

THE HIGH COURT

[2011 No. 351 COS]

IN THE MATTER OF VARKO LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACT 1963-2006 AND IN THE MATTER OF AN APPLICATION BY THE EXECUTORS OF CHARLOTTE MCCOY DECEASED PURSUANT TO SECTION 21(10) OF THE COMPANIES ACT 1963**VARKO LIMITED (IN LIQUIDATION)****JUDGMENT of Mr. Justice Gilligan delivered on the 3rd day of February, 2012**

1. This is an application by the executors of the late Charlotte McCoy, deceased, who died at the age of 89 years on 29th March, 2011, in the Bon Secours Hospital, Cork. By her last will and testament executed on 1st April, 2010 she appointed her daughters, Irene and Marlo as joint executors.
2. Varko Limited was incorporated on the 25th August, 2006, and the company operated a call centre operation from premises at Unit 1, Dosco Industrial Estate, South Douglas Road, Cork. James McCoy, the only son of the deceased, Charlotte McCoy, was one of two directors of the company and held 65 ordinary shares. The other director was Richard Doggett and he held 35 shares. The company appears to have been a substantial operation with administrative expenses for the year ended 31st August, 2009, amounting to €1,980,551.00. The company traded as Intercall Management and is described as one of Ireland's longest standing outsource call centre specialists with offices located in Cork City and a workforce in excess of 50 people across a diverse range of client projects.
3. In the originating notice of motion as dated 22nd June, 2011, the applicants seek a number of reliefs as follows:-
 - (1) A determination whether an amount of €216,832 does not form part of the assets of the Company.
 - (2) A declaration that the amount of aforementioned amount or part thereof is held on trust for the Applicant or otherwise payable to the Applicant and is not available for distribution in the winding up of the Company or whether the Applicant is a secured or unsecured creditor of the Company.
 - (3) A Declaration that the Applicant is beneficially entitled to aforementioned amount of part thereof.
 - (4) Pending determination of the foregoing:
 1. an order for discovery or disclosure of documentation relevant to the winding up of the Company and the assets available for distribution;
 2. an injunction preventing the disposal of the assets of the Company up to the value of €216,832.00
 - (5) Such further or other orders and this Honourable Court may direct.
 - (6) An order for costs of and related to this Application.
4. This application centres on an amount of €200,000.00, monies belonging to the late Charlotte McCoy, which through a complicated transaction are alleged to have found their way into the accounts of Varko Limited and to have benefited the company prior to it going into liquidation.
5. Having had the benefit of reading and considering the affidavit of Irene Judkins as sworn on 9th June, 2011, together with the exhibits as attached thereto, the affidavit of Linda Harney as sworn on 30th June, 2011, and the exhibits as attached thereto, the affidavit of Jennifer Fay as sworn on behalf of the liquidator of 15th July, 2011 and the exhibits as attached thereto the following is a summary as best as can be achieved from the information available and which leaves certain questions open and unanswered. In the circumstances, the court can only reach its conclusion on the basis of the facts before it.
6. The late Charlotte McCoy lived alone at 10B Ardbrack Heights, a property which she purchased jointly with her now deceased husband in 1989. She had five adult children including James McCoy, her only son and four daughters, including Irene and Marlo. Prior to her death she suffered from an eye condition, Macular Degeneration which in her later years rendered her partially sighted and she was not able to read the ordinary printed word although she could read much enlarged print by using a magnifying glass.
7. Following her husband's death in 1996, she remained living at her home at 10B Ardbrack Heights, Kinsale, Co. Cork. The property was a spacious split level apartment with panoramic views over the sea and over the years she had become very attached to it. She was a fully dependent wife throughout her marriage and all financial matters were handled by her husband and unfortunately upon his death she found that she was in a very poor financial state and her only source of income was a small disability allowance and the state pension in addition to her family home being the apartment which was unencumbered.
8. Subsequent to her husband's death, her only son James involved her in his business dealings by making her a nominal director/shareholder in his company, D.A.N. Limited. The deceased was glad to assist and did not think anything of it. She subsequently discovered that he had also made her a director/shareholder of another company, Club Select Limited.
9. Subsequently in or around 1999, James McCoy approached his mother again explaining that he was in some financial difficulty and as a result of conversations that took place, she agreed that her home could be used by James as security and, as a result of representations that were made to her by her son, the property was transferred into both their names in a joint tenancy. The deceased said that her son explained to her that this was just a legal technicality and there was nothing for her to worry about and

no need to tell anyone else in the family about the arrangement and she believed and trusted her son and had no reason to think otherwise.

