Neutral Citation Number: 2006 IEHC 328

THE HIGH COURT

2005 No. 292 COS

IN THE MATTER OF:
RED SAIL FROZEN FOODS LIMITED (IN RECEIVERSHIP)
RED SAIL KILMORE LIM ITED (IN RECEIVERSHIP)
RED SAIL EXPORTS LIMITED (IN RECEIVERSHIP)

AND IN THE MATTER OF AN APPLICATION FOR DIRECTIONS
UNDER SECTION 316 OF THE COMPANIES ACT, 1963-2003

TOM GRACE, RECEIVER

APPLICANT

Judgment of Miss Justice Laffoy delivered on 20th October, 2006.

The application

The applicant (the Receiver) is receiver and manager of the companies named in the title by virtue of the following appointments:
(1) In the case of Red Sail Frozen Foods Limited (Frozen Foods), an appointment dated 10th January 2002 by Ulster Bank Ireland Limited (the Bank) pursuant to the powers contained in the following security documents:
(a) a debenture dated 21st February, 1978 given by Frozen Foods to the Bank;
(b) a mortgage dated 4th October, 1978 made between Frozen Foods of the one part and the Bank of the other part of unregistered land at Clogherhead, County Louth;
(c) a supplemental charge (on book and other debts) dated on 18th February, 1985 made between Frozen Foods of the one part and the Bank of the other part.
(2) In the case of Red Sale Kilmore Limited (Kilmore), an appointment dated 10th January, 2002 by the Bank made pursuant to the powers contained in the following security documents:
(a) a debenture dated 21st February, 1978 given by Kilmore to the Bank;
(b) a charge over registered land in County Wexford dated 11th September, 1978 executed by Kilmore in favour of the Bank; and
(c) a supplemental charge (on book and other debts) dated 18th February, 1985 made between Kilmore of the one part and the Bank of the other part; and
(3) In the case of Red Sail Exports Limited (Exports), an appointment made on 11th January, 2002 by the Bank pursuant to the powers contained in a debenture dated 1st February, 1982 given by Exports to the Bank.
By virtue of a guarantee dated 16th October, 1990 the indebtedness of Frozen Foods to the Bank was guaranteed by, *inter alia*, Kilmore and Exports. By virtue of a guarantee of the same date the indebtedness of Kilmore to the Bank was guaranteed by, *inter alia*, Frozen Foods and Exports.
The receivership is nearing completion. Frozen Foods and Kilmore are insolvent. On this application the Receiver has sought the directions of the court pursuant to s. 316 of the Companies Act, 1963 (the Act of 1963) on three discrete unrelated issues. I will deal with each issue separately.

The first issue

The Receiver seeks directions as to whether it is lawful for the Receiver to pay the preferential claims made by the Minister of Enterprise, Trade and Employment (the Minister) through his department (the Department) and by employees of Frozen Foods and Kilmore under s. 285 of the Act of 1963 in circumstances where there was a pre-receivership practice in Frozen Foods and Kilmore of making payments to employees without deduction of PAYE and PRSI. Both the subrogated claims of the Minister/Department and the residual employees' claims are made in respect of payments where PAYE and PRSI deductions were properly operated.
Exports had no employees.
In dealing with this issue, it is important to stress at the outset that the Receiver sought directions as to service of the originating notice of motion. In consequence of directions given by the court, notice of the proceedings was given to the following:
(1) The Minister and the Department;
(2) the Revenue Commissioners; and
(3) employees of Frozen Foods and Kilmore with residual claims in excess of €1,000.
None of those notice parties participated in the proceedings. Notice of the proceedings was also served on Frozen Foods, Kilmore and Exports (collectively referred to as "the Companies"), who participated in the proceedings. The Bank also participated, but in relation to the third issue only.
Following his appointment the Receiver discovered that prior to the receivership "under the counter" payments had been

made to employees of Frozen Foods and Kilmore. Payments were made in cash and no PAYE/PRSI were deducted. The payments were recorded in the books of the Company as the purchase of fish. The Receiver informed the Department of the practice and of his concerns as to the impact the practice might have on employment contracts. He raised the question of the consequential uncertainty as to the status of any subrogated claims the Department would have based upon payments made by it to the employees of Frozen Foods and Kilmore. It was agreed between the Receiver and the officials of the Department that the claims which would be confirmed by him, as employers' representative, in respect of employee entitlements the subject of claims against the Department would exclude payments in respect of which the appropriate PAYE/PRSI deductions had not been made. Subsequently, when submitting the relevant forms to the Department, the Receiver reminded the Department of the pre-receivership practice and confirmed that the forms covered amounts for employees' wages and salaries in respect of which the relevant PAYE/PRSI was paid. Further, the Receiver made it clear that he was not making any determination as to whether the relevant employees had enforceable contracts of employment notwithstanding the cash payments and that he was not admitting any future subrogated claim by the Department in respect of any payment which it would make to the employees.

Subsequently, the Department made payments to employees of Frozen Foods and Kilmore in respect of –

(i) arrears of wages,

(ii) holiday pay,

(iii) minimum notice, and

(iv) unfair dismissal.

The Department claims that it has a preferential claim in respect of the amounts which were so paid against Frozen Foods and Kilmore.

The Receiver's concern is whether, having regard to the manner in which the employment contracts of employees of Frozen Foods and Kilmore were operated in practice, as a matter of law, the employees' claims under the Minimum Notice and Terms of Employment Act, 1973 (the Act of 1973), the Unfair Dismissals Act, 1977 (the Act of 1977) and the Protection of Employees (Employers' Insolvency) Act, 1984 (the Act of 1984) were enforceable and whether the Department's claim to be subrogated is valid. It is regrettable that the Department was not represented before the court to argue for the enforceability of the claims, which it in fact discharged, and the validity of its claim to subrogation. The Receiver had envisaged that the issue would be argued as between the Minister/Department, on the one hand, and Frozen Foods and Kilmore, on the other hand. However, in the absence of the Minister, counsel for the Receiver set out the relevant legal principles for consideration by the court.

There is authority in this jurisdiction for the proposition that, where it is a term of a contract of employment that it will be implemented in a manner which defrauds the Revenue Commissioners, the contract is illegal and wholly unenforceable. That is the decision of this Court (Barron J.) in *Hayden v. Sean Quinn Properties Limited* (unreported, 6th December, 1993). On the facts of the case Barron J. held that there had been a breach of the plaintiff's contract of employment. However, on the basis that the contract had provided for a basic salary to which there was added a sum by way of "non-taxable allowance to cover expenses", he held that the contract itself was an illegal one. In dealing with the consequences of that, he referred the decision of the Court of Appeal of England and Wales in *Napier v. National Business Agency Limited* [1951] 2 All E.R. 264, stating that the facts in that case were almost identical to the facts in the case under consideration by him. He quoted the following passage from the judgment of Sir Raymond Evershed M.R. (at p. 266):

> "It must be that, by making an agreement in that form the parties to it were doing that which they must be taken to know would be liable to defeat the proper claims of the Inland Revenue and to avoid altogether, or at least to postpone, the proper payment of income tax. If that is the right conclusion, it seems to me equally clear … that the agreement must be regarded as contrary to public policy. There is a strong legal obligation placed on all citizens to make true and faithful returns for tax purposes, and, if parties make an agreement which is designed to do the contrary, i.e. to mislead and to delay, it seems to me impossible for this court to enforce that contract at the suit of one party to it."

