> (a) Clapin Limited (Record No. 2012/45 COS); and
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> (b) Open Minds Centre Limited (Record No. 2012/46 COS),

having served s. 214 demands on both companies. Eventually, the Receivers withdrew both petitions following correspondence with a firm of solicitors involved on behalf of the companies. Those matters are at an end, and it would be inappropriate for the Court to express any views on the issues raised by the applicant in these proceedings in relation to the petitions, although the manner of the defence of the winding up proceedings was raised by the Receivers on their application referred to in para. 25 below and is considered in the judgment on that application.

Commercial Court Proceedings

23. As has been recorded, the applicant has challenged the validity of the appointment of the Receivers in the Commercial Court Proceedings in which the Bank is the defendant. It would be wholly inappropriate for this Court to express any view on the validity or otherwise of the appointment of the Receivers given that the pertinent issues are before the Court in the Commercial Court Proceedings. Apart from that, the Bank, which appointed the Receivers, is not before this Court in these proceedings.

Proceedings before EAT

24. When the applicant's application was heard, the issues in relation to redundancy and the termination of the employment of the applicant and Ms. Maher were pending before the appropriate forum, the EAT. The issues raised by the applicant in relation to those matters are not properly before this Court and it would be wholly inappropriate for this Court to express any view on them.

High Court proceedings Record No. 2012/600 COS

25. Finally, on 27th February, 2013, this Court, immediately following the hearing of this application, heard an application initiated by the Receivers by originating notice of motion dated 30th October, 2012, which was brought under the Companies Acts 1963 – 2012 and was entitled in the matter of JRM, BCGM, Citywide, Blarney and Aspere and was between the Receivers, as applicants, and the applicant in these proceedings and Ms. Maher, as respondents (Record No. 2012/No. 600 COS). In those proceedings, the Receivers sought directions pursuant to s. 316 of the Act of 1963 compelling the respondents (*i.e.* the applicant and Ms. Maher) to deliver to them the books and records of each of the companies. The applicant, in his role as a respondent on that application, was represented by counsel and a solicitor. The Court's decision on that application is dealt with in a separate judgment of even date with this judgment.

Court's function on an application under s. 316
26. The provisions of s. 316 which are of relevance for present purposes provide as follows:

> "(1) Where a receiver of the property of a company is appointed under the powers contained in any instrument, any of the following persons 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, that is to say –
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> (a)(i) the receiver;
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> (ii) an officer of the company;

(iii) a member of the company;

(iv) employees of the company comprising at least half in number of the persons employed in a full-time capacity by the company;

(v) a creditor of the company; and

(b)(i) a liquidator;

(ii) a contributory;

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.

(1A) An application to the court under subsection (1), except an application under paragraph (a)(i) of that subsection, 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."

In s. 316, as originally enacted, only a receiver had standing to apply for directions. Section 171 of the Companies Act 1990 introduced subs. (1) in its current form, but it also introduced subs. (1A), where the application is being made by a person other than a receiver.

27. Those provisions of s. 316 in its current form were considered by the High Court (Budd J.) in *Kinsella v. Somers* (22nd November, 1999, unreported). Apropos of s. 316(1A), Budd J. stated:

> "Unless the receiver is the Applicant, the application must 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. Accordingly the right to apply for directions is rather limited and would seem not to cover an application for clarification of the receiver's powers or other general application for directions. If the application is being made by a director or shareholder then it would appear that a prerequisite is that proof is adduced that the Applicant is being unfairly prejudiced by some action or omission on the part of the receiver."

28. The effect of s. 316(1A) was also considered by the High Court (Clarke J.) more recently in *Re HSS* [2011] IEHC 497, where he stated, apropos of the requirement to show "unfair prejudice":

> ". . . it seems to me that the prejudice that is spoken of in s. 316(1A) is prejudice to the actual rights of individuals. In other words, a creditor applying under s. 316 needs to show that that creditor's rights might be unfairly prejudiced by an action (or, indeed, inaction) of a receiver. It does not give the Court some general jurisdiction to consider whether things are fair or unfair."

29. It was not disputed, nor could it be, that the applicant being an officer, which term is defined as a director or secretary, of each of the respondent companies has standing to bring an application under s. 316 in relation to the receivership of each of the respondent companies. However, on the basis of subs. (1A) of s. 316, and having regard to the authorities just referred to, the Court must be satisfied that in his capacity as an officer of each of the respondent companies the applicant is being unfairly prejudiced by the action or inaction of the Receivers. Although, as has been indicated earlier, it is not open to the Court to express a view on many of the issues raised by the applicant, I now propose to consider each of the directions sought in the amended notice of motion sequentially.

Direction 1
30. This Direction was not sought in the original originating notice of motion. As has been recorded and as I now reiterate, the issue of the validity of the appointment of the Receivers is the subject of the Commercial Court Proceedings. This Court cannot express any view on that issue. In any event, the appointor of the Receivers, the Bank, is not before the Court on this application. Further, the Receivers are not parties to the proceedings in the Commercial Court. The applicant is undoubtedly wasting the Court's time by pursuing this aspect of his revised application as a personal litigant, when he has solicitors and counsel acting for him in the Commercial Court Proceedings in pursuit of the same relief. Accordingly, the Court refuses to grant the direction sought.

