



THE COURT OF APPEAL

**Peart J.
McGovern J.
Baker J.**

Neutral Citation Number: [2018] IECA 320

Appeal No.: 2016/228

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF /

RESPONDENT

- AND -

BRENDAN FLYNN

DEFENDANT/

APPELLANT

BETWEEN

BRENDAN FLYNN

PLAINTIFF /

APPELLANT

- AND -

PAUL MURRAY, MICHAEL FLYNN, THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND, MARTIN CALLINAN, EUGENE GALLAGHER, IAN BRENNAN, WILLIAM FRY SOLICITORS, BRIAN MURPHY, LIAM LAVELLE

DEFENDANTS/

RESPONDENTS

Judgment of Mr. Justice Michael Peart delivered on the 15th day of October 2018

1. By order dated the 12th April 2016 the High Court (McDermott J.) firstly granted judgment in favour of Bank of Ireland ("the Bank") against the appellant, Brendan Flynn ("Mr Flynn"), in the sum of €135,980.91, as claimed by the Bank in the first above named summary summons proceedings, and secondly, dismissed the second above named plenary summons proceedings commenced by the appellant against the named defendants, but in truth pursued by him against the third, eighth and ninth defendants ("the Bank defendants"). Mr Flynn was not legally represented in the High Court or in this Court on appeal.

2. The appellant had defended the summary summons proceedings primarily on the basis that he had accepted a certain loan offer made to him in January 2007 under duress and undue influence exerted upon him by the Bank, and that the servants or agents of the Bank had concealed from him certain information in relation to its dealings with two companies with which Mr Flynn was involved, namely Eagle Flag Limited and Governetz Commercial Limited.

3. In his plenary proceedings, Mr Flynn had sought damages for various alleged wrongdoing by principally the Bank defendants which in due course led to the collapse of both companies, and the businesses with which they were engaged, and he sought that such damages be set off against any liability that he may be found to have to the Bank in the summary summons proceedings.

4. Those two companies have brought no proceedings in relation to these allegations, and Mr Flynn, a director and shareholder of the companies, brings the action personally. Quite apart from the merits of the allegations being raised by Mr Flynn against the Bank defendants, he clearly also faces difficulties presented to him by the rule in *Foss v. Harbottle* [1843] 2 Hare 461, where the losses suffered, if any, have been suffered by the companies, and not by Mr Flynn personally, and where the companies have not brought proceedings or joined as plaintiffs in his own proceedings.

5. The trial judge heard oral evidence in these proceedings over three days in July 2015. He delivered a very detailed written judgment in which he made a number of findings of fact adverse to the case being advanced by Mr Flynn which led to the rejection of the defence mounted to the summary proceedings, and to the dismissal of the claims made in the plenary proceedings.

6. These findings of fact present the appellant with a further difficult obstacle on appeal given the well-known principles in *Hay v.*

O'Grady [1992] 1 I.R. 210, as to this Court's entitlement to overturn findings of fact in the court below, and to draw different inferences from primary findings of fact than those drawn in the court below.

The summary summons claim

7. In the High Court, the trial judge rejected claims by the appellant that the Bank's claims in the summary summons proceedings were statute-barred, and that there was inordinate and inexcusable delay by the Bank. He was correct to do so for the reasons he outlined, and indeed there is no appeal to this Court against that conclusion.

8. As for the claims of duress and undue influence under which the appellant alleges he accepted the loan facility dated the 26th January 2007, the trial judge rejected the appellant's evidence on which these claims were made. Not only does he say that the Bank threatened him with financial ruin if he did not accept that loan offer which was to consolidate his personal overdraft and the amount due under his guarantee of company liabilities, but also that when a loan offer was made at a meeting in the Grand Hotel, Malahide it was said to be a two year term loan, whereas when he attended at the Bank's offices three days later he discovered from the documentation that it was an offer of a three month term loan. He alleged that when he tried to point this out to the Bank personnel present he was told that he "must sign or else ...". These matters are set forth in the trial judge's written judgment, as is his summary of the evidence given by the Bank in answer. That evidence is set forth in considerable detail by the trial judge. At para. 21 of his judgment the trial judge expresses his conclusions as follows:

