Neutral Citation: [2013] IEHC 453

THE HIGH COURT

[2012 No. 11977P]

BETWEEN

Tom Kavanagh

And

Bank of Scotland plc

Plaintiffs

And

Patrick McLaughlin

And

Roseann McLaughlin

Defendants

JUDGMENT of Mr Justice Birmingham delivered the 30th day of September, 2013.

1. The present proceedings involve separate claims by both plaintiffs. The first named plaintiff is seeking declaratory relief in relation to the validity of his appointment as receiver, while the second named plaintiff is seeking judgment in the sum of €4,022,734.92 on foot of loans advanced by Bank of Scotland Ireland to the defendants.

2. So far as the claim for judgment is concerned it is a striking feature of this case that it is not in dispute that the sums in question were borrowed and have not been repaid. Neither is there any dispute, at least for the purpose of these proceedings, as to the figures involved. However, a series of technical defences have been mounted.

3. In broad terms the arguments canvassed on behalf of the defendants is that at the time of the purported appointment of the receiver the loans were not due and this in circumstances where there had been a merger of Bank of Scotland Ireland Limited and Bank of Scotland Plc, a merger by absorption. Then, it is argued that even if the loans were due and there was a power to appoint a receiver, that Mr. Kavanagh has not been validly appointed essentially because the officer of the bank who appointed him had not been validly delegated with the power to do this.

4. So far as the merger is concerned, the defendants contend that the security for the loans issued by BOSI, the mortgages, were not transferred on merger and did not form part of the assets which were transferred as part of the Bank of Scotland Ireland Limited/Bank of Scotland Plc merger. Moreover, it is argued that the Bank of Scotland Plc is not the registered owner of a charge and that as a matter of law not being registered does not have entitlement to execute powers.

The loans had not fallen due

5. Consideration of the argument that the monies had not fallen due requires an examination of the terms of the contract. Clause 9 of residential mortgages housing loans standard conditions so far as they are material is in these terms:-

> "Events of default
>
> We may declare that an Event of Default has occurred upon or at any time after the happening of any of the following events and
>
> (g) You break any of the terms and conditions of this agreement or
>
> (h) You are in breach of the terms and conditions of any security given by you to us or
>
> (i) You do not pay on time any of the amounts due under the agreement
>
> [...].
>
> If we declare that an Event of Default has occurred we may at (or any time after) the time of making the declaration
>
> (a) Cancel any undrawn amount of the loan; and/or
>
> (b) Demand immediate payment of the sums outstanding in which case the sums outstanding will become immediately due and payable by you (or declare that the sums outstanding shall become due and payable on demand; and/or
>
> (c) Charge to you any costs and expenses incurred by us in enforcing our rights under this loan agreement or in protecting or enforcing our security,
>
> (d) Charge interest on any arrears balance in accordance with the terms of Clause 5(c) hereof

> Before declaring an Event of Default, we will serve a notice specifying the Breach and informing you what must be done to remedy the Breach in the time specified. If you do not remedy the Breach within 21 days of the service on you on the notice, we will then terminate the agreement and enforce our rights against you as set out above."

6. On behalf of the defendants it is argued that the bank never, before declaring a event of default served a notice specifying the breach and informing the defendants what had to be done to remedy the breach within the time stipulated. The argument is that the power to appoint a receiver arises after a power of sale has arisen and that a power of sale does not arise until there has been a default and there is no default until there has been demand.

7. The argument is made notwithstanding the fact that on the 19th April, 2012 Byrne Wallace Solicitors wrote separately to each of the defendants. That letter .. identified their clients as Bank of Scotland Plc and identified the matter of the letter as six "Facility Letters". It began:-

> "We are authorised and instructed to issue this letter to you in relation to the facility letters".

The letter then referred to the merger and continued:-

> "As you are aware, the loan facility advanced to you pursuant to the facility letters are in default, notwithstanding the fact that they are demand in nature. The bank has attempted to resolve your default with you in a reasonable manner which efforts have not resulted in any agreement. As of the 16th April 2012, the unpaid sum together with interest accrued amount to €3,902,976.99 which amount can be broken down in the following manner".