Barron J. recorded that the Master of the Rolls then went on to consider whether or not the fraudulent part of the agreement could be severed and he held that it could not. The plaintiff's claim was dismissed on the ground that the contract was unlawful and so unenforceable. Concluding his judgment, Barron J. stated as follows:

> "In my view that case would have been decided in the same way and upon the same grounds in this jurisdiction at that date. Notwithstanding the very great changes that have occurred in society in this country since then I do not believe that public policy on this issue would have changed in any way. The plaintiff allowed himself to agree to something which would benefit the defendant at the expense of the Revenue. Such an agreement is unenforceable and the plaintiff's claim must therefore fail."

Similarly, in a statutory claim for unfair dismissal under the Act of 1977 and a claim under the Act of 1973, the Employment Appeals Tribunal determined that the claim should be dismissed due to the illegality of the contract of employment, which had the effect of rendering the contract unenforceable and depriving the claimant of the basis on which to establish that he was an employee as required by the Act of 1977, where the facts were that part of the claimant's salary was treated in the

employer's books as an expense: *Lewis v. Squash (Irl) Limited* [1983] I.L.R.M. 363. That decision predated the amendment of the Act of 1977 by the Unfair Dismissals (Amendment) Act, 1993. The current position is that s. 8 of the Act of 1977, as amended, now contains a sub-s. (11) which provides as follows:

> "Where the dismissal of an employee is an unfair dismissal and a term or condition of the contract of employment concerned contravened any provision of or made under the Income Tax Acts or the Social Welfare Acts, 1981 to 1993, the employee shall, notwithstanding the contravention, be entitled to redress under this Act, in respect of the dismissal."

Because of that provision, counsel for the Receiver submitted that the pre-receivership practice of "under the counter" payments is not now an impediment to an employee successfully prosecuting a claim under the Act of 1977 and the Minister having a valid right of subrogation arising out of the discharge of that claim. Counsel for the Companies agreed that this is a correct statement of the law. Accordingly, I am satisfied that it is lawful for the Receiver to pay the components of the Minister's claim and, insofar as it arises, the employees' residual claims relating to unfair dismissal.

It was submitted on behalf of the Receiver that there is also a statutory solution to the issue insofar as it relates to claims under the Act of 1973. Those claims have all been the subject of awards made by the Employment Appeals Tribunal under s. 12 of the Act of 1973. The awards were made notwithstanding that the Receiver apprised the Employment Appeals Tribunal that certain employees of Frozen Foods and Kilmore were in regular receipt of cash payments in respect of which their employer did not make returns or pay the relevant PAYE/PRSI. The awards stand and, by virtue of s. 13 of the Act of 1973, they have preferential status under s. 285 of the Act of 1963. Although counsel for the Companies was not in agreement with the submission made by counsel for the Receiver on this point, it seems to me that, by virtue of the combined operation of ss. 12 and 13, the awards stand and they stand as debts which have preferential status. Therefore, I consider that it is lawful for the Receiver to pay the component of the subrogation claim and any component of the residual claims in relation to minimum notice as preferential claims.

That leaves the components of the claims in relation to arrears of wages and holiday pay to be considered. In relation to these components, it was submitted on behalf of the Companies that, as the Oireachtas had not intervened, the common law position should prevail and that these payments should be treated as deriving from an illegal contract and to be unenforceable. It was submitted that, as the Department paid the claims in the knowledge that a significant doubt arose as to their validity, the Companies should not bear the burden of a decision made by the Department, particularly in circumstances in which the Department has not been prepared to argue in favour of its entitlement to be paid. While, at first sight, that smacks of "the pot calling the kettle black", that is invariably the perception which arises from the application of the common law principle that a contract tainted with illegality is not enforceable. Counsel for the Companies drew on the following passage from the judgment of Lord Goff in *Tinsley v. Milligan* [1994] 1 A.C. 340 (at p. 354) to illustrate the principle:

> "The basic principle was stated long ago by Lord Mansfield C.J. in *Holman v. Johnson* [1775] 1 Cowp. 341, 343, in the context of the law of contract, when he said:
>
> > 'The objection, that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has not right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, potior est conditio defendentis.'
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> That principle has been applied again and again, for over two hundred years. It is applicable in courts of equity as well as courts of law … it is important to observe that, as Lord Mansfield made clear, the principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover, the principle allows no room for the exercise of any discretion by the court in favour of one party or the other."

Counsel for the Receiver referred the court to a recent decision of the Court of Appeal of England and Wales in *Hall v. Woolston Hall Leisure Limited* [2001] 1 W.L.R. 225. That case arose out of a statute which gave effect in the United Kingdom to the provisions of the Equal Treatment Directive (Directive 76/207/EEC). The statute provided that in the case of unlawful discrimination on the ground of sex an industrial tribunal could award damages measured in the same manner as any other claim in tort. Accordingly, the Court of Appeal was not considering a claim in contract. While the observations made in relation to the application of the principle of illegality in the context of the law of contract were clearly *obiter*, they

do help to explain the concept. In his judgment, Peter Gibson L.J. (at p. 234) identified two types of case in which it is well established that illegality renders a contract unenforceable from the outset: where it is entered into with the intention of committing an illegal act; and where the contract is expressly or implicitly prohibited by statute. He also identified a third category of cases in which a party may be prevented from enforcing the contract. That is where a contract, lawful when made, is illegally performed and the party participated in that illegal performance. In summarising the position under the law of contract he stated as follows (at p. 236):

> "In cases where the contract of employment is neither entered into for an illegal purpose nor prohibited by statute, the illegal performance of the contract will not render the contract unenforceable unless in addition to knowledge of the facts which make the performance illegal the employee actively participates in the illegal performance. It is a question of fact in each case whether there has been a sufficient degree of participation by the employee."