"Mr Flynn was a very experienced businessman involved in extensive property deals and investments throughout his career. I am satisfied that he was not under any duress or subjected to intimidatory threats by Mr Murphy or Ms. O'Connor in entering this term loan. He had liabilities in respect of which he had obligations. There was extensive engagement between Mr Flynn and Mr Murphy before the loan was sanctioned and the letter of offer issued on 23rd January, as is evidenced by the "Business Loan Credit Application" and the emails exchanged on the issue. This facility was clearly advanced as part of the financing of Mr Flynn's business affairs and continuing commercial transactions. He was offered the opportunity to review his obligations to the Bank, as a result of which he agreed to consolidate his obligations into the term loan agreement. I do not accept Mr Flynn's account of the Grand Hotel meeting nor do I accept the account of his encounter with Ms O'Connor at Omega House on the 26th. It is also clear from the subsequent forbearance of the Bank, when the money from Mr Kelly's group of investors failed to materialise, and Mr Flynn was faced with a period of illness, that sympathetic consideration was given to his difficulties prior to the initiation of these proceedings. I prefer the evidence of Mr Murphy and Ms O'Connor all these events to that of Mr Flynn. I am therefore satisfied that the Bank has established that it is entitled to recover the amount claimed on foot of the term loan agreement which remains undischarged."

9. The appellant has pointed to what he maintains are errors on the part of the trial judge. He refers to references by the trial judge to a meeting between him and Mr Murphy of the Bank on the 8th January 2007 whereas he says that it is clear that he was in France on that date. He has accepted that he did have a meeting with Mr Murphy around that time but that it was probably one that took place on the 16th January and not the 8th January. He refers also to the statement by the trial judge at the end of para. 15 of the judgment where the trial judge states he is satisfied that Mr Flynn sought a term loan agreement on the 8th January 2007. Mr Flynn says that there was no evidence that he had sought that loan, be it on the 8th January or another date thereafter. He refers also to the trial judge's statement at the commencement of para. 14 of the judgment that Mr Murphy had given evidence that the term loan was initiated as a result of discussions with Mr Flynn in order to keep the companies going. Mr Flynn has referred to some of Mr Murphy's evidence in this regard from the transcript, and submits that the finding of the trial judge is incorrect.

10. In my view the sort of errors identified by the appellant, if they be errors, do not affect the entitlement of the trial judge to conclude as he did, even to the point of not accepting Mr Flynn's version of events. The 'errors' pointed to are in relation to relatively minor details in the overall case. They are certainly not sufficient to entitle this Court on appeal to overturn the trial judge's conclusion that there was no duress or undue influence exerted upon Mr Flynn to enter into the January loan, which was the main plank of his defence to the liquidated claim made by the Bank in its summary summons proceedings.

11. In his effort to satisfy the Court that, in fact, it was the Bank and not he who proposed a term loan, the appellant called in aid something said by Abbott J. in different proceedings to the effect that the loan applications provided by the Bank were not applied for by Mr Flynn but rather put in place by the Bank unbeknownst to him. The appellant has stated that Abbott J. found that these loans had not been applied for by him, and submits that the question is therefore '*res judicata*'. His submission in that regard is misconceived. The principle of '*res judicata*' cannot apply where the Bank was not a party to the proceedings in which Abbott J. is said to have made that statement, since the Bank had no opportunity to be heard on the question.

12. I would reject the appellant's appeal against the money judgment awarded against him.

The dismissal of the plenary proceedings

13. In his plenary proceedings against the Bank, Mr Flynn again relied upon allegations of duress and undue influence, but went further and alleged fraud in relation to the January 2007 loan, as well as a conspiracy to defraud, on the part of the Bank and Mr Murphy, such that the loans should be considered to be unenforceable against him. He had included Mr Lavelle, the third named defendant, as a co-conspirator, but later abandoned that claim against Mr Lavelle.

14. This conspiracy was alleged by Mr Flynn in relation to the manner in which the Bank dealt with a new bank mandate signed in relation to the current account of Eagle Flag Limited, and which resulted in the collapse of that company as well as Governetz Limited and the financial ruin of Mr Flynn.