A breakdown is then set out and the letter continues:-

> "We now hold instructions from the Bank to issue proceedings for the full amount of the sum due and continuing interest and to take such further or other measures to protect the Bank's position.
>
> No step will be taken in this regard, however, within the period of21 days next from the date of service of this notice on you.
>
> Should the bank not receive full repayment of the said sum of€3,902,976.99 and accrued interest within the said period of 21 days from the date of service of this notice on you, then the Bank will, not less than 10 days thereafter proceed to enforce its rights, under the Facility Letters to recover this debt and/or enforce its right under the security held and without further notice to you. Please note you will remain liable for any outstanding debt, including any accrued interest, charges, legal, selling and other related costs, should the realisation of the security held not fully pay off any outstanding debt owed under the Facility Letters."

8. In my view the suggestion that because the letter was written by Byrne Wallace Solicitors rather than by Bank of Scotland Ireland Limited or its successors or assigns and therefore it lacks effectiveness is without substance. Just as a solicitor may, when authorised demand money on behalf of the bank so, when authorised it can act on foot of the bank in declaring an act of default and specifying what requires to bring the borrower into compliance.

9. I can see no basis for contending that the necessary procedures have not been complied with. This is a case where the maxim *qui facit per alium facit per se* applies.

Developments of the cross-border merger

10. The factual background to the issue that now arises is that by cross-border merger, pursuant to European Communities (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008) in Ireland and the Companies (Cross-Border Mergers) Regulations 2007 in the United Kingdom approved by the High Court (Kelly J.) of Ireland on the 22nd October, 2010 and approved by the Court of Sessions on 10th December, 2010, all assets and liabilities of the Bank of Scotland (Ireland) Limited were transferred to the Bank of Scotland Plc at 23.59 hours on the 31st December, 2010 and Bank of Scotland (Ireland) Limited was then dissolved and ceased to exist.

11. A number of points have been raised by the defendants arising from the merger. Essentially the defendants are contending that the mortgages and charges which Bank of Scotland Plc seek to rely on were not validly transferred to Bank of Scotland Plc by Bank of Scotland Ireland when these bodies merged. This contention is based on assertion that the mortgage does not constitute an asset within the meaning of Council Directive 05/56/E.C. of 26 October, 2005 on cross-border mergers of limited liability companies, O.J. L310/1 25.11.2005. Associated with this argument a question mark is placed over the validity of the European Communities (Cross-Border Mergers) Regulations of 2008. In that regard, the defendants had indicated a desire to involve the Attorney General in the present proceedings but that application was put in abeyance. However, the defendants seek to keep open the option of joining the Attorney General, even at this stage.

12. By way of preliminary observation in relation to this point, it may be said that it would seem a surprising state of affairs if security was not transferred. The situation is more surprising if one bears in mind that the transferring company, the company being merged, the company being absorbed, in this case Bank of Scotland Ireland ceases to exist. Accordingly, it is not a case of security being left behind in the original company but disappearing, dropping into the sea as it was put during the course of argument by the plaintiffs.

13. It is necessary to consider the terms of Council Directive 05/56/E.C. in some detail to see whether it in fact produces such a surprising outcome.

14. The first point of note is to be found in the opening recitals. Recitals 1, 2 and 3 provides as follows:-

> "(1) There is a need for cooperation and consolidation between limited liability companies from different Member States. However, as regards cross-border mergers of limited liability companies, they encounter many legislative and administrative difficulties in the Community. *It is therefore necessary with a view to the completion and function of the single market, to lay Community provisions to facilitate the carrying out of cross-border mergers between various types of limited liability company governed by the laws of different Member States*.
>
> (2) *This Directive facilitates the cross-border merger of limited liability companies as defined herein*. The laws of the Member States are to allow the cross-border merger of a national limited liability company with a limited liability company from another Member State if the national law of the relevant Member States permits mergers between such types of

company.

(3) *In order to facilitate cross-border merger operations, it should be laid down that, unless this Directive provides otherwise, each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law which would be applicable in the case of a national merger*. None of the provisions and formalities of national law, to which reference is made in this Directive, shall introduce restrictions of freedom of establishment or on the free movement of capital save where these can be justified in accordance with the case law of the Court of Justice and in particular by requirements of the general interest and are both necessary for and proportionate to, the attainment of such overriding requirements." (Emphasis added in the case of each recital)

15. Article 2 is the definition section, Article 2(c) provides as follows:-

"[A] company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital."