Direction 2
31. The order for security for costs was made in the Commercial Court Proceedings and this Court was informed that it is subject to an appeal to the Supreme Court. What the applicant is asking this Court to do is to direct that the Receivers, who were appointed by the Bank as receivers and managers over the property and assets of the respondent companies on foot of debentures given by those companies to the Bank, to make available the funds to put in place the security for costs to enable the applicant to pursue his proceedings against the Bank in which he is challenging the validity of the appointment of the Receivers. Counsel for the Receivers was correct in his submission that there is simply no legal authority which would permit such a direction. The Receivers are not party to the Commercial Court Proceedings nor, understandably, did they sanction them. The duty of a receiver in relation to the distribution of the assets of a company over which he is a receiver and manager is governed by statute law and by contract law. The applicant has not pointed to any legal principle under which the Court could make the direction sought. Accordingly, the Court refuses to grant the direction sought.

Direction 3
32. This Direction was not in the original originating notice of motion. As counsel for the Receivers submitted, the Receivers were appointed by the Bank and they owe duties to the Bank to act within the parameters of the relevant debentures. They have no authority to "pursue" the Bank for alleged "overcharging". As counsel pointed out, if the applicant believes that overcharging or other irregularities have occurred, it is for him to pursue the relevant avenues of inquiry. Accordingly, the Court refuses to grant the direction sought.

Direction 4
33. This Direction was not sought in the original originating notice of motion. The submission made on behalf of the Receivers was that they have no authority to make any inquiry in relation to the alleged breach of s. 60 of the Act of 1963 in relation to the loan advanced by the Bank to Aspere or as to the more recent allegation in relation to the loan advanced by the Bank to JRM. Once again, counsel for the Receivers was correct in submitting that, if he so wishes, the applicant may pursue any inquiry in relation to any perception he has as to financial or statutory irregularity surrounding the loans made to some of the respondent companies. Apart

from that, as has been stated earlier, the position of the Receivers, on the basis of what they have been told by Byrne Wallace, Solicitors, is that there was no breach of s. 60 of the Act of 1963. Accordingly, the Court refuses to grant the direction sought.

Direction 5
34. This relief was not sought in the original originating notice of motion. However, the issues in relation to the redundancy of the applicant and of Ms. Maher were raised in the grounding affidavit. As I have already stated, those matters are properly before the EAT and are not a matter for this Court. Similarly, the claim by CSL for debt was initiated in the Circuit Court and is not a matter for this Court. Accordingly, the directions in relation to both of those elements of this direction are refused.

35. As to the application for a direction on "appropriate sanction and damages award" to the applicant arising out of the alleged interference and damage to what I understand to be his other business interests and personal property, I propose taking one example from the applicant's grounding affidavit to illustrate the nature of the applicant's complaint.

36. The complaint chosen relates to what is described as "the business of Tante Zoes", which I assume was a restaurant business. The applicant alleged that the Receivers interfered deliberately and damaged that business, contributing to the company's (which I assume was the company referred to as Tante Zoes Limited) voluntary liquidation in August 2011. The complaints itemised in the grounding affidavit included the following:

> (a) that the Receivers "poached" a manager and a chef to work in the Holiday Inn Hotel;
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> (b) that the applicant was refused access to the accounts, records, shared computer system, payroll system and bookkeeping records of the business which was managed in conjunction with the business of the respondent companies;
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> (c) that the Receivers terminated various common arrangements, such as wages processing, waste collection, bottle bin collection, without notice causing considerable damage to the Tante Zoes business; and
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> (d) that the Receivers refusal to pay certain "company group suppliers" on their appointment caused considerable damage to the business of Tante Zoes, as did the fact that the Receivers advertised the sale of the Holiday Inn Hotel.

37. In response, in his first replying affidavit, Mr. Charleton convincingly refuted each of those allegations. Particularly, he pointed out that by letters dated 4th, 18th and 19th April, 2001, the Receivers requested the applicant to provide them with a listing of all information stored on site in respect of other business interests, as well as listing any assets over which he clamed personal ownership, in order that the Receivers could make arrangements for these to be returned to him, but the Receivers received no response to that correspondence. As regards termination of common arrangements, Mr. Charleton pointed out Citywide and Tante Zoes were two separate trading entities which traded from separate properties, asserting that the actions taken by the Receivers could only have a minimal collateral impact on the business of Tante Zoes. As regards the Receivers' refusal to pay suppliers, Mr. Charleton averred that when the Receivers were appointed to Blarney and Citywide, they advised all creditors that they were not in the position to discharge unsecured liabilities of those companies incurred before the date of the appointment and that all such debts were ranked as claims against the respective company.

38. Having regard to the response of Mr. Charleton, I consider that the applicant has not factually established any basis for the allegation of interference by the Receivers with the business of Tante Zoes or, indeed, any other business interests of the applicant, the consequence of which was that the business of Tante Zoes or any other business was damaged. Apart from that, there is the very fundamental issue as to what, if any, duties the Receivers owed to the applicant, in his capacity as an officer of each of the respondent companies, which will be addressed later. Finally and importantly, it is to be borne in mind that the applicant brings this application under s. 316 of the Act of 1963 as an officer of the respondent companies and, in accordance with subs. (1A), as interpreted by Clarke J. in *Re HSS*, the onus is on him to show that he has been unfairly prejudiced by action or inaction of the Receivers in that capacity. His claim is formulated as a claim for damage to him in his capacity as the owner of other businesses. That is not an appropriate claim to pursue under s. 316. Accordingly, the Court must refuse to make an order in relation to this element of Direction 5.