15. The general background to these allegations is set out clearly in the judgment of the trial judge. It involves the two companies, Eagle Flag Limited and Governetz Limited, a golf course development in Rennes, France by Eagle Flag Limited, and the involvement of Paul Murray, John Kelly, and Frank McCarthy as shareholders. A disagreement broke out between the shareholders, followed by a settlement of that disagreement which enabled funds to be invested in both Eagle Flag Limited and Governetz Limited which was involved in a separate business in the United Kingdom providing advice and assistance to local authorities in the UK in relation to the relocation of staff.

16. A summary of evidence in relation to these matters appears in the judgment of the trial judge. He also describes in some detail the events that led up to the releasing by the Bank of Mr Murray as a guarantor of the overdraft of Governetz in the amount of €150,000. It is unclear whether or not there was an actual guarantee document executed by Mr Murray. None has been produced, but that could be because the Bank is not relying upon the guarantee and did not sue upon it.

17. It seems to be the case, as noted by the trial judge, that Mr Flynn needed a source of funding for the rapidly growing business of

Governetz in the UK, and that Mr Murray was prepared to assist in providing it. The Bank agreed to provide an overdraft in the amount of €150,000, a condition of which was that Mr Murray would place €75,000 on deposit with the Bank, and both he and Mr Flynn would execute a guarantee each in the amount of €150,000. In return for this, Mr Murray's shareholding was increased to 50%.

18. As noted by the trial judge at paras. 28 *et seq.* of his judgment, a serious dispute subsequently erupted between Mr Flynn, his brother Michael Flynn, and Paul Murray in relation to Eagle Flag Limited and Governetz. The nature of that dispute is described in some detail by the trial judge. Mr Flynn informed the Bank about what had occurred in relation to both companies. His brother, Michael Flynn resigned as a director from both companies. It appears that Mr Murray and Michael Flynn attended at Bank of Ireland, Balbriggan in order to withdraw a sum of €140,000 from the Eagle Flag account there, but this was refused by the Bank because of the dispute of which it had become aware and the fact that Michael Flynn, having resigned, was no longer a signatory on the company's accounts.

19. There was a meeting of Governetz Limited on the 6th June 2006. Mr Murray notified the board that he would not be attending. At the meeting, Mr Murray was removed as a director by a unanimous vote. As the trial judge noted in his judgment, Mr Murray later claimed that he had been unlawfully excluded from the meeting, and that any business transacted at the meeting was therefore invalid, including the alteration to the bank mandate for the company's account. His solicitors wrote to that effect by letter dated the 30th June 2006.

20. Having looked into the matter, the Bank was satisfied that the resolution passed regarding the new bank mandate was in order, and that it would act on it. They so informed Mr Murray's solicitors by letter dated the 30th June 2006. In the same letter, as noted by the trial judge, the Bank informed the solicitors that it also held a board resolution appointing a new signatory to the bank mandate in respect of Eagle Flag Limited. Mr Murray reacted by immediately making a complaint to the Garda Bureau of Fraud Investigation ("GBFI") in which he stated that the Bank had told him that Mr Flynn had lodged a fraudulent mandate for Eagle Flag limited. The trial judge stated in his judgment that "this was a misrepresentation of the Bank's position".

21. From this point matters deteriorated further. The Bank notified Mr Flynn by letter dated the 3rd July 2006 that the Governetz overdraft facility was withdrawn, and that the outstanding balance of €19,739.40 was repayable on demand, and further that funds must be lodged to clear it. The reason for this withdrawal was stated to be "as a result of the serious dispute which has occurred among the directors of the company". This was stated to be a material adverse change in circumstances, and it was also explained that Mr Murray had indicated a wish to limit his exposure under his guarantee.

22. The trial judge noted in his judgment that Mr Flynn's obligation under his own personal guarantee in respect of the Governetz's overdraft became subsumed into the new loan sanctioned to Mr Flynn in January 2007 and which is the subject of the Bank's summary summons proceedings already dealt with above.