16. Article 14 of the Directive deals with the consequences of the cross-border mergers. It provides as follows:-

"1. A cross-border merger carried out as laid down in points (a) and (c) of Article 2(2) shall, from the date referred to in Article 12 have the following consequences:-

(a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;

(b) the members of the company being acquired shall become members of the acquiring company;

(c) the company being acquired shall ceased to exist.

2. [...]

3. Where, in the case of a cross-border merger of companies covered by this Directive, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies become effective against third parties, these formalities shall be carried out by the company resulting from the cross-border merger.

4. The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, be transferred to the company resulting from the cross-border merger on the date on which the cross-border merger takes effect."

17. I agree with the submissions on behalf of the plaintiff that each mortgage and charge is an asset that is transferred to the second named plaintiff by virtue of the Council Directive 05/56/E.C. and reg. 19(1)(a) of the Regulations of2008. Regulation 19(1)(a) of the Irish Regulations is the equivalent domestic provision to article 14 of the Directive. The relevant article is headed "Consequences of a Cross Border Merger" and so far as material provides as follows:-

"19(1) Subject to paragraph (2) the consequences of a cross-border merger are that, on the effective date

(a) all the assets and liabilities of the transferor companies are transferred to the successor company,

(b)[...]

(c) the transferor companies are dissolved.

18. If the Directive and the Irish Regulations did not have this effect then I cannot see how it could possibly be said that Council Directive 05/56/E.C. and the domestic Regulations of 2008 were facilitating cross-border mergers. On the contrary, if the transfer is to be facilitated, indeed if it is to be effective, it is essential that the whole undertaking is transferred from the merging company to the successor company. It is fundamental to the whole project that no assets or anything of value is to be left behind.

19. It seems to me that there is no rational basis for concluding that while loans transfer, the security underlying the loans does not. The value of the loan, the quality of the loan and indeed the nature of the loan depends on whether it is secured and what the nature of that security is. In my view there is no basis for interpreting either the Council Directive 05/56/E.C. or the Regulations of2008 so as to conclude that the security does not transfer with the loan. But if there was any ambiguity and I do not believe that there is, then a purposive interpretation could produce only one result.

Any other interpretation would make cross-border mergers impossible and in the case of a cross-border merger that somehow or other proceeded, damage the interests of shareholders and creditors alike. That cannot be so, rather it seems to me that the security granted for a loan is in fact an asset in the nature of a contingent asset.

20. In my view there can be no doubt but that the loan and the security which underlie it cannot be divorced. My views in that regard are reinforced by the very clear evidence that was given by Mr. Vincent Fennelly a former senior executive of Bank of Ireland.

21. Accordingly I reject the arguments that have been advanced in this regard on behalf of the defendants.

22. The position is clearer still if one has regard to the terms of regs. 19(1)(g) and 19(1)(h) of the Regulations of2008 which provide as follows:-

"Subject to paragraph (2), the consequences of a cross-border merger are that, on the effective date-

(g) every contract, agreement or instrument to which a transfer or company is a party, shall, not withstanding anything to the contrary contained in that contract, agreement or instrument, be construed and have effect as if-

(i) the successor company had been a party thereto instead of the transfer or company,

(ii) for any reference (however worded and whether express or implied) to the transfer or company there were substituted a reference to the successor company, and

(iii) any reference (however worded and whether express or implied) to the directors, officers, representatives or employees of the transferor company, or any of them, were respectively, a reference to the directors, officers, representatives or employees of the successor company or to such director, officer, representative or employee or the successor company as the successor company nominates for that purpose or, in default of nomination, to the director, officer, representative or employee of the successor company who corresponds as nearly as may be to the first mentioned director, officer, representative or employee.

(h) every contract, agreement or instrument to which a transferor company is a party becomes a contract, agreement or instrument between the successor company and the counter party with the same rights, and subject to the same obligations, liabilities and incidents (including rights of set off), as would have been applicable thereto if that contract, agreement or instrument had continued in force between the transferor company and the counter party, and any money due and owing (or payable by or to the transfer or company) under or by virtue of any such contract, agreement or instrument shall become due and owing (or payable) by or to the successor company instead of the transfer or company."