Direction 6
39. This was Point 1 in the original originating notice of motion. This direction is sought under s. 319 of the Act of 1963, subs. (1) of which requires the following steps to be taken after the appointment of a receiver over the whole of the property of a company:

> "(a) the receiver shall forthwith send notice to the company of his appointment; and
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> (b) there shall, within 14 days after receipt of the notice, or such longer period as may be allowed by the court or by the receiver, be made out and submitted to the receiver in accordance with section 320 a statement in the prescribed form as to the affairs of the company; and
>
> (c) the receiver shall within 2 months after receipt of the said statement send to the registrar of companies, to the court, to the company, to any trustees for the debenture holders on whose behalf he was appointed and, so far as he is aware of their addresses, to all such debenture holders, a copy of the statement and of any comments he sees fit to make thereon."

40. As counsel for the Receivers pointed out, the applicant appears to have misunderstood the obligations actually imposed on the Receivers by s. 319. The obligation to comply with paragraph (b) quoted above, is on the officers of the company at the date of the appointment of the receiver, as is clear from s. 320. Under subs. (2) of s. 319, the Receivers are under an obligation within one month after the expiration of each period of six months from the date of appointment and each subsequent period to send to the CRO an abstract in the prescribed form showing the assets of each of the respondent companies and the other details stipulated in subs. (2). As I have recorded earlier, I am satisfied, on the basis of the CRO searches furnished to the Court at the direction of the Court, which were exhibited in the fifth affidavit sworn by Mr. Charleton, that the Receivers have complied with their obligations under s. 319(2). It is true that, at the time these proceedings were commenced, the filing of the abstracts was out of time. However, Mr. Charleton averred in his first affidavit that they had been prepared and would be filed within seven days. The late filing, in my view, in no way unfairly prejudiced the applicant in his capacity as an officer of any of the respondent companies. Accordingly, the Court refuses to grant the order sought in Direction 6.

Directions 7 and 8
41. Directions 7 and 8 replicate Points 2 and 4 of the original originating notice of motion. It is convenient to consider them together, as counsel for the Receivers did in his submissions.

42. In his grounding affidavit the applicant complained that the Receivers had refused to allow the directors of the respondent companies to have access to the various "Companies' Accounts Department" located in Pearse Street, Dublin, 2, where the financial records and statutory books were maintained. At the time, the directors had audited accounts for the year ended 31st May, 2010 at draft stage, which were overdue for submission to the CRO and they would incur late filing penalties. In addition, various statutory returns were overdue to be filed. The complaint of the applicant was that the Receivers by their actions were blocking the directors from fulfilling their statutory duties in relation to the respondent companies and also in relation to companies which were not subject to the receiverships. In the grounding affidavit the applicant elaborated on what was sought under what is now Direction 7, itemising, for example, full access to the accounting records and so forth and a direction that the Receivers be held personally liable for the late filing fees, penalties and fines incurred "due to the Receivers' obstruction" and that they "be held liable for all professional fees to bring all matters up to date".

43. In response to the applicant's complaint, counsel for the Receivers made the point that they had repeatedly offered the applicant and his accountants access to the companies' accounts insofar as it is necessary to allow them to prepare an audit up to 17th January, 2011, but the offer was not taken up by the applicant or by anyone acting on his behalf.

44. The claim underlying Direction 8 (formerly Point 4) is based on an allegation that the Receivers have refused to provide information to the respondent companies or to the officers of the respondent companies since their appointment. In the grounding affidavit what was sought was elaborated on and included that the Receivers provide:

> (a) management accounts in relation to the Holiday Inn business, Blarney Inn business and Aspere business from 17th January, 2011 to date; and
>
> (b) a myriad of details in relation to –
>
> (i) the sales revenue,
>
> (ii) receipts and payments for each of the companies,
>
> (iii) employees,
>
> (iv) termination of the Holiday Inn franchise,
>
> (v) the role and terms of engagement of Pembroke Hospitality,
>
> (vi) cash flow,
>
> (vii) funding provided by the Bank to the Receivers, and many more details, many of which relate to matters on which I have already ruled that the applicant cannot pursue on this application.

45. Direction 7 addresses alleged interference by the Receivers in the performance by the officers of each of the respondent companies of their own statutory obligations. The position of the Receivers, as set out in Mr. Charleton's first replying affidavit, is that the directors are entitled to engage auditors to complete the statutory requirements for the respondent companies. It was almost a year prior to the initiation of these proceedings that Byrne Curtin Kelly, the auditors for the respondent companies, notified the applicant of the letter received from the Receivers on their appointment that they would require the Receivers' authorisation before any further actions could be taken in relation to the companies. On that point, Mr. Charleton averred, in his first replying affidavit, that the Receivers' letter was intended to go no further than to indicate that, if the recipient (meaning the auditors) were to take any further action without their (the Receivers') authorisation, they would not be paid by the Receivers' office. On the evidence before the Court, I am satisfied that, as a matter of fact, the Receivers are not obstructing the officers of the respondent companies in the performance of their statutory duties.