10. Shortly after this, the deceased attended with her son at a firm of solicitors in Cork who had previously represented her and her deceased husband and it was the deceased's understanding that another solicitor in that firm was to act on behalf of her son in the transfer. The deceased was informed that a mortgage application with Irish Nationwide Building Society would be processed in the sum of €100,000 credited to her bank account and that this sum would then be paid out to her son. The deceased avers that at no time was it explained to her that the legal consequences of transferring the property into a joint tenancy would bring about a situation whereby the property would not form part of her estate. Further she avers that she was not advised as to how matters were going to be regularised in the future.

11. Subsequently in 2002, the deceased averred that her son came to see her and as a result of a discussion about making a will she went with him to the same solicitor's office and the deceased averred that she was advised that she did not have anything to leave to her daughters because of the joint tenancy but the solicitor advised her that there was a mechanism to sever the joint tenancy either then or at anytime in the future but she was not aware of this option. She averred that she trusted her son James entirely and did not think he was doing anything underhand nor that he was trying in anyway to take the property from her. Her understanding of the situation was that the will in question which she made on the day reconfirmed the joint tenancy in the property and that her son was most likely trying to pave the way for further borrowings without her consent. She averred that she had since attended at the solicitor's office with the same solicitor and that the document itself consisting of the will was destroyed in her presence.

12. The deceased averred that her son James had a gambling problem and she noticed a gradual change in his behaviour and he began to make use of her credit card for various betting transactions.

13. Subsequently in 2008, the deceased averred that her son James attended with her and told her that there was no longer any need for her to be a director of D.A.N. and that she should sign a document that would mean that she came off the list of directors. The deceased averred that she recalled this request in particular because her son handed her a document to sign but had rolled up the top piece of the paper so she could not see the heading and in retrospect she now considers that this document may well have been in connection with her son's arrangement to re-mortgage the property with First Active Building Society. She was also brought around that time to a local garda station to sign some identity papers and her son explained to her that the bank was just being difficult and wanted J.D. documentation.

14. In or about April 2008, the deceased's property which at that time she held with her son James was re-mortgaged to the First Active Building Society in the sum of €371,000. The deceased averred that she knew nothing about this mortgage, the purpose of which was to repay the existing mortgage with the Irish Nationwide and to provide an equity release for future investment. In the loan documentation which was submitted, the deceased's home was constantly referred to as a residential investment property which had a rental income of €24,000. The deceased averred that she never sanctioned this loan and was not involved in negotiating the loan with any of the banks in question. She did not receive any benefit directly or indirectly from the loans and in respect of the First Active loan, the signature which appears on the acceptance document has been purportedly witnessed by solicitors who acted for her son and the deceased averred that she did not attend that solicitor's office in respect of the First Active loan and was never advised by anyone in that office that the loan was being processed. She averred that she never had a lodger in her house and nobody paid rent on her property which she lived in.

15. Subsequently, it appears that James McCoy and Richard Doggett (his fellow director in Varko) both accepted that out of this €371,000.00 loan a sum of €200,000.00 was used to the benefit of Varko Limited and both agreed that a sum of €200,000.00 would be repaid to the deceased.

16. Subsequently, when all these events came to light, the deceased's daughters became aware of what had transpired between their mother and their brother and various attempts were made to resolve matters.

17. Pursuant to an indenture of 14th May, 2010, James McCoy agreed and declared that he held his share of the property 10B Ardbrack Heights, Kinsale, Co. Cork in trust for the deceased and agreed to granting his mother his half share in the property at the request of his mother or to such other person or persons at such time or times in the manner as she shall direct or appoint. This agreement was reached apparently without reference to and without the consent of the First Active Building Society who held a mortgage over the property at the time in the sum of €371,000.00.