However, in a situation where the possibility of joining the Attorney General so as to argue that the regulations in question are *ultra vires* and where the issue can clearly be, resolved without any detailed consideration of the Irish Regulations, I have not found it necessary to engage in that exercise.

Charges not registered in name of Bank of Scotland Plc

23. The starting point for the arguments that are advanced on behalf of the defendants in this regard are to be found in article 14(3) of the Council Directive 05/56/E.C. which provides as follows:-

> "Where, in the case of a cross-border merger of companies covered by this Directive, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies become effective against third parties, those formalities should be carried out by the company resulting from the cross-border merger."

And the equivalent provision of the Regulations of2008 which is reg. 19(1), which states:-

> "The successor company shall comply with filing requirements and any other special formalities required by law (including a law of another EEA State), for the transfer of the assets and liabilities of the transferor companies to be effective in relation to other persons".

Essentially what is contended is that under the regime established by the Registration of Title Act 1964, in relation to registered land that powers or rights are vested in the owner of a registered charge. They say that the concept of registered charge is undoubtedly a charge registered in the name of some entity and in this case, Bank of Scotland Ireland. They say that must be so as the purpose of the land register is to provide conclusive evidence of the title of the owner of the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon drawing attention of s. 31(1) of the Registration of Title Act 1964 which is in these terms:-

> "The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document or matter relating to the land; but nothing in this Act shall interfere with jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such a manner and on such terms as it thinks just."

And so far as the other properties concerned in these proceedings, Latona and 12 Hawthorn Manor, are concerned, which are unregistered land, it is said that the defendants are the registered legal owners of these properties. The defendants say that the position for which they contend is reinforced by the terms of a legal notice issued by the Property Registration Authority, "Bank of Scotland (Ireland) Limited- Legal Office Notice No. 1/2011",which states as follows:-

> "On the 17th September 2007 the Governor and Company of the Bank of Scotland ('GCBS') changed its named to Bank of Scotland Plc ('BOS'). Pursuant to European Communities (Cross-Border Mergers) Regulations 2008, Bank of Scotland (Ireland) Limited ('BOSI') merged with BOS on the 31st December 2010, at 23.59 hrs and all the assets of BOSI did vest in BOS. BOSI was thereby dissolved. Henceforth the following practices will apply.
>
> (1) Discharges by BOS of BOSI and GCBS charges will be acted upon and the relevant charge cancelled, as if the discharge was by BOSI or GCBS.
>
> (2) Charges dated on after the 1st January 2011 must be in the name of BOS.
>
> (3) Charges prior to the 1st January 2011, in the name of BOSI, or prior to the 17th September 2007, in the name of GCBS, may be registered in the name of BOS.
>
> (4) On application by BOS in any particular case, it may be registered in substitution for BOSI or GCBS as owner of individual charges, on payment of a fee of €40."

On the other hand the plaintiffs say that following the making of the transfer order Bank of Scotland Plc has stepped into the shoes of Bank of Scotland Ireland which was absorbed and ceased to exist. In those circumstances it says that s. 64 of the Registration of Title Act 1964 is concerned with transfer of charges and changes of ownership has no application. The position adopted by the plaintiffs-which has received support from Mr. John Murphy in the Property Registration Authority where he has worked since 1980-is that their interpretation of the European Communities (Cross-Border Mergers) Regulations 2008 is that all mortgages passed to Bank of Scotland Plc.

24. So far as para. 4 of the legal notice is concerned, he said that this provided an option in an individual case but that it was not a

mandatory requirement. The attitude taken by the Property Registration Authority is not determinate of the issue but nonetheless, is of a considerable significance. It is, after all, the body that is primarily the Property Registration Authority accords with common sense. It reflects the fact that Bank of Scotland Ireland has ceased to exist and in the space where Bank of Scotland once stood now stands Bank of Scotland Plc. Accordingly, I am satisfied that the arguments raised by the defendants in relation to the non-registration of the charges in the name of Bank of Scotland Plc fail.