46. The core question raised on the claim underlying Direction 8 is the following: under what, if any, duty is a receiver appointed over a company to provide information to the officers of the company in relation to what has transpired since the appointment? Counsel for the Receivers referred to two Irish authorities on that question.

47. The first was a decision of the High Court (Costello J.) in *Irish Oil and Cake Mills Ltd. v. Donnelly* (Unreported, 27th March, 1983). That was a decision on an application in a plenary action for an interlocutory injunction claiming a mandatory order directing the defendant receiver over the plaintiff company to furnish certain information which had been requested by letter, for example, financial management accounts for periods subsequent to the appointment of the defendant receiver, the latest balance sheet analysed as to all debtors and stocks and all creditors, details of all sales and purchase contracts and suchlike. Having stated that the defendant receiver derived his appointment and his authority from the contract entered into between the parties, namely, the debenture given by the company to the lender bank which appointed the receiver, and having analysed the provision therein to the effect that the defendant receiver was to be treated as the agent of the plaintiff company, Costello J. stated that he could find no basis for implying a term into the contract which would oblige the defendant receiver to furnish the information sought. In the background was an agreement by the defendant receiver to sell an asset of the plaintiff company, which it was alleged was being sold at an undervalue and which it was alleged amounted to a breach of a duty of care owed by the defendant receiver to the plaintiff company.

48. The passage from the judgment of Costello J. cited by counsel for the Receivers and, indeed, the passage most frequently cited by commentators on the topic of the duty of a receiver to a company over which he is appointed and its officers, is the following passage:

> "The plaintiffs advanced a second argument to support the contention that the Receiver is in breach of a duty of care he owes to the Company. It is said that apart from the special facts of this case the general duty on Receiver and Manager to take reasonable steps to secure the best possible price for the Company's assets include a duty 'to keep the Company appraised of how the business of the Company is going'. This is a very far-reaching proposition, unsupported by any authority and I must reject it. There may well be circumstances in which, to ensure that the best price possible is obtained for the assets, trading information since the appointment of a Receiver should be given to the Company's Directors. But in the absence of special circumstances which might favourably affect the price, a Receiver/Manager is not under any duty of care which involves him in reporting as suggested to the Directors on his management of the business.
>
> It cannot be said that a Receiver/Manager is under no duty to account to the Company whose affairs he is managing nor

> did the Defendant so urge in this case. The extent and nature of the duty and the extent and nature of the accounts he must furnish would depend on the facts of each individual case. Smiths Limited v. Middleton (1979) 3 All ER 842 illustrates this point. That was a case in which an account was ordered after a receivership had come to an end, the Court holding that as an agent an equitable obligation to account existed which had not been obviated by statute. But the Plaintiffs (having perhaps been misled by the headnote to the report) are not correct in finding in that case a general proposition to support their contentions in this case." (Emphasis in original)

Costello J. refused to grant the injunction sought, stating that the information sought was wholly exceptional and he could find nothing in the evidence to justify him exceeding to the application.

49. The decision in *Smiths Ltd. v. Middleton* was a decision of the Chancery Division of the English High Court. The receivership had terminated when the proceedings were brought because the debt due to the bank, which had appointed the receiver, was discharged. The headnote in the report accurately summarises the decision of Blackett-Ord V-C. The headnote (in which in quoting it below, in order to simplify its meaning, I have substituted for the relevant provisions of the Companies Act 1948 in England and Wales the corresponding provisions of the Act of 1963) stated:

> "A receiver appointed under a debenture providing for him to be the agent of the debtor company, in practice ran the company on behalf of its directors and was, therefore, answerable to the company for the conduct of its affairs. That being so, the receiver was under a duty to keep full accounts (*i.e.* fuller than the abstracts of receipts and payments required under [s. 319(2)]) and to produce those accounts to the company when required to do so. In order to enforce that right the company required a remedy beyond that provided in [s.322]. The receiver would be treated as an accounting party to the company."

In that case, the company was disputing the figures supplied by the receiver in the abstracts filed and was seeking more information for the purposes of producing its audited accounts. No such dispute has been pointed to by the applicant in relation to the abstracts filed by the Receivers in the CRO. It is also worth recalling that in his first replying affidavit, Mr. Charleton expressed concern as to the motives of the applicant in seeking the information.