23. The trial judge sets out in his judgment, at para. 33 *et seq.*, the dispute that developed between Mr Flynn and Mr Murray concerning the bank mandate for Eagle Flag Limited in June 2006. The Bank had concerns that the company's account could not continue to be operated in the light of that dispute. Mr Lavelle, the Bank's solicitor, recommended a solution which was that both parties be written to indicating that unless a fresh mandate was signed with the agreement of both Mr Flynn and Mr Murray, the account could not be operated. The result was that the account could not be operated as there was no agreement. The situation was therefore that the Governetz account was frozen, and the Eagle Flag account was suspended, so neither could trade as before. Mr Flynn ceased to derive an income from the companies, and was unable to meet his obligations to the Bank.

24. It will be recalled that the Bank sanctioned a loan to Mr Flynn in January 2007 which is one of the loans in respect of which judgment was granted in the summary summons proceedings. As part of his defence to those proceedings, Mr Flynn had alleged duress and undue influence on the part of the Bank. Those defences were rejected by the trial judge, as already explained. As the trial judge noted at para. 38 of his judgment, the general theme of duress was carried into Mr Flynn's statement of claim in his plenary proceedings, but that he went further by alleging fraud and fraudulent conspiracy against the Bank, Mr Murphy, and Mr Lavelle (later withdrawn as against Mr Lavelle).

25. Part of Mr Flynn's allegations in this regard is that he himself did not make any application for the new term loan in January 2007, and that the Bank created a new facility for him by making a false application in his name without his knowledge, "and forced him to accept same under duress in order to conceal the frauds the Bank had perpetrated at the behest of Paul Murray and William Fry (solicitors to Mr Murray)".

26. Having heard the evidence of those concerned, the trial judge concluded as follows in relation to this allegation:

"I am not satisfied that a false application for the facility was made by officials of the Bank in Mr Flynn's name without his knowledge. There was a detailed engagement with Mr Flynn by Mr Murphy in respect of this facility. I do not accept that Mr Flynn was unaware of any aspect of the steps taken by Mr Murphy to process and secure this loan facility on his behalf and with his authority and consent. He was not dealing with the bank as a "consumer" under section 2 (1) of the Consumer Credit Act 1995 (as amended). The purpose of the 2007 loan was to facilitate the advancement and conduct of his commercial business. Furthermore, I am not satisfied that there is any evidence that any misrepresentation or negligent misstatement was made to Mr Flynn in respect of this agreement."

27. Mr Flynn also claimed that there was a fraudulent conspiracy by the Bank in relation to how it dealt with the controversy surrounding the bank mandate for Eagle Flag Limited, and the decision by the Bank that it would not act on foot of the new mandate signed on the 22nd June 2006. The trial judge deals with some of the correspondence between Mr Flynn and the Bank in this regard, as well as an internal memo attaching a letter from Mr Flynn which explained Mr Flynn's view that Mr Murray had not been attending board meetings of the company, that he had been properly voted off the board on the 22nd June 2006, and that the Bank's requirements that a new mandate be put in place could not be met. The letter requested that the Bank would reconsider its position. That did not happen.

28. In relation to the allegation of a fraudulent conspiracy, the trial judge stated at para. 40 of his judgment:

"By this time, Mr Murray, for his part, had complained to the Garda Bureau of Fraud Investigation (GPFI) on the 30th June, 2006 that Mr Flynn was guilty of an attempted fraud against him and the company. He described the board meeting of 22nd June as illegal and invalid claiming that he had not been advised in advance of the meeting which passed an allegedly illegal resolution resulting in a revised bank mandate which had been lodged with the Bank in order to extract funds from the company for Mr Flynn's benefit. The complaint suggested that Mr Murphy had advised Mr Murray on 29th June of the revised mandate received by the Bank. In his statement of claim Mr Flynn suggested that it was evident from

Mr Murray's complaint that Mr Murphy, Mr Desmond, Mr Lavelle and the Bank actively participated in a false criminal complaint which damaged Mr Flynn's reputation and his ability to obtain credit. I am satisfied that the letter of 29th June is not evidence of their participation in the criminal complaint and could not be so construed. There is no evidence to support this allegation."