The receiver was not validly appointed

25. In essence the argument made on behalf of the defendants is that the purported appointment of a receiver is not valid because, the official of Bank of Scotland Plc, who appointed the receiver, Ms. Lauren Whitmore, was not entitled to carry out this task, not having been properly authorised to perform this role on behalf of the bank.

26. In order to assess the merits of the arguments advanced it is necessary to consider the sequence of events in greater detail. At the outset it is appropriate to draw attention to the provisions of the mortgage that are most directly in issue. Clause 8 provides as follows:-

> **"8. Power of Sale**
> 8.1 At any time after the occurrence of an Event of Default or where the Secured Obligations have otherwise become due and payable the Bank may forthwith without any further demand on or notice to the Mortgagor exercise the statutory power of sale conferred on mortgagees by the Act free from the restrictions imposed by Section 20 thereof and Section 17 of the Act shall not apply to the mortgages and charges hereby created.
>
> 8.2 Immediately upon the Bank making demand upon the mortgagor for payment and discharge of the Secured Obligations or any part thereof (as and when the same shall have become due and payable) or immediately upon the the provisions hereof, the Secured Obligations shall be deemed to have become due within the meaning of Section 19 of the Act and this security shall immediately become enforceable and the power of sale and other powers conferred by the said Sections as varied or extended by this Deed and all other powers conferred upon the Bank by this Deed shall be immediately exercisable."

27. Clause 9 deals with the appointment of the receiver. It provides as follows:-

> **"9. Appointment and Powers of Receiver**
> 9.1 At any time after the power of sale has become exercisable whether or not the Bank has entered into or taken possession of the Secured Assets or at any time after the Mortgagor so requests, the Bank may from time to time appoint under seal or under hand of a duly authorised officer or employee of the Bank any person or persons to be receiver and manager or receivers or managers (herein called 'Receiver' which expression shall where the context so admits include the plural and any substituted receiver and manager or receivers and managers) of the Secured Assets or any part or parts thereof and from time to time under seal or under hand of a duly authorised officer or employee of the Bank remove any Receiver so appointed and may appoint another or other in his stead. If the Bank appoints more than one person as Receiver of any of the Secured Assets, each such a person shall be entitled (unless the contrary shall be stated in the appointment (to exercise all the powers and discretions hereby or by statute conferred on Receivers individually and to the exclusion of the other or others of them)."

28. In a situation where the defendants defaulted, the bank moved to appoint a receiver. However, on behalf of the defendants, it is said that the purported appointment of the receiver is invalid. Two points are taken, it is said that Ms. Whitmore was not authorised to execute the instrument of appointment on behalf of the bank and the second point taken is that the receiver was, according to the bank appointed on the 6th June, 2012 whereas the instruments were executed by Ms. Whitmore on the 28th May, 2012.

29. It will be recalled that the relevant provision of the deed provides that:-

> "At any time after the power of sale has become exercisable [...] the Bank may from time to time appoint under seal or under hand of duly authorised officer or employee of the Bank any person or persons to be receiver and manager [...] of the Secured Assets."

30. If we look at the two instruments of appointment we find in each case that the cover sheet is dated the 6th June, 2012 and the opening sentence in the body of the document reads:-

> "THIS APPOINTMENT made on the 06 day of June 2012 ***BETWEEN Bank of Scotland Plc*** having its registered office at The Mound Edinburgh EH1 1YZ Scotland, (the "Bank") and to Tom Kavanagh of Kavanaghfennell, Simmonscourt House, Simmonscourt Road, Ballsbridge, Dublin 4 (the "***Receiver***")."

31. Then, the instrument concludes as follows:-

> "In ***witness*** whereof the Bank has duly executed this appointment on the date first above written. Executed as a Deed on behalf of ***Bank of Scotland Plc*** by *Lauren Whitmore at Princess House, 1 Suffolk Lane, London*, EC4R OAX on 28th day of May 2012.
>
> Lauren Whitmore
>
> Authorised Signatory
>
> and *Karla Alford* Witness
>
> Karla Alford Credit Risk Manager
>
> Ireland Business Support Unit
>
> (Italics indicate handwritten portion on document original).

32. A document concludes with an acceptance sheet which provides as follows:

> "I, the within named ***Tom Kavanagh*** do hereby accept the appointment to act as receiver of the Secured Property and I

hereby undertake to discharge all the duties of such office and to duly and regularly account to Bank of Scotland for all monies received by me as such receiver dated the 6th June 2012 at 11 o'clock in the forenoon."