50. The other Irish authority cited by counsel for the Receivers was the decision of the High Court (Budd J.) in *Kinsella v. Somers* [1999] IEHC 44, which was an application under s. 316. The company in issue, Dublin Gas Company, had been in receivership for twelve years when the application was brought by the applicant, who was a director and shareholder of the company. In addressing the duty of a receiver to provide information, Budd J. referred to the decision of Costello J. in the *Irish Oil and Cake Mills* case and he also referred to the decision in *Smiths Ltd. v. Middleton*. He also considered authorities on the broader question of the duty of a receiver/manager to the company over which he is appointed. In rejecting the application, Budd J. stated:

> "I conclude that the Applicant has not proved that the matter comes within the peculiar circumstances in which the Court would consider it just to make an order. There has been a failure to show that the information is required for a specific purpose and there has been a failure to show that the Receiver has not been acting reasonably in refusing to give further information to the Applicant in his capacity as director and shareholder. Indeed, it is doubtful whether even the Company, to whom the Receiver clearly owes a duty to render appropriate accounts in respect of his dealings with the Company's assets, would be able to make out a case that the Receiver was acting unreasonably at this stage in refusing to delve back into the documents with regard to the sale of the assets conducted more than ten years ago. Different considerations might well apply if the Applicant were able to prove that the refusal to give further information was actuated by bad faith on the part of the Receiver."

Budd J. added that his decision would not "preclude an application being made on behalf of the Company for material information which may be relevant to the directors of the Company in exercising their responsibilities when the management of the Company is being returned to them as their responsibility".

51. Lurking beneath the orders sought in Directions 7 and 8 are allegations by the applicant that the Receivers have mismanaged the business of the respondent companies, and, in particular, the business of the Holiday Inn Hotel and the business of the Blarney Inn. Two examples will illustrate the nature of the applicant's complaints. They are the following allegations:

> (a) The applicant alleged in the grounding affidavit that, *inter alia*, "due to the lack of attention to the businesses by the Receivers significant damage/loss has occurred to the value of the Holiday Inn Hotel in Pearse Street in Dublin by losing the Holiday Inn franchise in July 2011". Mr. Charleton in his first replying affidavit has rejected that assertion and has explained the circumstances in which the Holiday Inn brand was removed from the Pearse Street property.
>
> (b) In the grounding affidavit the applicant also alleged that the Receivers had failed "to implement the six year lease agreement negotiated and agreed by the Directors in December 2010 for the Blarney Inn premises" and alleged "mismanagement of the Blarney Inn business", which resulted in the closure of the business in December 2011. Mr. Charleton in his first replying affidavit has rejected both of those propositions. He averred that, when the Receivers were appointed, there was no lease agreement in place and the previous lease had expired on 31st December, 2010. He also averred that the Blarney Inn business ceased trading as the Receivers were unable to reach agreement on a sustainable rental amount with the landlord of the premises.

52. In relation to both of those examples, the factual controversy continued through the subsequent exchange of affidavits. The factual controversies cannot be resolved on an application such as this which has been heard on oral evidence. However, the allegations made by the applicant necessitate some comment on a difficult legal question, namely, on the nature and extent of the obligations of the Receivers to the companies over which they are appointed in general.

53. In addressing that issue, counsel for the Receivers quoted from the judgment of Budd J. in *Kinsella v Somers* and he has also referred to the decision of the High Court of England and Wales in *Medforth v. Blake* [2000] Ch. 86 and the comments thereon of Clarke J. in *Mooreview Developments Ltd. v. First Active Plc* [2009] IEHC 214. In the relevant part of his judgment, Clarke J. was considering an allegation of negligence against a receiver in conducting the business of the company over which he had been appointed receiver and manager and in managing its assets, which included a property development. Having considered two divergent lines of authority –

> (a) the judgment of Sir Richard Scott V-C in *Medford v. Blake*, and
>
> (b) a different line of authorities from the courts of England and Wales, which were referred to by Budd J. in *Kinsella v.*

Somers, namely, *Downsview Nominees Ltd. v. First City Corp Ltd.* [1993] 1 A.C. 295 and Re B. Johnson & Co. (Builders) Ltd [1955] 1 Ch. 634,

Clarke J. observed (in para. 12.6 *et seq*.) as follows:

> "12.6 It is possible, therefore, to discern two strands in the United Kingdom authorities. Cases such as *Downsview* are part of a line of authority which suggests that a receiver is immune from liability for acts carried out in the management of an asset (as opposed to the sale of the same asset), where no *mala fides* can be established.
>
> 12.7 However, *Medforth v. Blake* represents a different view which suggests that while the primary obligation of a receiver is towards the debenture holder, the receiver may, subject to that obligation, have a remaining obligation to the company.
>
> 12.8 The Irish authorities, so far as they go, appear to accept the *Downsview* position with no Irish authority being cited which has considered the expanded view of the potential liability of a receiver identified in *Medforth v. Blake*."

54. Clarke J. then went on to consider whether *Medforth v. Blake* represents the law in this jurisdiction. Having stated that, in any event, *Medforth v. Blake* would not have availed the plaintiffs in the case before him, because no sufficient case had been made out for negligence on the part of the receiver or, of equal importance, for any causal link between the alleged negligence and any consequences for the plaintiff companies and that it would be inappropriate to seek to make a definitive ruling on the applicability of *Medforth v. Blake* in this jurisdiction, Clarke J. observed as follows (at para. 12.14):

> "Any such view would, necessarily, be obiter. I would confine myself to indicating that I believe that there are at least arguable grounds for the proposition that *Medforth v. Blake* does represent the law in this jurisdiction. While understanding the practical difficulties which have led courts in the common law world to shy away from imposing a liability on receivers in such circumstances, (and in particular the difficulty in identifying the responsibility of a receiver to a company where the primary responsibility of that receiver is to the debenture holder), I am not convinced that a blanket immunity from liability on the part of receivers for the management of businesses placed in their hands is an appropriate response to the undoubted difficulties which arise. On the other hand, it is also necessary to take into account the fact that the legislature has decided to enact a specific provision providing for the liability of receivers in cases of sale at an undervalue without specifying any similar liability in cases of mismanagement. It is at least open to the view that, in so doing the legislature impliedly declined to extend the potential liability of receivers beyond the category of sale at an undervalue traditionally established at common law."