29. As the trial judge noted, Mr Flynn also made a complaint to the Office of Corporate Enforcement by letter dated the 14th July 2006 against various parties including Mr Murray and his brother, Michael Flynn, and wrote to Mr Murphy to inform him of this fact. The trial judge goes on to note that Mr Flynn had stated that he had refused efforts to compromise the issues between the parties because he did not want to "compromise the investigation [by the OCE]".

30. The trial judge then described a sequence of events about which much complaint is made by Mr Flynn. At para. 43 of his judgment, the trial judge states:

"In September/October 2006 it became necessary to make a number of payments from the Eagle Flag Ireland Ltd account to various parties to enable its business to continue. The Bank agreed to permit these payments on a once-off basis pending the resolution of the disputes between the parties. On 16th October, 2006 the Bank set out the terms of upon which it would make these payments. It required Mr Flynn and Mr Murray to sign five cheques drawn on the company account for the purpose of purchasing five drafts which would issue in respect of each of the proposed payments. On 17th October, Mr Flynn wrote to Mr Murphy concerning these payments. He enclosed cheques for payment to SA Eagle Flag Ltd and a named notary. Two sums were to be paid to SA Eagle Flag Ltd. He requested that both payments be made by electronic transfer to the account of SA Flag Ltd in France. The Bank declined to do so. Mr Murphy claims that the Bank declined to transfer this money by electronic transfer because of the difficulties which existed between Mr Flynn and Mr Murray. The bank transfers were backed by the cheques which had been lodged but which could be countermanded before presentation for payment. Mr Flynn requested the electronic transfers because, he said, time was of the essence to the making of the payments. The French bank would not accept Bank of Ireland bank drafts. Mr Murphy said that he acted on legal advice in declining to transfer the funds by electronic means. Mr Lavelle in his evidence states that he did not give any such legal advice concerning electronic transfers and if it was given it must have been given by another solicitor within the Bank."

31. Having so stated, the trial judge then referred to other allegations against the Bank in Mr Flynn's statement of claim. He reached the following conclusions at paras. 45-46 of his judgment:

"45. Mr Flynn alleged extensive misbehaviour by Mr Murphy and Mr Lavelle. In the course of the hearing, all allegations against Mr Lavelle were withdrawn. They were simply untrue. They included an allegation that Mr Lavelle had given wrong advice to Mr Murphy in his capacity as bank solicitor "as a favour" to William Fry solicitors acting on behalf of Mr Murray which resulted in the freezing or closing of the company accounts of Governetz Commercial Ltd and Eagle Flag Ireland Ltd knowing their actions to be illegal and thereby facilitating a series of frauds which destroyed the companies. It was alleged that Mr Lavelle, as a solicitor, ignored the facts underlying the creation of false mandates for these companies and then covered up illegalities perpetrated against the defendant. These accusations were unwarranted and unsustainable: they were an unjustifiable attack on Mr Lavelle's personal and professional reputation and integrity. Mr Flynn eventually withdrew the allegations and accepted Mr Lavelle's evidence explaining the limited nature and extent of the advice which he had given on these issues.

46. Once the allegations of professional misconduct and wrongdoing against Mr Lavelle were withdrawn, Mr Flynn concentrated on the alleged wrongdoing of Mr Murphy concerning the term loan account and the events between June 2006 and January [2007] concerning the operation of the bank accounts of Governetz Commercial Ltd and Eagle Flag Ireland Ltd."

32. Having so stated, the trial judge then went into some detail as to these allegations against Mr Murphy, including one that he had endorsed the allegation of criminal conduct made by Mr Murray against Mr Flynn to the GBFI, and that Mr Murphy was the source of information relating to Mr Murray's allegations in relation to a fraudulent bank mandate being signed by Mr Flynn. The trial judge concluded that these allegations were "baseless and misconceived". He found no basis for these allegations against Mr Murphy, and explained his reasons for so concluding. He went on to state, at paras. 52-54 of his judgment:

"52. It is clear that notwithstanding the continuation of this dispute, the Bank endeavoured to facilitate, to the extent that it could, the continued operation of the company's accounts, with limited cooperation from Mr Murray and Mr Flynn, against a background of mutual distrust between them. I am satisfied that Mr Murphy and the Bank were responding to a difficult situation created by that dispute between the directors.