There follows a signature which is illegible and then the document is witnessed by Brendan O'Reilly, accountant of Simmonscourt House.

33. Dealing first with the point in relation to the date I am quite satisfied that there is nothing untoward or irregular here. Here, the documentation was signed by Ms. Whitmore on the 28th May. However, that was not the end of the matter as it was necessary that the instrument of appointment be communicated to the nominated receiver and that he accept the appointment. The significance of the communication of the decision to appoint was discussed by Donavan L.J. in *Windsor Refrigerator and Company Limitedv. Branch Nominees Limited* (1961] 1 All E.R. 277. At p. 284 he commented:-

"As to the second question, the argument is that the receiver was appointed the moment the document was signed, and so before the debt became payable. I agree that in a context where precision is not required, one might speak of the document loosely as appointing a receiver. But in this context precision is required. What the debenture holder wants to do is to levy equitable execution, and for that purpose to have some person in being clothed with the necessary authority to take possession of the company's property, to carry on its business, to act in its name, and pay the debt; and the company has to submit to the exercise of these powers by the person having such authority. This state of affairs is not achieved simply by the debenture holder signing a document in privacy, and keeping the contents to himself for as long as he wishes. Clearly the contents of the document must be communicated at least to the receiver before his appointment can be said to be effective."

34. The significance of acceptance by the proposed receiver was discussed by Goff J. in *Cripps (Pharmaceuticals) Limited v. Wickenden* [1973] 2 All E.R. 606. At p. 615 he commented:-

"As to the necessity of acceptance, which is perhaps self-evident, see Kerr on Receivers [14th Edn (1872), pt. II, ch. 14, p. 272]. The delivery of the document gives the receiver knowledge, or means of knowledge who the debtor is if he does not know already, and acceptance may, of course, be tacit. The date of the instrument is irrelevant except as a piece if evidence is the actual date of handing over is not known, because as Lord Evershed M.R. and Harman L.J. both observed in the *Windsor* case [1961] 1 All E.R. at 282, 284 it may be prepared and left until it is required."

35. In this case the signature of the document on the 28th May, 2012 set the process in being but that process came to a conclusion only when the appointment was accepted. Had Mr. Kavanagh responded to his nomination for appointment by refusing the position, perhaps because of pressure of work or for whatever reason it could not be said that he had been appointed on the 28th May. A receiver cannot be appointed without his knowledge and consent. Accordingly the appointment took effect on the 6th June as is recited in the documentation.

36. I turn now to the question of whether Ms. Whitmore was a duly authorised officer or employee of the bank under whose hand, a receiver might be appointed. Ms. Whitmore gave evidence during the course of the hearing. From her evidence it emerged that she was a Senior Credit Risk Manager in Bank of Scotland, a position she took up in October 2011. Her evidence was that when she took on that role that she received authority or nomination to sign various documents on behalf of the bank. She signed the instruments of appointment in question and as far as she was concerned she was an authorised signatory and had the authority to sign the documentation. She had executed such documentation on a regular basis in the past, a fact that was known to her superiors, and the fact that she was signing and executing such documentation was logged and recorded and formed part of her job description.

37. The chain of authority which led to Ms. Whitmore, who took the decision to call the loans and complete the documentation required for the appointment of Mr. Kavanagh, has been considered in some detail. The chain begins with the grant of power of attorney on the 1st March, 2011 to Juan Columbas, Chief Risk Officer. The power of attorney included a provision as follows:-

"The attorney in connection with the purpose appoint one or more persons in writing to act as a delegate attorney for the Company in his or her place with power to exercise all or any of the powers conferred on the attorney by the Company in his or her place with power to exercise all or any of the powers conferred by the attorney by this power of attorney (other than the power to appoint a delegate attorney) as are required for that specific purpose."