Mance L.J. (at p. 246) broadly agreed with that dictum but pointed out that the conceptual basis upon which a contract not illegal or prohibited when made may become unenforceable due to the manner of its performance is open to debate.
I think it is reasonable for present purposes to adopt the requirement of active participation in addition to knowledge of the facts to render a contract of employment unenforceable. The employees' claims under consideration here, and the Minister's claim to be subrogated, arise under the Act of 1984. Therefore, it is necessary to consider whether, even if there was evidence that an employee actively participated in defrauding the Revenue Commissioners, his statutory claim can be pursued. Under s. 6 of the Act of 1984 the Minister is mandated to pay out of the Redundancy and Employers' Insolvency Fund the amount which, in his opinion, is or was due to a person to whom the Act applies and who was employed by an employer who has become insolvent in respect of a debt to which the section applies. Arrears of wages and holiday pay come within the categories of debts to which the section applies set out in sub-s. (2) of s. 6. Section 10 of the Act of 1984 provides that where the Minister makes a payment under s. 6 in respect of any debt to which that section applies, any rights and remedies of the employee in respect of the debt shall become rights and remedies of the Minister, including, the right to be paid in priority under s. 285 of the Act of 1963. As I understand it, it is common case that the Minister could be in no better position in relation to claiming priority under s. 285 than the employee. So the question in any case is whether the employee could have enforced the debt. The Act of 1984 contains no provision on the lines of s. 8(11) of the Act of 1977.
There is a fundamental difficulty in this case in determining the validity of the Minister's claim under s. 10 because it is impossible, as a matter of fact, to come to a conclusion as to the extent, if any, to which a particular employee participated in the illegal performance of his or her employment contract in the context of determining whether the debt was enforceable. The evidence put before the court by the Receiver relates to the global position in each of the relevant companies, Frozen Foods and Kilmore. From his examination of the books and records of the Company, the Receiver has ascertained that in the shortened tax period between 6th April, 2001 and 31st December, 2001 (arising from the change of the tax year) the total wages and salaries on which PAYE and PRSI was deducted in relation to both companies was in excess of €1.8 million, whereas total untaxed payments to employees of both companies in the same period amounted to *circa* €0.425 million. The Receiver has averred as to his belief, based on his interviews with Roderick Younger (Mr. Younger), the principal shareholder of the Companies, who is since deceased, and the employees whom he met, and based also on the fact that the employees' payslips and P60s did not take account of the under the counter payments, that the employees were aware that part of their payments for services did not have PAYE/PRSI deducted from them. The evidence put before the court by the Companies, while suggesting that the cash payments were employee driven, does not put the position any further in relation to the participation of individual employees in the illegality.
It is only fair to record that the court was informed by counsel for the Receiver that the Revenue Commissioners have raised an assessment in relation to the twelve-month period prior to the commencement of the receivership and the outstanding tax has been paid. However, I cannot see how that can affect the application of a principle based on public policy.
It would appear, on the basis of the evidence before the court, that the relevant officers of the Department either ignored the anomalous state of the law, which has not translated the protection given in s. 8(11) of the Act of 1977 to redress under the Act of 1984, and took a pragmatic view in relation to the matter and made payments from the Redundancy and Employers' Insolvency Fund on the basis of the taxed payments which had been made to the employees without regard to the issue of enforceability of his or her employment contract at the suit of each individual employee, or, alternatively, were satisfied that no issue as to enforceability arose. Given that the Department did not avail of the opportunity to apprise the court of the basis on which it acted, I consider it reasonable to infer that a pragmatic view was adopted. While I am conscious that this is not a principled way of dealing with the issue, on the state of the evidence, I consider that the court has little option but to accept the approach which was adopted by the Department. Accordingly, I hold that it is lawful for the Receiver to pay the arrears of wages and holiday pay components of the preferential claims made by the Department. Further, insofar as the residual employee claims relate to arrears of wages and holiday pay, I consider that it would appear unfair to discriminate between these employees and employees whose claims have been processed. Therefore, I consider that they should receive similar treatment and the Receiver should meet the claims if they are otherwise valid.
The interest which the Receiver is seeking to protect in seeking the directions of the court on this issue is the interest of the unsecured creditors. While the unsecured creditors were not represented before the court, I am satisfied that there is a high degree of probability, if not certainty, that they could add nothing to resolving the factual impasse in relation to individual

employee knowledge of, and participation in, the "under the counter" payments. Aside from that, I am satisfied that the Companies effectively performed the role of *legitimus contradictor*.

The second issue

In broad terms, the second issue relates to the remuneration of the Receiver and the discharge of costs, charges and expenses incurred by him. Specifically, the Receiver sought directions on the following matters:
(a) as to his entitlement to remuneration under the security documents, s. 318 of the Act of 1963 or otherwise;
(b) as to the restriction, if any, on his entitlement to remuneration on the basis of s. 24(6) of the Conveyancing Act, 1881 (the Act of 1881); and
(c) as to the payment of his future remuneration, costs and expenses under the security documents, s. 318 of the Act of 1963, s. 24(6) of the Act of 1881 or otherwise.
Additionally, the Receiver sought an order, if necessary for the exercise by the court of its discretion under s. 24(6) of the Act of 1881 and/or s. 318 of the Act of 1963 to allow the Receiver to retain out of the assets of the Companies the remuneration costs and expenses incurred to date together with the reasonable remuneration, costs and expenses that the Receiver will incur in the finalisation of the receiverships.
On the hearing of the application counsel for the Receiver intimated that the application of s. 318 of the Act of 1963 did not arise, which was consistent with the position adopted by counsel for the Companies.
In dealing with this issue, it is necessary to consider first what the security documents say on the issue of the Receiver's remuneration and costs, charges and expenses incurred by him. Each of the debentures dated 21st February, 1978 given by Frozen Foods and Kilmore to the Bank contained a provision in the following terms:

> "A Receiver so appointed shall be deemed to be the Agent of the Company and the Company shall be solely responsible for his acts or defaults and for his remuneration which shall be fixed by [the Bank] at the time of or subsequently to his appointment. The provisions of sections 19 sub-section (1), 21, 22, 23 and 24, sub-sections (3), (4), (6), (7), and (8) of the Conveyancing Act 1881 as amended by the Conveyancing Act 1911 and the powers thereby conferred on a mortgagee or receiver shall so far as applicable apply to the Receiver so appointed as if such provisions were incorporated herein save that all monies received by such Receiver after providing for the matters specified in clauses (i) to (iii) of section 24, sub-section (8) aforesaid and for payments which are by Statute declared to be preferential to this security, and for all costs, charges and expenses of or incidental to the exercise of any of the powers of such receiver shall be applied in or towards the satisfaction of this Debenture."

The debenture dated 1st February, 1982 given by Exports to the Bank contained a provision which was in substance the same as the provision in the debentures of 21st December, 1978, the only variation in the wording being that instead of the phrase "for payments which are by Statute declared to be preferential to this security" the phrase "Section 285 of the Companies Act, 1963 so far as applicable" appeared.
The statutory provisions which were expressly applied "so far as applicable" to the Receiver which are relevant for present purposes are sub-ss. (6) and (8) of s. 24 of the Act of 1881.
Sub-section (6) of s. 24 provides as follows:

> "The Receiver shall be entitled to retain out of any monies 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."