53. Mr Murphy's attitude towards Mr Flynn is evidenced by an email to Mr Dermot Davis on 25th July, 2008 following a discussion with Mr Flynn the previous day. Mr Flynn indicated that he hoped to receive management fees for the following September with which he hoped to discharge his liability to the Bank. Mr Murphy noted: -

"While this is not ideal I feel we will get cleared and may need to have patience with this deal".

54. I am not satisfied that any of the allegations set out at para. 5 of the statement of claim alleging that the Bank and Mr Murphy "joined in and became an integral part of" frauds committed by Michael Flynn and Paul Murray or participated in any false criminal complaint to destroy Mr Flynn's character or his ability to obtain credit and conduct business, have been established. Mr Flynn has not proven any facts to establish the existence of any cause of action arising out of these allegations. Mr Flynn's claim for damages for "criminal libel" against the defendants arising out of these events is also entirely misconceived.

55. Furthermore, I am not satisfied that the Bank, in refusing to transfer sums by electronic means on behalf of Eagle Flag Ireland Ltd were in breach of duty or negligent in their dealings with Mr Flynn or in breach of any contract with him. There was no breach of fiduciary duty by the bank to the company nor was any such duty owed to Mr Flynn by the bank in respect of its operation of the company accounts. The bank's officials, as they were entitled to do, in the circumstances, acted with care and caution [given] the nature of the dispute between Mr Murray and Mr Flynn. This was a dispute which arose out of commercial dealings between them involving the two companies which had accounts with the Bank. Neither company brought proceedings against the Bank or made any complaint in respect of any loss or damage allegedly sustained as a result of the Bank's behaviour or actions or in respect of any alleged loss of profits arising therefrom. The

accounts were company accounts not personal accounts of Mr Flynn.”

33. Having concluded thus, the trial judge went to state that, even if Mr Flynn had established liability on the part of the Bank, he had not established any loss in respect of which he or Eagle Flag Limited was entitled to damages, as he had not established on the balance of probabilities that either he or the company had sustained a loss of €1 million or any damages as a result of the Bank's acts or omissions, and he therefore dismissed Mr Flynn's counterclaim in the summary summons proceedings, and his claims made in his own plenary summons proceedings against the Bank.

34. The appellant has raised grounds of appeal under a number of broad headings. Firstly, he argues that the trial judge erred in not concluding that the January 2007 loan agreement was unlawful, and unenforceable by the Bank. He relies on his evidence that he never applied for that loan, and that it was sought by the Bank for its own purposes and without his knowledge. He acknowledges that he accepted the loan but that he did so under duress. He relies also upon the fact that there was a second unrequested application for a loan (which he did not in fact take up) and that this is confirmed in correspondence with Messrs. Gallagher Shatter solicitors dated the 20th October 2010. Mr Flynn has complained also that the application form completed by the Bank in respect of that loan application has never been discovered by the Bank in these proceedings. He contends that the practice by the Bank of putting forward applications for loans that had not been requested was commonplace at the time, as was the practice of then forcing these loans upon the customer who was often not in a position to refuse to accept it. He submits that this evidence has been overlooked by the trial judge. He maintains strongly that he never applied for the loan in respect of which judgment was granted, and that it was forced upon him, and that the trial judge erred in granting judgment in such circumstances.

35. Mr Flynn submits also that the trial judge erred in his conclusion given what was stated by Abbott J. as stated above, and that this question is therefore *res judicata*. The appellant is simply incorrect in relation to this question being *res judicata*. The Bank was not a party to the proceedings before Abbott J. That principle is inapplicable in such circumstances. In any event, the trial judge rejected the plaintiff's arguments in relation to the loan application. He was entitled to do so. In reality, once the trial judge was satisfied that there was no duress or undue influence exerted on the appellant in relation to his acceptance of the loan in question, it does not matter at all whether it was the appellant who applied for the loan, or whether it was processed by the Bank and then offered to the appellant. One way or another, he accepted it. He was an experienced businessman. He needed no independent legal advice to know well the obligations he was taking on when signing his acceptance of the loan. He knew that he was obliged to repay it in accordance with its terms. I would reject this ground of appeal.