The power of attorney contains a statement that is governed and is to be construed in accordance with the laws of England and Wales. Then, on the 2ih January, 2012, a power of attorney headed "Power of Attorney Execution of Documents" was executed by Juan Columbas. The execution of the document was witnessed by one Lauren O'Toole. The document ofthe 2ih January, 2012 appointed Derek Woodhead, Ireland Business Support Unit Director, to be the bank's attorney. It stated that it did so:-

"(1) In connection with the Ireland Business Support Unit ("IBSU") business of the bank (the "Purpose" to approve, execute, (as a deed or otherwise) and deliver all documentation on behalf of the Bank as the attorney in his/her absolute and unfettered discretion deems necessary for the purpose.

(2) To approve, execute and deliver as the attorney on behalf of the bank such other documents (as a deed or otherwise) and to do all other acts and things on behalf of the bank in each case as the bank shall in his absolute and unfettered discretion deem necessary or desirable in connection with the purpose. (Mr. Woodhead) might at any time in connection with any specific named transaction or proposed transaction appoint one or more persons to act as a delegate attorney for the bank in his place."

This provision was included despite the fact that the power of attorney that had been granted to Juan Columbas, which permitted him to appoint a person as a delegate attorney, excluded a person so appointed from himself or herself appointing a further delegate attorney. The documentation of the 27th January stated that the power of attorney was to take effect as deed and was to be governed by and construed in accordance with English Law.

38. It is important to note that Mr. Woodhead did not purport to appoint a delegate attorney rather, on the 26th April, 2012, he issued a document described as a letter of nomination. The document is headed, "Bank of Scotland Plc and Ireland Business Support Unit- Letter of Nomination to whom it may concern", and provides as follows:-

"I, Derek Woodhead, Director, Ireland Business Support Unit, by the authority given under the power of attorney granted in my favour by Bank of Scotland Plc on 27th January 2012, confirm that each of the directors of Credit Risk, Head(s) of Credit Sanctioning and Senior Managers of "Ireland, Business Support Unit" (IBSU) is an authorised signatory of Bank of

Scotland Plc (the company) authorised to sign the deed and documents specified below".

Fourteen categories of documents are then set out including at M, appointment of receivers and insolvency practitioners.

39. I am in no doubt that Mr. Woodhead's powers were broad enough to permit him to nominate authorised signatories. Authorising individuals to sign particular categories of documents over a particular period is a very limited delegation of function and in my view clearly comes within para. 2 of the power of attorney of the 2ih January, 2012 which had authorised Mr. Woodhead to do all other acts and things on behalf of the bank in each as he should in absolute and unfettered discretion think necessary or desirable in connection with the Ireland Business Support Unit Business of the bank. In that regard I find myself in complete agreement with what Ms. Lorinda Peasland, the solicitor called on behalf of the plaintiff to give evidence as to " English law, had to say on this topic. I should add that even had I been persuaded that some frailty attached to a particular link in the chain leading to the nomination of Ms. Whitmore to execute documents I would, without question, have concluded by reference to Ms. Whitmore's evidence that she was acting as agent of the bank and that her actions had been approved by the bank and ratified by the bank. The bank knew full well what she was doing and approved of it.

40. A further point was raised about the validity of the appointment of Mr. Kavanagh by deed, when Mr. Whitmore had not himself been nominated or appointed by deed. At the outset it is right to say that the documentation completed by Ms. Whitmore on the 28th May, 2012 purports to be a deed. As we have seen the document records in terms that it was executed as a deed on behalf of Bank of Scotland by Ms. Whitmore.

41. The defendants put before the court evidence from Mr. Richard Singleton, an English solicitor as to matters of English law. From his evidence, it appears to be the case that the power to execute a deed has to be conferred by deed. This requirement in English law in relation to the execution of a deed is in contrary distinction to the provisions relating to a delivery of a deed. The requirement of a deed to authorise the delivery of a deed was ended by s. 1(1)(c) of the Law of Property (Miscellaneous Provisions) Act 1989.

42. Mr. Singleton, also drew attention to the provisions of s. 44(1) of the Companies Act 2006 which deals with the concept of authorised signatories. It provides that:-

> "(a) A document is validly executed by a company if it is signed on behalf of the company by two authorised signatories or
>
> (b) By a director of the company in the presence of a witness who attests the signature."

43. In a situation where the deed of mortgage and charge contained a choice of law and jurisdiction clause, stating that they were governed and to be construed in accordance with Irish Law. It is not surprising that Mr. Singleton agreed that whether the document purporting to appoint the receiver was valid was a matter of Irish law.