Sub-section (8) provides as follows:

> "The receiver shall apply all money received by him as follows (namely):

(i) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and
(ii) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and
(iii) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and
(iv) In payment of the interest accruing due in respect of any principal money due under the mortgage; and shall pay the residue of the money received by him to the person who, but for the possession of the Receiver, would have been entitled to receive the income of the mortgaged property, or who was otherwise entitled to that property."
The type of receiver envisaged in ss. 19 to 24 of the Act of 1881 is "a receiver of the income of mortgaged property, or any part thereof" (s. 19(1)(iii)). However, it is well settled that those provisions can be applied by the parties to a mortgage or debenture to a receiver and manager of all the property and assets of a company, such as the Receiver in this case. The decision of this Court (Geoghegan J.) in *In the Matter of City Car Sales Limited* [1995] 1 I.L.R.M. 221 is authority for that

proposition.
As a matter of construction of the clause in the debentures as quoted above and the incorporation therein of the provisions of sub-ss. (6) and (8) of s. 24 of the Act of 1881, in my view, the position in relation to the Receiver's entitlement to remuneration and reimbursement of costs is as follows:
(1) Sub-section (6) of s. 24 deals with the quantification of his commission. Sub-section (6), as enacted, provides that the commission is to encompass two elements: receiver's remuneration; and the costs, charges and expenses incurred by him. However, it is open to the parties to a mortgage deed or debenture to vary that provision and I will consider later whether it has been varied by implication in the case of the debentures. It has not been expressly varied.

Staying with sub-s. (6), the quantum of the commission can be either –

(a) at a rate, not exceeding 5% as the mortgagee or debenture holder specifies in the appointment of the receiver, or
(b) if no rate is specified either –
(i) the rate of 5%, or
(ii) such higher rate as the court allows on an application made by

the receiver.

In each case the percentage is applied to the gross amount of all money received by the receiver. In this case, no rate was specified by the Bank in the appointment of the Receiver. Therefore, the relevant rate is either 5% or such rate as the court thinks fit to allow on this application.

(2) Sub-section (8) is concerned with the order of priority of the application of the monies received by a receiver. Sub-section (8), as enacted, gives the receiver's commission priority after rent and other outgoings in relation to the property and the interest and such like payable on any prior mortgage. The debentures preserve the statutory order of priority by reference to sub-paras. (i) to (iii) of sub-s. (8), which at (iii) includes the receiver's commission, but then they expressly prioritise –
(a) debts which are statutorily declared to be preferential, and
(b) all costs, charges and expenses of or incidental to the exercise of any of the powers of the Receiver.

What is significant about the manner in which the provisions of sub-s. (8) are varied by the debentures for present purposes is that it envisages the costs, charges and expenses of the receivership being treated separately from the Receiver's "commission" as provided for in s. 24(8)(iii).

(3) That leads to the question whether, in applying sub-s. (6) of s. 24, to ascertain the quantum of the Receiver's "commission", all costs, charges and expenses incurred by the Receiver acting as such, including trading expenses, should be disregarded, as submitted by counsel on behalf of the Receiver. That is the issue of construction which the court must resolve. If the Receiver is correct, in effect, it means that in the application of

sub-s. (6) "commission" is synonymous with "remuneration".

In support of their submission counsel for the Receiver relied on the decision of Megarry V-C in *Marshall v. Cottingham* [1982] Ch. 82. In that case a receiver appointed by a bank under the powers contained in a debenture sold property the subject of the debenture. One of the issues with which the court was concerned was whether the receiver was required to treat the estate agent's fees and expenses, the conveyancing costs and the wages paid to a caretaker pending the sale as part of the "costs, charges and expenses incurred by him as receiver" under s. 109(6) of the Law of Property Act, 1925 so as to be payable out of his commission. Apart from substituting "other rate" for "higher rate", s. 109(6) reproduced s. 24(6) of the Act of 1881 down to the last comma, as Megarry V-C recorded in his judgment (at p. 86). Section 109(8)(i) of the Act of 1925 also reproduced s. 24(8)(i) of the Act of 1881 (p.89). In the debenture under consideration there was a provision which operated by way of adaptation of s. 109(8). It provided that all money received by the receiver "shall be applied first in the payment of his … remuneration and the cost of realisation …" and there followed the matters specified in the first three paragraphs of s. 109(8). Megarry V-C dealt with the effect of that provision, clause 8, as follows (at p. 90):

> "The result, in my judgment, is that if the phrase 'costs of realisation' in clause 8 includes the agents' fees and expenses on the sale of the property, the conveyancing costs of that sale, and the caretaker's wages pending the sale, then the debenture has expressly provided for them to be paid out of any money received by the receiver; and as they are to be paid in this way, then it cannot be contended that they are nevertheless to be borne by the receiver out of his commission as part of the 'costs, charges and expenses incurred by him as a receiver' within section 109(6). It seems to me perfectly plain that these items are included in the 'costs of realisation', and that there is no ground on which it could be said that the receiver's commission must bear them."

Counsel for the Companies did not seriously take issue with the submission of counsel for the Receiver, acknowledging that there was a reasonable argument for the interpretation advanced and that there was some support for the interpretation

advocated in *Marshall v. Cottingham*, although they emphasised that the clause under consideration there specifically referred to the receiver's "remuneration".
If one is to construe the incorporation of the provisions of sub-s. (6) and sub-s. (8) of s. 24 into the debentures so as to give consistency *inter se* to the incorporated provisions, the commission referred to in sub-s. (6) and in sub-s. (8)(iii) must exclude the Receiver's costs, charges and expenses which are expressly provided for in the incorporation of sub-s. (8) subject to variation.
The remuneration and the costs, charges and expenses, including legal costs, claimed by the Receiver for acting as receiver are tabulated in the following table:

COSTS AND EXPENSES CLAIMED BY THE RECEIVER			
Remuneration/Costs/Expenses IncurredFrozen Foods € Kilmore € Exports €			
Time-costed costs: date of appointment to 30th June, 2005 Out of pocket expenses: date of appointment to 30th June, 2005 Estimated costs: 1st July, 2005 to completion of receivership.	791,283 26,346 50,000	186,450 6,548 25,000	28,324 143 5,000
A Total	**867,629**	**217,998**	**33,467**

Legal Costs: date of appointment to 30th September, 2004 Estimated legal costs: 1st October, 2004 to completion of receivership 188,527 25,000 52,709 25,000 12,760 -	
B Total **213,527** **77,709** **12,760**	

What has happened in fact is that the Bank has already paid to the Receiver considerable sums in respect of both the Receiver's costs and expenses and legal costs in relation to each of the three companies. For instance, in the case of Frozen Foods, the Bank has paid to the Receiver on account a sum which is equivalent to 72% of the figure of €867,629 claimed by the Receiver for remuneration, which in the case of remuneration in respect of the period up to 30th June, 2005 has been claimed on a time-costed basis, and for reimbursement of out of pocket expenses. In his grounding affidavit the Receiver has averred, by reference to his report of the receivership which is exhibited in the affidavit (the Report), that the remuneration and expenses actually received out of the assets of the Companies constitute less than 5% of total receipts even on the narrowest possible interpretation of s. 24(6) of the Act of 1881. The Receiver has gone on to explain that the Bank made the additional payments on account of this remuneration on the basis of reserving its right to recoupment depending on the determination of this issue. In relation to the basis on which he has charged remuneration, the Receiver has averred as follows:

> "… I have charged remuneration based on the normal accounting basis and have at all times acted *bona fide* with regard to delegation and charging of remuneration. Equally, where I have engaged professional advisors, it has been on the ordinary basis of charge which I would operate as a receiver or liquidator. I beg to refer to the Report which sets out at appendix 2 of the Report a schedule setting out the remuneration for the course of the receivership and I confirm that the rates charged are those charged by my firm for work of this nature and that work has been delegated to more junior members where possible."