36. The appellant relies also upon the fraud that he alleges was committed by Paul Murray and his brother, Michael Flynn, about which he made complaint to the GBFI. He points to the fact that his brother pleaded guilty to sample charges brought against him by the investigatory body of the Institute of Chartered Accountants, and received a fine and an admonition. He complains that the GBFI first accepted a complaint of fraud against Mr Murray and Michael Flynn but refused to proceed with it. While he discovered this fraud and was able to put a stop to it, he maintains that the Bank perpetuated it in a way that led to the downfall of his companies.

37. He contends that the trial judge erred in his conclusions in relation to the Governetz account and that of Eagle Flag Limited, and all the events that eventually led to the collapse of his businesses, as has been described. He complains that the trial judge ignored the fact that he was kept 'out of the loop' so to speak in relation to the withdrawal of the overdraft facility. He complains that the Bank's correspondence with Messrs. William Fry, solicitors acting for Mr Murray, was not copied to him or the company. Mr Flynn has attempted to tie the Bank into his complaints of fraud against Mr Murray and Michael Flynn both in his oral submissions and his written submissions. The trial judge's judgment makes it clear that he did not accept that there was evidence of fraud or of a fraudulent conspiracy on the part of the Bank. Nevertheless, Mr Flynn asks this Court to reverse these findings by the trial judge.

38. However, the Court's power to set aside findings of fact made in the court below is restricted (see *Hay v. O'Grady*). It may do so, for example, where there was no evidence to support the finding of fact. In this case, the trial judge stated that he preferred the evidence given by the Bank to that given by the plaintiff. The appellant must understand that his appeal is not a rehearing of the evidence or even a full reconsideration of the evidence given in the court below. The appellant's task on appeal is to demonstrate that there was no credible evidence upon which the trial judge could rely for his conclusions. It is not sufficient merely to point to other evidence, no matter how weighty, that he considers should have persuaded the trial judge to find in his favour, and ask this court to reach a different conclusion than the trial judge. Much of Mr Flynn's appeal labours under this difficulty.

39. Mr Flynn has claimed that the Bank acted fraudulently when accepting the advice of Mr Lavelle as to how to deal with the situation arising in relation to the account of Eagle Flag Limited in the light of the issues raised as to the bank mandate. Again, he submits that the trial judge erred by accepting the evidence of Mr Lavelle. He points to discrepancies between the evidence of Mr Lavelle and of Mr Desmond. Especially when one recalls that any claim of fraud against Mr Lavelle was withdrawn by Mr Flynn, the trial judge was entitled to accept his evidence where he preferred it to other evidence.

40. Mr Flynn has identified what he considers to be factual errors relied upon by the trial judge in his judgment. I do not propose to set out all these errors which he identifies in his written submissions. In my view they do not go to the heart of the judgment, even if they be errors. The heart of the case is an allegation of fraud and a fraudulent conspiracy which resulted in the financial ruin of the companies, and through them, the appellant's own financial ruin. The trial judge found that there was no evidence of such a fraud on the part of the Bank. Mr Flynn may well have cause for complaint against Mr Murray and his brother, Michael Flynn. He has tried to pursue his complaints both with the GBFI and the Institute of Chartered Accountants and the Director of Corporate Enforcement. But the counterclaim in these proceedings is against the Bank. In my view, the trial judge was entitled to conclude as he did on the basis of his view of the evidence adduced by each side.

41. Much complaint is made by Mr Flynn in relation to the manner in which the Bank refused to transfer funds by electronic transfer to a French bank account on the basis of cheques being lodged by Mr Flynn in Ireland. Mr Flynn needed funds transferred very quickly to meet obligations in France. The Bank was prepared to issue only bank drafts which Mr Flynn believed would take about one month to clear. The French subsidiary of Eagle Flag Ltd had apparently drawn cheques on the French account to deal with certain creditors, and if there was delay in getting funds to the French account those cheques would not be met. That is what happened, thereby causing serious reputational damage to the company and Mr Flynn. He characterises this action by the Bank in refusing to make an electronic transfer of funds on foot of the cheques lodged to the Irish account as a deliberate and malicious destruction of both he himself and Eagle Flag Limited.