18. Following further protracted negotiations in which both sides had the benefit of independent legal advice, an agreement was arrived at as dated 23rd July, 2010, whereby both parties agreed that the deceased had put the property in question into the joint names of herself and her son, James McCoy, by deed of transfer dated 6th August, 1999. It was not the deceased's intention to transfer any beneficial ownership to her son, James McCoy, by virtue of the said deed of transfer dated 6th August, 1999 and it was done at the request of James McCoy in order to facilitate raising capital to assist his business. Both parties intended that the capital would be repaid in full to the deceased.

19. It is further set out in this agreement that it was not the deceased's intention that James McCoy would inherit the property by right of survivorship on his mother's death. It is specifically stated that it was the deceased's intention that her estate would take the property on her death. There is a further reference in the agreement that the property was charged to First Active and that the parties were signing this particular agreement for the purpose of setting out a payment schedule for the repayment to the deceased for the monies charged against the property and further it was acknowledged in the agreement that Varko Limited had the benefit of €200,000 raised on the security of the property.

20. Subsequently, it is apparent that James McCoy did not honour the agreement of 23rd July, 2010, and failed to make any significant payment in respect of the €371,000 presumably together with any accrued interest that was due to First Active. It was necessary for the deceased to institute proceedings by way of summary summons which she did in proceedings entitled (High Court, 2010 No. 8282 P. Charlotte McCoy (Plaintiff) and James McCoy and Varko Limited (Defendant)).

21. Solicitors for James McCoy and Varko Limited entered an appearance to the proceedings but no replying affidavit was ever filed to answer the affidavit of Charlotte McCoy. Subsequently, the matter came on for hearing before the Master of the High Court on the 9th day of December, 2010, and counsel instructed by the same solicitors represented both James McCoy and Varko Limited and sought an adjournment which the Master refused to grant. The Master heard counsel for the plaintiff and counsel representing James McCoy and Varko Limited and having read and considered the grounding affidavit of Charlotte McCoy proceeded to enter judgment for

the full amount as claimed in the sum of €314,931.38 as against James McCoy and as against James McCoy and Varko Limited in the sum of €200,000.00 together with interest pursuant to the Courts Act 1981, from the 1st day of January, 2010.

22. Despite ongoing correspondence and despite solicitors representing both James McCoy and Varko Limited (against unknown background circumstances to this Court), the Master was never informed that in fact in the intervening period between the proceedings having been issued on the 3rd day of September, 2010 and 9th day of December, 2010, when the matter came on for hearing in the Master's Court, Varko Limited had been placed in voluntary liquidation on the 24th day of November, 2010, and a liquidator appointed. It appears from the accounts there was an overall deficit of €1,414,872.00, with preferential creditors amounting to €799,216.00 and unsecured creditors amounting to €770,656.00.

23. Subsequently, it appears that the business assets of Varko Limited, T/A Intercall Management (in voluntary liquidation) was sold to a company Tacketdale Limited for a sum of €68,400. Further it appears that subsequent to Varko Limited going into voluntary liquidation on 24th November, 2010, James McCoy was retained in a consultancy capacity to manage the company and keep it turning over and that subsequently as per a letter of 28th January, 2011, from James McCoy's solicitors to the solicitors for the late Charlotte McCoy, it appears that the liquidator having sold the goodwill of Varko Limited to a new company (which is Tacketdale Limited) the new company employed James McCoy as a business development manager and one of the terms of employment was that James McCoy would be entitled to a six monthly profit share.

24. It further appears that when Tacketdale Limited was incorporated and when the first move was made by Tacketdale Limited to purchase the goodwill and assets of Varko Limited, James McCoy's wife, Celestine, was a director and shareholder in that company but subsequently prior to purchasing the assets and goodwill of Varko Limited she resigned as a director and transferred her shares.

25. Further it appears that following the accountant's advice when James McCoy in his capacity as a director of Varko Limited placed the company in voluntary liquidation, he may not have advised the liquidator of the existence of the proceedings of Charlotte McCoy as against James McCoy and Varko Limited.

26. In her grounding affidavit in this application, Irene Judkins in her capacity as a co-executor to the estate of her late mother, Charlotte McCoy avers that this application was a further step in her late mother's attempt and now her estates attempt to recover money that her brother James McCoy raised as a loan secured on her mother's home and that this loan was made without her mother's knowledge or informed consent and that she never received the benefit of it or any part thereof. She avers that at all times James McCoy and Richard Doggett in their capacity as directors of Varko Limited accepted that Varko Limited had received the benefit of €200,000.00 and she refers to the judgment as obtained on 9th December, 2011, as against the company in the sum of €200,000.00 and she avers that she did not know that the company had gone into liquidation on 24th November, 2010, and that this fact only came to light in January 2011 when her late mother was informed of the liquidation.