44. Even assuming that the fact that Ms. Whitmore was not herself appointed by deed raised an issue as to her entitlement to execute a deed it is clear that the document completed by her on the 28th May, 2012 was a document in writing executed under her hand.

45. The question of whether a document intended to operate as a deed and purporting to be a deed but which for some reason cannot operate validly as a deed may nonetheless have validity was considered in the *Windsor Refrigerator Company Limited v. Branch Nominees Limited* case [1961] 1 All E.R. 277. In that case Lord Evershed M.R. having referred to various arguments that called into question the validity of a deed commented as follows at p. 280:-

> "For the purpose of the rest of my judgment, however, I shall assume that on the grounds stated by the learned judge, or for some other good reason, this instrument was ineffective at any relevant date as a deed for the purpose of making appointment of Mr. Greenwood or otherwise[...] The question as I conceive it to be, is: Can this document, albeit purporting to operate as a deed but failing so to do--can it none the less be the instrument of the company in writing? I have come to the conclusion that that question ought to be answered in the affirmative."

Similar conclusions were reached by Harman L.J. and by Donovan L.J.."

46. In *Jennings and Another v. Bank of Scotland and Another* [2012] IEHC 515, (Unreported, High Court, 5th December, 2012) McGovern J. was called on to consider an application brought pursuant to s. 316 of the Companies Act 1963 declaring that Mr. Wallace and Mr. Donohue did not stand validly appointed as receivers and managers over the assets of Diorama Limited. Mr. Wallace and Mr. Donohue having been appointed as receivers by the Bank of Scotland. The closing paragraphs of the judgment are on point:-

> "11. In this case, the signature of the receivers was merely to confirm their acceptance of the appointment. There were no formal requirements necessary. What they did on the 25th May, 2012 was sufficient to signify their acceptance of their appointment. This was expressed in a more formal way when they signed the original deed which was sent over from Scotland. But I cannot see how these steps would in any way call into question the validity of their appointment. Support for this view is to be found in the judgment of Lord Evershed M.R. in *Windsor Refrigerator Company Limited and Another v. Branch Nominees Limited and Others* [1961] 1 All E.R. 277 where at p. 281, he said:-
>
> > "The question is not whether these two gentlemen, when they put their names on this document, where purporting to execute a document under their hands as agents for the company, or had any authority to do so. The question, as I conceive to be, is: Can this document, albeit purporting to operate as a deed, but failing to do - can it none the less be the instrument of the company in writing? I have come to the conclusion that question ought to be answered in the affirmative".
>
> 12. In this case the bank contends that the document executed by Mr. Bruce was a deed. But even if it was not a deed, it is clear that it had all the requisite qualities to be an instrument in writing under Mr. Bruce's hand, and, for the reasons I have outlined above, I accept that Mr. Bruce had authority to create such an instrument.
>
> 13. I therefore hold that the receivers are validly appointed and I refuse the application to discharge them."

In the present case even if there is any doubt as to whether the document created by Ms. Whitmore on the 28th May and accepted by Mr. Kavanagh on the 6th June operates as a deed then there can be no doubt that it was a document under hand of a person who was a duly authorised employee of the bank.

47. In this case the proceedings have been defended on technical grounds with great industry and ingenuity. However, in my view none of the points that have been raised either in oral or written argument provides a defence. Money was lent and has not been repaid. The money is due and owing. It follows that the plaintiffs are entitled to the orders that they seek. There is just one other topic that I should refer to even though it was not pressed as an issue. These loans were advanced for property development purposes. When they were advanced there was an expectation that the sale of one of the mortgaged properties Latona on Torquay Road, Foxrock would see the loans repaid. There has been a suggestion, which has never really been spelled out that because it has not been possible to sell Latona or the other properties that the bank was not entitled to call in the loans. Because the point has not been pressed I do not propose to say too much about this, save to say there does not appear to be any basis for suggesting that the bank was obliged to stand back indefinitely because of the difficulty in disposing of Latona and indeed the other properties.

48. In summary then the second plaintiff is entitled to judgment against the defendants in the amount referred to of €4,022,734.92. The first named plaintiff is entitled to a declaration that he stands validly appointed.