42. I have set out the trial judge's conclusions in relation to this matter at paras. 30 *et seq.* above. Mr Flynn, in his written submissions, has characterised the actions of the Bank in this regard as illegal, and amounting to a criminal libel. I appreciate that Mr Flynn felt aggrieved by the Bank's refusal to make the electronic transfers he was requesting. But it has to be remembered that at that time there was a serious dispute existing between Mr Flynn and Mr Murray. It is completely understandable that the Bank would act with caution in such circumstances. To characterise it as an illegal act or a fraudulent act, or what he calls 'a criminal libel' is

simply misplaced. In my view the trial judge was entitled to conclude as he did in relation to this particular issue.

43. Mr Flynn makes a complaint as to 'criminal libel' which he argues arises from the complaint made by Paul Murray against Mr Flynn to the GBFI. That complaint contained a reference to certain information that Paul Murray stated had come from Mr Murphy in connection with the new bank mandate that Mr Flynn had given to the Bank in respect of the Eagle Flag Limited account. It is on this basis that he maintains that the Bank was complicit with Mr Murray in this 'criminal libel'. I have already referred at para. 20 above to the trial judge's conclusion that "this was a misrepresentation of the Bank's position", and to his conclusions at paras. 54 of his judgment that he was not satisfied that the Bank had been complicit in any way in the frauds and criminal libel that Mr Flynn alleges against Mr Murray. Apart from repeating his own beliefs and contentions in this regard, Mr Flynn has not established any error on the part of the trial judge that would entitle this Court on appeal to interfere with the findings of the trial judge. Mr Flynn has also asked this Court to direct the Bank to write to the GBFI to inform that body that the complaint made against him by Mr Murray is untrue. There is no basis for this Court complying with such a request.

44. Mr Flynn has also argued that the trial judge was incorrect to conclude, as he did at para. 56 of his judgment, that he had not established any loss in respect of which he would be entitled to an award of damages. Mr Flynn, in his written submissions, points to the fact that he used his own personal finances to keep the two businesses afloat, including the payment of expenses for Mr Murray and his brother, Michael Flynn. He also did not draw the salary to which he was entitled. He claims that he is owed two years' salary from Eagle Flag Limited and one year's salary from Governetz. He refers to other amounts representing a loss to him personally. He calculates all these losses to total €1,775,000.

45. I consider that the trial judge was correct to note, first of all, that neither company brought proceedings in relation to losses suffered by these companies as a result of any of the alleged actions of the Bank, and that, in so far as Mr Flynn claims that as a result of the financial ruin of the companies he too has suffered a personal loss, he cannot bring such a derivative claim. If the companies have suffered the primary loss, it is the companies who must bring proceedings. But even if there are personal losses that Mr Flynn can rightly claim have resulted from all the actions of Mr Murray and his brother, the failure to prove wrongdoing against the Bank is fatal. I am not satisfied that there is any basis upon which this Court can conclude that the trial judge erred in dismissing his claims against the Bank defendants.

46. Finally, Mr Flynn had argued in his written submissions that the trial of his action was unfair because he was prevented from calling Mr Raymond King, who resides in UK, as a witness. Mr King is an elderly man, and was unable to travel to Dublin for the hearing when contacted by Mr Flynn. The point was not raised by Mr Flynn in his oral submissions before this Court. However, since the issue appears in the written submissions, I should say that having read the transcript for the final day of the hearing, the 30th July 2015, it is clear that the trial judge engaged in a discussion with Mr Flynn about what evidence Mr King would give. That discussion developed to a point where it became apparent that the two matters to which Mr King's evidence would be directed were matters of fact that were not in dispute, and therefore his attendance as a witness would not have advanced Mr Flynn's case in any material way. The trial judge explained his reasons for concluding that Mr King's attendance was not necessary, to which Mr Flynn replied "Fine. Thank you, judge". I see no basis for concluding that the trial of this action before the trial judge was unfair and a breach of Article 6 of the European Convention on Human Rights, as contended by Mr Flynn.

47. For these reasons I would dismiss this appeal.