Appendix 2 identifies, in relation to each of the Companies, the members of the Receiver's accountancy firm, PricewaterhouseCoopers, engaged on work on the receiverships, the status or grade within the firm of each person, the period during which each was engaged, the number of hours during the relevant period when each was engaged and the hourly rate charged.

In the grounding affidavit the Receiver asked the court, if necessary, to use its discretion pursuant to s. 24(6) of the Act of 1881 to allow him his actual remuneration and costs and expenses charged together with reasonable future remuneration and costs and expenses which he expects to incur in the finalisation of the receiverships as per the estimated figures set out in the above table.

In the exhibited Report there is set out in appendix 1, in relation to each of the Companies, a receipts and payments account for the period from the date of appointment to 30th June, 2005. The Receiver's claims set out in respect of each of the Companies at A in the above table, according to the calculations made by counsel for the Companies, which appear to me to be correct, represent the following percentages of the receipts in respect of the relevant company as set out in appendix 1: in the case of Frozen Foods 10.1%; in the case of Kilmore 8.2%; and in the case of Exports 1.6%. In aggregate the total costs claimed at A in the table represent 8.4% of the total receipts from the three companies (€13,328,431.00).

The only relevant authority in this jurisdiction on this issue is the decision of this Court (Geoghegan J.) in *In the Matter of City Car Sales Limited*. In that case the official liquidator of City Car Sales Limited challenged the retention by a receiver appointed under a debenture of the sum of £37,300 out of the gross assets realised by him in respect of his fees as a receiver. The terms of the debenture had provided that its provisions would take effect "by way of variation and extension of the provisions of sections 19 to 24 (inclusive) of the … Act [of 1881] which provision so varied and extended shall be

regarded as incorporated herein". The liquidator submitted that the terms of the debenture provided that the receiver was entitled to 5% commission calculated in accordance with the provisions of s. 24, which amounted to the sum of £15,493.81. One of the issues the court was concerned with was whether it should, in the exercise of the discretion conferred by s. 24(6), fix a higher rate of remuneration. On this issue Geoghegan J. stated (at p. 227):

> "I am satisfied that in this case [the receiver] fixed his remuneration on a normal accountancy basis and acted at all times entirely *bona fide* and did not advert to any problem arising under the Conveyancing Act, 1881. I am satisfied that the court does have jurisdiction and furthermore that it should exercise it in favour of the receiver in this case."

Later Geoghegan J. stated (at p. 228):

> "As I am satisfied that the sums retained by the receiver in this case are reasonable, I will make an order under s. 24(6) of the Conveyancing Act, 1881 as extended by the debenture under section 19 of the same Act allowing the receiver such higher rate than the 5% which results in his being lawfully entitled to retain the sum which he has in fact retained."

Counsel for the Companies pointed out that the decision of Geoghegan J. pre-dated the decision of the English High Court, Chancery Division, in *Mirror Group Newspapers plc v. Maxwell* [1998] BCLC 638. That case concerned the remuneration payable to receivers appointed by the court to get in the estate of Robert Maxwell in the absence of a grant of administration to his estate and in the context of proceedings by Mirror Group Newspapers plc (MGN) against his estate. Although formally appointed by the court, the receivers had been selected by MGN and they had the benefit of an indemnity from MGN. Following five years of complex investigations the receivers applied to court for directions as to the manner in which their remuneration was to be fixed. At that time they were claiming Stg.£1.628 million as the cost of the receivership, including solicitors' costs and disbursements and the receivers' own disbursements and proposed remuneration, whereas the net assets amounted to Stg.£1.672 million. The court held that in the circumstances of the case, the remuneration of the receivers should be fixed by the taxing officer pursuant to the rules of court and it should be made on a standard basis, rather than on an indemnity basis. Of interest are the statements of principle in the judgment of Ferris J. in relation to the remuneration of office holders such as administrators, liquidators, receivers, trustees in bankruptcy and such like. Having stated the essential point, that office holders are fiduciaries whose fundamental obligation is a duty to account, both for the way in which they exercise their powers and for the property with which they deal, Ferris J. stated (at p. 648):

> "Certain more particular consequences follow from what I have said so far. First, office holders must expect to give full particulars in order to justify the amount of any claim for remuneration. If they seek to be remunerated upon, or partly upon, the basis of time spent in the performance of their duties they must do significantly more than list the total number of hours spent by them or other fee-earning members of their staff and multiply this total by a sum claimed to be the charging rate of the individual whose time was spent. They must explain the nature of each main task undertaken, the considerations which led them to embark upon that task and, if the task proved more difficult or expensive to perform than at first expected, to persevere in it. The time spent needs to be linked to this explanation, so that it can be seen what time was devoted to each task. The amount of detail which needs to be provided will, however, be proportionate to the case."

Later, in a passage relied on by counsel on behalf of the Companies, Ferris J. stated (at p. 652):

> "In my judgment it is vital to recognise three things in this field. First, time spent represents a measure not of the value of the service rendered but of the cost of rendering it. Remuneration should be fixed, so as to reward value, not so as to indemnify against cost. Second, time spent is only one of a number of relevant factors, the others being, as I have said, those which find expression in r. 2.47 and similar rules. The giving of proper weight to these factors is an essential part of the process of assessing the value, as distinct from the cost, of what has been done. Third, it follows from the first two points that, as the task is to assess value rather than cost, the tribunal which fixes remuneration needs to be supplied with full information on all the factors which I have mentioned."