The statutory provision to which Clarke J. was referring in the above passage was s. 316A of the Act of 1963, which was inserted by the Act of 1990. The applicant did not invoke that provision in this case.

55. I think it is important to emphasis that Clarke J. was considering the liability of a receiver for negligence in the management of the assets of the company over which he was receiver in a plenary action. If the applicant wishes to pursue a claim for alleged negligence against the Receivers which he alleges resulted in loss to him, the appropriate course would be to pursue his claim by way of a plenary action, not on an application for directions under s. 316. The applicant's grounding affidavit contains no more than allegations of mismanagement by the Receivers with the alleged resulting loss, which the Receivers reject as being untrue, giving rise to a fundamental factual controversy which cannot be resolved on this application. Accordingly, it would be inappropriate to express a definitive view on the legal issue as to the liability of a receiver in negligence generally. Therefore, on the legal question, the matter cannot be advanced beyond what was stated by Clarke J. in the *Mooreview* case.

56. In this case the receivership is ongoing. Not only that, the applicant in the Commercial Court Proceedings is challenging the validity of the appointment of the Receivers. That being the case, there is justification for the Receivers being concerned about the motivation of the applicant in seeking the Directions 7 and 8. I am satisfied that the applicant, as an officer of the company, has not established an entitlement to the information he has sought, other than the information proffered by the Receivers in relation to the period up to their appointment, which the applicant has not taken up. In the circumstances, the Court must refuse to grant the orders sought in Directions 7 and 8.

Direction 9

57. In Point 3 of the original originating notice of motion, the applicant has invoked s. 318 of the Act of 1963. Sub-section (1) of s. 318 provides as follows:

> "The Court may, on an application made to it by the liquidator of a company or by any creditor or member of the company, by order fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as receiver of the property of the company notwithstanding that the remuneration of such receiver has been fixed by or under that instrument."

For the purposes of the application of s. 318, I am assuming that the applicant is a member of each of the respondent companies, although there is no evidence of that before the Court.

58. As to what is provided in the security documents on foot of which the Receivers have been appointed, as already noted, the Composite Debenture dated 30th June, 2005 and the Debenture dated 30th June, 2008 are both in the same form. In each, Clause 11.1 deals with the appointment of a receiver and provides that the appointment shall have effect –

> ". . . upon such terms as to remuneration (and the restrictions in s. 24(6) of the Act shall not apply) and otherwise as the Bank may, from time to time, think fit . . ..

The Act referred to in that quotation is the Conveyancing Act 1881. Clause 12.1 of each of those security documents addresses appropriation of monies received by a receiver and provides that, subject to repayment of any claims having priority over the security documents, and save insofar as is otherwise directed by the Bank, the monies received should be discharged in the following order:

> "(a) in payment of all Receiver Costs;
>
> (b) in or towards payment to the Bank of the Secured Obligations;
>
> (c) the surplus (if any) shall be paid to the Chargors or such other person or entity as may be entitled thereto."

59. As regards the Debenture dated 16th June, 2008, although in a different format, in substance it is the same. Clause 12.2 provides that every receiver appointed by the Bank shall be appointed –

> ". . . upon such terms as to remuneration and otherwise as the Bank shall from time to time fix or think fit to the intent that the restrictions contained in Section 24(6) of the Conveyancing Act shall not apply and so further that the amount of the Receivership Costs including the remuneration of any such Receiver may be fixed by the Bank at any time either upon or subsequent to the appointment of any such Receiver or after his discharge."

The application of proceeds of the receivership is dealt with in Clause 13.1, which provides that, subject to any prior ranking claims, the monies received by the Receiver shall be applied firstly "in payment of all costs, charges and expenses of and incidental to the appointment of the Receiver and the exercise by him of all or any of the powers aforesaid including all Receivership Costs and all outgoings properly paid by him".

60. Section 24(6) of the Conveyancing Act 1881, before its repeal, provided:

> "The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose."

None of the deeds of appointment by virtue of which the Receivers were appointed specified a rate of remuneration.

61. The remuneration of a receiver was considered by the High Court (Geoghegan J.) i*n In re City Car Sales Limited* [1995] 1 ILRM 221, a case which was relied on by counsel for the Receivers. The aspect of the judgment of Geoghegan J. relied on by counsel is summarised at (4) in the headnote as follows:

> "A literal construction of s. 318 of the 1963 Act would give the court a power to permit a higher amount in respect of remuneration than would otherwise have been allowed by the debenture. However, s. 318 was designed to curb excessive remuneration being retained by a receiver and therefore the court should only exercise its discretion to interfere with contractual rights where the remuneration was clearly excessive. In *re Potters Oils Ltd. (No. 2)* [1986] 1 W.L.R. 201 approved."