Rule 2.47 referred to in that passage was contained in the Insolvency Rules 1986, which governed the remuneration of an administrator of a company under an administration order. Under the rule the creditors' committee, if there was one, had to choose between remuneration in the form of a percentage of the value of the property dealt with and remuneration on the basis of time properly spent and, in doing so, had to have regard to various factors such as the complexity of the case, whether any responsibility of an exceptional kind or degree would fall on the administrator, the effectiveness with which he appeared to be carrying out his duties and such like. While the 1986 rules did not apply to court appointed receivers, Ferris J. considered that factors of the kind stated in r. 2.47, including time properly spent, were relevant to the fixing or assessment of remuneration of a court appointed receiver. It is also perhaps worth noting that in 1992 in England the relevant rules of court had been amended to allow the court to direct that remuneration should be fixed by reference to such scales or rates of professional charges as the court thought fit or to be assessed by a "taxing officer", meaning a taxing

master or a District judge.
Counsel for the Companies also referred the court to the extra judicial commentary by Mr. Justice Lightman on the decision in the *MGN* case published in Insolvency Intelligence (1998) Vol. 11, No. 1, January 1998, which makes interesting reading and has a lot of relevance to insolvency practice in this jurisdiction, if not to this particular case.
The argument advanced by counsel for the Companies in relation to the quantification of the Receiver's remuneration is premised on the entitlement of the owners of the assets out of which the assets are to be paid to know by what criteria the amount of the remuneration claimed is calculated. That proposition is correct, although, in an insolvency context, the owners of the assets will be the creditors whose debts require to be met. Essentially the argument advanced on behalf of the Companies was that the information provided by the Receiver falls short of enabling any real analysis of either the remuneration claimed or the legal costs in respect of which he seeks reimbursement.
I have already indicated the evidence adduced by the Receiver in support of his claim for remuneration. His Report outlines the history of the receivership, the steps he took to get in the assets of the Companies, his involvement in trading at three locations, Galway, Clogherhead and Kilmore Quay, for approximately four months, his dealing with the employees of Frozen Foods (179 employees) and Kilmore (59 employees) including matters covered by the first issue, dealing with title and planning issues in relation to the fixed assets, disposing of the fixed assets, dealing with stock in trade, which was disposed of over an eight-month period, dealing with trade debts and trade creditors and miscellaneous other matters, including the litigation which is the subject of the third issue. The Receiver has made interim distributions totalling €7 million to the Bank, following realisation of the Companies' fixed assets and the quantification of potentially preferential claims.
It was submitted on behalf of the Companies that the Receiver should, but has not, explained the nature of each of the main tasks undertaken, the considerations which led him to embark on those tasks, and whether and how the tasks proved more expensive or difficult. Having considered the Receiver's Report, I do not think that the criticism implied in that submission is justified. However, it is true, as counsel for the Companies submitted, that the Receiver has failed to link the time spent to the tasks he was required to perform in the receivership. Counsel for the Receiver accepted that that was the case, but gave a two-fold answer to it. First, it was submitted that the Receiver followed the practice in court liquidations and furnished the court with a report of the type which, as a matter of practice, is put before the Examiner and the court in a court liquidation, arguing that the submission by counsel for the Companies, that the analogy with a court liquidation is not apt because an official liquidator is at all times accountable to the Examiner and ultimately to the High Court, does not affect the issue. The point emphasised was that the Report gives an overview of the operational activity of the Receiver. In any event it was submitted that no objection had been advanced as to how the Receiver conducted the receivership. Secondly, it was submitted that, as there is no controversy in this case as to the manner in which the receivership was conducted by the Receiver, the court should follow the decision of Geoghegan J., which it was submitted was to sanction remuneration which was reasonable and calculated in the normal way.
There is no mechanism in this jurisdiction whereby the court can refer the measurement of remuneration and costs, charges and expenses (other than legal costs) in respect of which the Receiver is entitled to reimbursement of out of the assets collected by him to a venue or forum more knowledgeable and experienced and, in short, better equipped to deal with the issue than the court. In practical terms, in this type of situation, the court relies on some party who effectively performs a role similar to an *amicus curiae*, be it the Revenue Commissioners or some other representative creditor, or a regulator such as IFSRA or the company. In this case, the solicitors and counsel for the Companies performed that role conscientiously and effectively and raised the matters of which the court needed to be apprised. However, in reality, I do not think, even with further information and, in particular, information linking the hours claimed in appendix 2 to the Report with the various tasks performed by the Receiver, I would be in any better position to adjudicate on the claim.
There is an additional factor. If the court were to seek further information from the Receiver that would involve further time and expense on the part of the Receiver and further court time and litigation costs.
I am satisfied that the Receiver conducted the receivership in a proper and *bona fide* manner and that the basis on which the remuneration is claimed conforms with the normal practice in the accountancy profession. Accordingly, on that basis, subject to one qualification which I will outline when considering the third issue, I am prepared to adopt the course adopted by Geoghegan J. and make an order under s. 24(6) of the Act of 1881, as applied and extended by the debentures, allowing the Receiver such rate higher than 5% which results in his being lawfully entitled to remuneration by way of commission at the rate which will entitle him to the following sums out of the assets of the Companies:
(a) in the case of Frozen Foods €841,283;
(b) in the case of Kilmore €211,450; and
(c) in the case of Exports €33,324.
On the basis of the manner in which I have construed the debentures, the out of pocket expenses fall outside the commission, but are payable separately.
Similarly, the legal costs fall outside the commission and are payable separately. It was accepted by counsel on behalf of the Receiver that on that basis the court does not have to approve the legal costs. Unlike the other elements of the Receiver's claim, there is a mechanism for having the appropriateness of the legal costs dealt with – having them taxed by a Taxing Master of this Court. However, that is a matter for the parties *inter se*.
Finally, I should make it clear that the second issue is concerned only with the entitlement of the Receiver to remuneration and costs and the measurement of the remuneration. It is not concerned with the issue of priority of distribution out of the assets of the Companies.

The third issue

The Receiver seeks directions as to whether the Bank is entitled to be paid by the Receiver out of the assets of the Companies the legal costs and other expenses the Bank incurred in connection with:
(1) the appointment of the Receiver;
(2) proceedings taken against the Bank and the Receiver by the Companies and Constance Younger (the Executrix), as executrix of Mr. Younger; and
(3) the receivership of the Companies generally.
In his grounding affidavit the Receiver has averred that he was requested by the Bank to seek these directions in a letter dated 26th May, 2005 from the Bank's solicitors, McKeever Rowan.
The Receiver having adopted the position, properly in my view, that it would not be appropriate to offer submissions in respect of these matters, the proponents on this issue were the Bank and the Companies.
Apart from the deeds of appointment and the security documents, the only evidence put before the court of the Bank's claim is the letter of 26th May, 2005 and the enclosures sent with it which comprised the following:
(a) two bills of costs dated respectively 22nd August, 2001 and 31st January, 2002, which, *prima facie*, appear to relate to legal services provided to the Bank in relation to the enforcement of its security up to and including the appointment of the Receiver, including the publication of notice of the appointment as required by law;
(b) an agreement (the Settlement) dated 12th May, 2003 made between Kilmore, Frozen Foods and the Executrix of the one part and the Bank and the Receiver of the other part; and
(c) a "request for payment" for legal services dated 13th May, 2003 in respect of the period from 1st February, 2002 to the date of the request which, *prima facie*, apart from an item referred to as "advices to the Bank on all aspects of the receivership" relates to the proceedings the compromise of which was the subject of the Settlement.

The Settlement requires close consideration. It recited that –
(i) the Companies and Mr. Younger had instituted proceedings in this Court (Record No. 2002/6240P) in which they sought various reliefs against the Bank and the Receiver, including declaratory relief and damages arising from the banking relationship between the parties and the Bank and its related companies,
(ii) the Executrix had intimated that she too (presumably in her own right) might have a claim or claims against the Bank and/or the Receiver arising out of the banking relationship referred to at (i) or out of her own banking relationship with the Bank and/or its related companies, and
(iii) that the Bank and the Receiver disputed the validity of any of those claims and denied liability in respect thereof.
The operative part of the Settlement was in the following terms:

> "Each and every one of the aforementioned claims is hereby compromised and settled without any admission of liability on the part of [the Bank] and/or its related companies and [the Receiver] by a payment of €100,000 as a contribution towards the Plaintiffs' costs in the aforementioned proceedings, made by [the Bank] to Keane Solicitors on behalf of each of the claimants and/or prospective claimants, the receipt whereof is hereby acknowledged, which said payment is in full and final satisfaction of all such claims and any other claim arising from the aforementioned banking relationships between the parties."

In the Companies' written legal submissions it is stated that the essential thrust of the proceedings by the Companies and Mr. Younger against the Bank and the Receiver was that the Bank had acted unlawfully and/or in breach of contract in appointing a receiver under the security documents and that Mr. Younger had also a claim for personal injuries sustained in consequence of the alleged wrongdoing on the part of the Bank. Mr. Younger died after the appointment of the Receiver but before the execution of the Settlement. I am assuming that the foregoing correctly states the factual position, as it was not controverted by counsel for the Receiver or by counsel for the Bank.
In relation to the proceedings, the Bank is claiming both the recoupment of the sum of €100,000 it paid as a contribution towards the plaintiffs' costs and its own costs in the defence of the proceedings. The aggregate V.A.T. inclusive sum claimed on the request for payment referred to at (c) is €93,314.53, which, as I have stated, covers not only the costs in connection with the proceedings but also advices to the Bank on all aspects of the receivership. The case made on behalf of the Bank in support of its claim is that the Bank performed a vital service on behalf of the Receiver and the receivership in defending and settling the proceedings because ongoing litigation would have interfered with the disposal of the assets of the Companies and the expeditious progress of the receivership.
The legal principles governing the entitlement of a mortgagee to add to the secured debt his costs, charges and expenses properly incurred are summarised in the judgment of the Court of Appeal (delivered by Scott L.J.) in *Gomba Holdings Limited v. Minories Finance* [1993] Ch. 171. The summary commences with the following quotation of remarks made by Lord Selborne L.C. in *Cotterell v. Stratton* (1872) L.R. 8 Ch. App. 295, (at p.302), which were made in a case in which the mortgage, so far as the report revealed, was silent about cost charges and expenses:

> "The contract between mortgagor and mortgagee, as it is understood in this court, makes the mortgage a security, not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to

> a suit for foreclosure or redemption. … These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee … as may amount to a violation or culpable neglect of his duty under the contract."

On the basis of the authorities, the Court of Appeal held that the principle that a mortgagee is entitled to add to the secured debt his costs, charges and expenses properly incurred is firmly embedded in the law and is the principle underlying express contractual provisions of the type one usually finds in security documents. However, the court went on to clarify some aspects of the general principle.

First, it pointed out that it is not all costs, charges and expenses properly incurred which a mortgagee can, without express contractual justification, add to the security. It illustrated this point by reference to a decision of the Court of Appeal in *Parker-Tweedale v. Dunbar Bank plc (No. 2)* [1991] Ch. 26 and in particular the following passage from the judgment of Nourse L.J. (at p. 33):

> "A mortgagee is allowed to reimburse himself out of the mortgaged property for all costs, charges and expenses reasonably and properly incurred in enforcing or preserving his security. Often the process of enforcement or preservation makes it necessary for him to take or defend proceedings. In regard to such proceedings three propositions may be stated. (1) The mortgagee's costs, reasonably and properly incurred, of proceedings between himself and the mortgagor or his surety are allowable. The classical examples are proceedings for payment, sale, foreclosure or redemption, but nowadays the most common are those for possession of the mortgaged property preliminary to the exercise of the mortgagee's statutory power of sale out of court. (2) Allowable also are the mortgagee's costs, reasonably and properly incurred, of proceedings between himself and a third party where what is impugned is the title to the estate. In such a case the mortgagee acts for the benefit of the equity of redemption as much as for that of the security. (3) But where a third party impugns the title to the mortgage, or the enforcement or exercise of some right or power accruing to the mortgagee thereunder, the mortgagee's costs of the proceedings, even though they may be reasonably and properly incurred, are not allowable."

It is interesting to note that Nourse L.J. recorded (at p. 35) that the third proposition, which he characterised as an exception to the general rule, was recognised in Ireland in *In re Baldwin's Estate* [1900] 1 I.R. 15. However, on the basis of what the court has been told of the nature of the proceedings, and insofar as it is relevant, I do not consider the proceedings, notwithstanding the joinder of Mr. Younger as a plaintiff, are properly characterised as a third party challenge, so as to come within the exception.

Secondly, the Court of Appeal pointed out that the court will examine the costs, charges and expenses sought to be added to the security and disallow those that it considers have not been "properly incurred", subject to the qualification that express contractual provisions may alter what otherwise would have been the position.

Thirdly, there is authority for the proposition that the entitlement of a mortgagee to receive its costs "properly incurred" requires the costs to be taxed on a party and party basis. However, it was recognised that the express terms of security document, if plain and unequivocal, could justify a departure from that rule.

It is necessary to look at the security documents now to see what they say about legal expenses incurred by the Bank, as distinct from the Receiver. The position is as follows:

- The debentures secured "all moneys" due or to become due, but none of them contained an express provision in relation to legal costs or expenses.
- The supplemental charges on book debts given by Frozen Foods and Kilmore merely secured the monies and liabilities referred to in the debentures, to which they were supplemental.
- In the case of Frozen Foods, the proviso for redemption in the mortgage of unregistered land at Clogherhead made redemption conditional upon payment by Frozen Foods to the Bank of, *inter alia*, "all costs and expenses incurred by the Bank in recovering or enforcing payment of the said balance, or any part thereof, or attendant upon or incidental to this security".
- In relation to Kilmore, the charge on registered land in County Wexford for present and future advances contained no express provision in relation to legal costs or expenses.
- In relation to the guarantees, one of which was given by, *inter alia*, Kilmore and Exports in relation to the liabilities of Frozen Foods, and the other of which was given by, *inter alia*, Frozen Foods and Exports in respect of the liabilities of Kilmore, there was guaranteed payment to the Bank of –

> "… all present and future actual or contingent liabilities of the Debtor to the Bank whether on account of loans … and whether incurred as principal or surety and whether solely, jointly or in partnership with others and all legal or other expenses (on a full indemnity basis) howsoever incurred by the Bank in connection therewith."