The issue of the remuneration of a receiver was also considered by this Court in *Re Red Sale Frozen Foods Ltd. (In Receivership)* [2007] 2 I.R. 361, in which *In re City Car Sales Ltd.* was followed.

62. It was submitted on behalf of the Receivers that no evidence has been put forward by the applicant to suggest that the remuneration of the Receivers is excessive. In fact, in his first replying affidavit Mr. Charleton averred that the Receivers had not sought or obtained any payments in respect of remuneration up to that date, so that no issue arose in relation to remuneration at that point in time. Counsel for the Receivers made the same point. However, apart from that, the applicant has put no evidence whatsoever before the Court on the basis of which the Court could by order fix the amount to be paid by way of remuneration to the Receivers pursuant to s. 318(1). That evidential deficiency disposes of the matter, in that there is absolutely no basis on which the Court could make an order under s. 318(1). Direction 9 is, accordingly, refused.

Direction 10

63. Direction 10 and Point 6 of the original originating notice of motion are framed slightly differently. In any event, the issue raised is an alleged conflict of interest on the part of Arthur Cox in acting as solicitors for the Receivers. The grounding affidavit contains a number of sweeping assertions in support of an order directing that Arthur Cox should be removed as solicitors to the Receivers, for example, that the firm were legal advisers to the Bank before and after its collapse and that they advised the Government on "the Bank Guarantee schemes" and "on the creation of NAMA". As counsel for the Receivers submitted, no evidence has been tendered which demonstrates that these facts alone give rise to a conflict of interest.

64. More significantly, the applicant has asserted that Arthur Cox were solicitors to "the Holiday Inn, Blarney Inn" and to the applicant at the time the Receivers were appointed. The position of the Receivers, which has been supported on affidavit by Mr. Charleton, is that in the past the applicant was a client of Arthur Cox, but the respondent companies were not clients of Arthur Cox. In his third affidavit, the applicant averred that that "outright denial" was in direct contradiction to the facts. He exhibited a number of items of correspondence between Arthur Cox and himself. The first was an e-mail of 7th October, 2009, the gist of which was that Arthur Cox were prepared to represent him and the terms on which they were so prepared were set out. Secondly, there was an e-mail from Arthur Cox of 28th January, 2010 to the applicant furnishing draft letters to him for review and the applicant's response to the effect that they were "fine". Thirdly, there was an e-mail dated 4th April, 2011 from Arthur Cox to the applicant telling him that a motion in proceedings, which I interpret as being a motion for judgment in default of defence against the applicant personally, had been adjourned generally because the plaintiffs' replies to the defendants' notice for particulars remained outstanding. The applicant was advised that, practically speaking, the case was likely to become dormant. It is impossible to identify what the case in which the applicant was the defendant was about because the documentation exhibited has been redacted. However, in his third affidavit, Mr. Charleton referred to the exhibit and he stated that, at the time of the appointment of the Receivers, Arthur Cox was not acting for the companies over whose assets the Receivers were appointed. Nowhere is it apparent in the exhibited documents that Arthur Cox were acting for the respondent companies at that time.

65. Counsel for the Receivers referred to a number of decisions of courts in the United Kingdom in the context of the applicant's claim that there is a conflict of interest and that Arthur Cox should be removed as solicitors for the Receivers. I propose only addressing one of them: *Bolkiah v. KPMG* [1999] 2 A.C. 222, which was a decision of the House of Lords. The facts in that case, as summarised in the headnote, indicate that KPMG had acted as auditors for an investment agency established to hold and manage the general reserve fund and external assets of the Government of Brunei. In 1996 the plaintiff, who was the then chairman of the agency, was involved in major litigation relating to his financial affairs and he retained KPMG to provide forensic accounting services and litigation support. In the course of that work, KPMG performed many tasks usually undertaken by solicitors and were given access to highly confidential information concerning the extent and location of the plaintiff's assets. The litigation was settled in March 1998 and thereafter KPMG undertook no further work for the plaintiff. Around the same time the plaintiff was removed from his position as chairman of the agency. In June 1998 the Government of Brunei appointed a finance task force to conduct an investigation into the activities of the agency during the period when the plaintiff had been its chairman. The agency retained KPMG to investigate the whereabouts of certain assets which were suggested to have been used by the plaintiff for his own benefit. KPMG took steps to protect the plaintiff's confidentiality by ensuring that the personnel who had been on the team assisting with the plaintiff's litigation

were not on the team working on the agency's investigation, and by attempting to create an information barrier within its forensic accounting department so as to prevent the flow of information between the two teams.

66. The plaintiff in the *Bolkiah* case commenced an action for breach of confidence against KPMG and sought an interlocutory injunction restraining them from acting for the agency. He was granted the injunction at first instance, but the Court of Appeal discharged the injunction. The House of Lords allowed the appeal against that decision.