Counsel for the Companies argued that in the Settlement the Bank contracted out of any entitlement it might have to add to its debt the costs, charges and expenses incurred by it, whether proper or otherwise in connection with the receiverships. Alternatively, it was submitted that the Bank was estopped by reason of having entered into the Settlement from seeking to

add the sums claimed to its debt in the receiverships.
In my view, a distinction has to be drawn between the costs in relation to the proceedings, both the €100,000 contribution to the plaintiff's costs and the Bank's own costs, on the one hand, and the other costs claimed by the Bank, on the other hand. In relation to the costs of the proceedings, the analysis of the Settlement advanced by counsel for the Companies, in my view, is underpinned by irrefutable logic. They argued that, if the proceedings had continued to final determination, there would have been two possible outcomes: either the Companies and the Executrix would have succeeded in establishing that the Bank had acted improperly or unlawfully in appointing the Receiver, in which case they would have been entitled to various remedies including, probably, their costs as against the Bank and the Receiver; or the Companies and the Executrix would have failed and the Bank and the Receiver would probably have been awarded costs against them. An entitlement by the Bank to add its costs to the debt would only have arisen if the latter outcome, that the Companies lost, had come to pass. But what happened, so the argument goes, was that, presumably for reasons of commercial prudence, the Bank decided to compromise the proceedings. While this achieved the result which the Bank had hoped for in defending the proceedings, it was an outcome that was purchased. The Bank bought off the risk of the other outcome, the Companies winning, occurring. It cannot now maintain a claim on the assumption that the Companies would have lost, it was argued. By making the contribution towards the plaintiff's costs, the Bank must be taken to have waived or contracted out of any entitlement it might otherwise have to recover its own costs or to reclaim the sum of €100,000. Any alternative interpretation results in an absurdity and undermines consideration for the settlement, it was submitted.
In my view, the clear intent of the Settlement was to remove all challenges to the Bank's security and the validity of the appointment of the Receiver and to bring the proceedings to a final conclusion. It was implicit in the Settlement that the intention of the parties was to terminate all liability of each side to the other side arising out of the proceedings, including liability for costs. In particular, it was an implied term that the plaintiffs would have no liability to the defendants for costs and that the defendants would have no further liability, beyond the contribution of €100,000, to the plaintiffs for costs. The effect of the compromise was to render inapplicable any entitlement the Bank would have had to costs had it not been entered into. As a matter of contract as between the Bank, on the one hand, and the Companies and the Executrix, on the other hand, the Bank has no entitlement to recoup from the assets of the Companies the sum of €100,000 it paid under the Settlement or to its own costs of the proceedings.
In relation to the Bank's claim to be entitled to be paid the legal costs and expenses incurred in connection with the appointment of the Receiver out of the assets of the Companies, I assume that the costs in question are those to which the bills of costs dated 22nd August, 2001 and 31st January, 2002 relate. Those bills aggregate €24,138, inclusive of VAT. Having regard to the information given in the bills, I am satisfied that those costs and expenses were reasonably and properly incurred by the Bank in relation to the enforcement and preservation of its security and, subject to being reasonable in amount, the Bank is entitled to reimbursement out of the secured assets.
It was submitted on behalf of the Companies that the decision of the Court of Appeal in the *Gomba* case is authority for the proposition that, where a mortgagee is claiming entitlement to recoupment of legal costs out of the secured assets, the proper measure of the costs is what they would tax on a party and party basis. I do not fully accept that interpretation of the decision of the Court of Appeal. In my view, the Court of Appeal (at p. 186) clearly recognised that the express terms of a particular security document may eliminate the risk of taxation being ordered on a party and party basis, for example, where it is expressly provided that the mortgagee is entitled to costs on "a full indemnity basis". However, such a term does not countenance costs which are either unreasonably incurred or unreasonable in amount being allowed. In this case, the guarantees cover the liability of Frozen Foods and Kilmore for legal and other expenses on a full indemnity basis and the three debentures secure, *inter alia*, the liability of each of the Companies giving the debentures as guarantor by way of floating charge on the respective assets of each of the Companies. That, in my view, is sufficient to entitle the Bank to the costs it has claimed in relation to the appointment of the Receiver on an indemnity basis, subject, however, to not being unreasonable in amount. As regards the quantum of this aspect of the claim by the Bank, adopting an approach consistent with the approach I have adopted in relation to the Receiver's legal costs, I do not propose to approve of the amount claimed. If the Companies dispute the amount, they can request the taxation of the costs.
However, I do not see how the Bank can justify an assertion that it is entitled to legal costs of the receivership generally over and above the costs associated with the appointment of the Receiver. The costs referable to any legal advice or assistance required in connection with the conduct of the receivership and the exercise of the Receiver's powers must be to the account of the Receiver, under the provisions of the debentures, which I have already considered. To recognise an entitlement of the Bank to the costs of the receivership generally would, in effect, be to charge the assets of the Companies twice for the cost of legal services which could only properly be incurred once. Therefore, the Bank has no entitlement to reimbursement in respect of any of the matters covered by the request for payment dated 13th May, 2003.
Finally, the issue of the Receiver's legal costs of defending the proceedings brought by the Companies was not specifically addressed. *Prima facie*, it seems to me that the position of the Receiver can be no different from that of the Bank, so that, as a matter of contract as between the Receiver, on the one hand, and the Companies and the Executrix, on the other hand, the Receiver can have no entitlement to recoup from the assets of the Companies his legal costs of defending the proceedings. Therefore, it seems to me that the Receiver must look to the Bank for recouping his legal costs of the proceedings. However, I will hear further submissions on this issue, if the parties so wish. As the issue was neither raised nor addressed I am making no decision on it.

The issue of the Receiver's claim for remuneration arising out of the legal proceedings was adverted to. Counsel for the

Receiver made the case on his behalf that he acted at all times in accordance with his powers and duties as Receiver in defending the proceedings and that he had been advised that they would have been unsuccessful if they had proceeded to a full hearing. As a matter of logic, it is not clear to me that the Receiver's remuneration arising out of the defence of the proceedings should be treated differently from the legal costs incurred by him. However, as the Receiver did not participate in the argument on the third issue, I am making no decision on this point, although I set out my preliminary views as a qualification to my decision on the second issue. I will hear further submissions on this point, if the parties so wish.

Order

I am leaving the precise form of the order to be made in abeyance until the parties have had an opportunity to consider this judgment.