67. Lord Millett, with whom the other Law Lords concurred, pointed out that the issues raised had not been previously considered by the House of Lords. The controlling authority in England before that had been the decision of the Court of Appeal in *Rakusen v. Ellis, Munday & Clarke* [1912] 1 Ch. 831. Lord Millett said apropos of that case (at p. 234):

> "The case is authority for two propositions:
>
> (i) that there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; and
>
> (ii) that the solicitor may be restrained from acting if such restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client.
>
> Like most of the later authorities, the case was concerned with the duties of a solicitor. The duties of an accountant cannot be greater than those of a solicitor, and may be less, for information relating to his client's affairs which is in the possession of a solicitor is usually privileged as well as confidential."

Lord Millett went on to say that in Rakusen's case the Court of Appeal founded the jurisdiction on the right of the former client to protection of his confidential information. The Court's intervention is founded not on an avoidance of any perception of possible impropriety but on the protection of confidential information. Lord Millet affirmed that principle as "the basis of the court's jurisdiction to intervene on behalf of a former client".

68. Lord Millett went on to distinguish the position of an existing client stating (at p. 234):

> "It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation."

Lord Millett then reiterated the position of a former client as follows (at p. 235):

> "Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.
>
> Accordingly it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in position of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious."

69. The applicant has not established that, when these proceedings were initiated, he was an existing client of Arthur Cox. He clearly was not. Nor has he established that any of the respondent companies were ever clients of Arthur Cox. Therefore, following the reasoning of Lord Millett, there is not a conflict of interest inherent in this situation in which Arthur Cox are now acting for the Receivers in their capacity as receivers and managers of the respondent companies. On the other hand, the applicant is a former client of Arthur Cox, but he has not put before the Court any evidence which would enable the Court to conclude, on the balance of probabilities, that Arthur Cox is in possession of information which is confidential to him and which is relevant to the matters in respect of which he has sought directions against the Receivers, whose interests I would be prepared to presume are adverse to his. In short, the applicant has not discharged the onus of proof, even though it is not a heavy one, which would enable the Court to intervene on the basis of the principles expressed by Lord Millett.

70. At the end of the hearing, counsel for the Receivers referred the Court to one Irish authority: the decision of the Supreme Court in *O'Carroll v. Diamond* [2005] 4 I.R. 41. The Court was referred to a passage from the judgment of Hardiman J. (at para. 21, p. 52) to the following effect:

> "I have had the opportunity of considering a very recent English case on solicitors' duty, *Hilton v. Barker Booth & Eastwood . . .* [2005] 1 W.L.R. 567. There, a firm of solicitors acted for two separate persons engaged in a property development. The firm was privy to information about one of those persons (that he had served a prison sentence for a commercial offence) in respect of which they owed him a duty of confidentiality. Accordingly, they did not disclose it to their other client. The House of Lords held that if a solicitor put himself into a position of having two irreconcilable duties, that was his own fault. The solicitor who had conflicting duties to two clients could not prefer one to the other. He had to perform both as best he could and 'this may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other. But in any case the fact that he has chosen to put himself in an impossible position does not exonerate him from liability'. I have no doubt that this is correct. . . .. The impossible position referred to in *Hilton v. Barker Booth & Eastwood* , and in other cases dating back to *Moody v. Cox and Hatt* [1917] 2 Ch. D. 71, is that of accepting instructions from two persons with conflicting interests without disclosing that state of affairs."

The type of impossible situation envisaged in that passage does not arise in this case, because Arthur Cox are not acting for the applicant and in relation to the matters in issue on this application they have not accepted instructions from two persons with conflicting interests without disclosing that state of affairs.

71. Accordingly, the Court refuses to grant the order sought in Direction 10 in relation to the involvement of Arthur Cox.

Direction 11
72. At Point 5 in the original originating notice of motion the applicant sought an order directing the removal of the Receivers, who are partners in Ernst & Young, as receivers and managers of the assets of the respondent companies. The basis on which the applicant sought such direction, as set out in the grounding affidavit, was that Ernst & Young had been the former auditors of the Bank until they resigned on 1st September, 2009. Mr. Charleton's response in his first replying affidavit was that he was satisfied that no conflict of interest existed in the Receivers acting and continuing to act as such. I have outlined earlier the relevant facts in relation to the applicant's complaint to CARB and the treatment by CARB of that complaint as set out in its letter of 29th June, 2012 and I have also referred to the applicant's letter of 28th August, 2012 to CARB

73. I agree with the submission made by counsel for the Receivers that it is difficult to see how the ground of the applicant's complaint to CARB falls within the conflict situation identified by the House of Lords in *Bolkiah v. KPMG* or that any conflict of interest arises at all. While Ernst & Young were the auditors of the Bank until 1st September, 2009, I cannot see how there was any conflict involved in two of their insolvency practitioners accepting, sixteen months later, an appointment by the Bank as receivers and managers of the respondent companies on foot of the security documents given in 2005 and 2008 by the respondent companies to the Bank. The Receivers must carry out their functions as such in accordance with statute law and in accordance with the contract between the respondent companies and the Bank. Any issue of conflict seems even more remote now that, since early February 2013, the Bank is in statutory liquidation pursuant to Irish Bank Resolution Corporation Act 2013.

74. I consider that the applicant has not established any ground for concluding that conflict of interest arises as between the Receivers and the respondent companies or the applicant. Accordingly, the Court must refuse the order sought in Direction 11.

Order
75. There will be an order refusing all of the reliefs sought on the amended notice of motion and dismissing the application.