27. She avers that the monies were held on trust by James for her late mother and that the company received the benefit of same and it did so with the knowledge that the sum of €200,000.00 was secured on her mother's property and not in consideration for any transaction to which her mother was a party or consented to. She avers that the company held the monies on trust for her mother and now the estate and that the estate requires the payment of the monies in order to discharge the loan obtained from First Active.

28. There was an issue raised as regards a letter from Richard Doggett, a co-director with James McCoy in Varko Limited as dated 26th June, 2008.

29. This letter stated that Mr. Doggett wishes to confirm that the proceeds from ACC investment policies in the name of James McCoy and Richard Doggett which are due to mature in February 2010, will be used to repay any balance outstanding on the loan of €200,000 made to Varko Limited as of February 2010. On a personal basis, Mr. Doggett thanks the deceased for all her advice and financial assistance over the past number of years.

30. Ms. Judkins appreciates that on its face this letter suggests that the money was lent and the deceased offered advice and financial assistance. However, she says this was clarified by Mr. Doggett and he accepted that this was never the case. Subsequently, Mr. Doggett resigned as a director and company secretary of Varko Limited on 5th November, 2010, but remained as a 35% shareholder. Terry Nichols was appointed a director in his place. The petition to wind up the company was advertised on 10th November, 2010 and the creditor's meeting took place on 24th November, 2010. Linda Harney, a solicitor and partner in the firm of Donegan's Solicitors in Cork, in her affidavit of 30th June, 2011, avers that at the creditor's meeting, James McCoy failed to inform those in attendance as regards the applications pending in the High Court relating to the return of the monies due from the company to Charlotte McCoy. Neither did he have Charlotte McCoy's name on the list of creditors secured or non-secured.

31. Linda Harney engaged in substantial correspondence with the liquidator and she was in a position to establish subsequent to the voluntary liquidation, the business of Varko Limited in liquidation was being run by a company Tacketdale under a license pending the sale of Varko Limited as an ongoing concern. Tacketdale was incorporated as a company on 23rd September, 2010 and Kathleen Morrison otherwise Celestine McCoy, the spouse of James McCoy was a registered shareholder, company secretary and director of Tacketdale immediately prior to the sale. Her address is given as 10 Ringcurran Rise, Kinsale, Co. Cork which is the residential address of James and Celestine McCoy. A certificate of the register of marriage shows that the full name of Celestine McCoy prior to her marriage to James McCoy is Kathleen Celestine Morrison and they were married on 26th October, 2001.

32. Linda Harney avers at para. 23 of her affidavit that she wrote to O'Grady's solicitor on Monday, 28th May, 2011, informing them of the connection to Celestine McCoy and forwarding copies of the company's office entries in respect of Tacketdale Limited and a further company in which James McCoy's wife is involved, Hattitude, and various urgent requests were made, but were not replied to prior to the instigation of these proceedings.

33. Jennifer Fay, a solicitor acting on behalf of Ken Farrell, the liquidator appointed by Varko Limited in voluntary liquidation, avers in an affidavit sworn on 15th July, 2011, that the liquidator first became aware of the claims of the estate of the deceased by letter dated 9th December, 2010. She refers to correspondence which sought that the estate be paid as a creditor in accordance with the insolvency rules and she replied that any claim registered by the estate would rank as a non-secured creditor in the liquidation. She avers that the first time the issue arose of the company holding monies in trust for Mrs. McCoy, deceased, was by way of a letter of

25th March, 2011, and that in general terms there was no request to desist from the sale of the assets of the business.

34. Ms. Fay refers to the fact that the liquidator has now learned from the estate that Mrs. McCoy issued High Court proceedings against her son, James McCoy and Varko Limited in December 2010, prior to the company going into voluntary liquidation. She says that the liquidator was not on notice of these proceedings and had no involvement therewith and that it would appear that when entering judgment, the court was not advised that the company had gone into voluntary liquidation. In this regard, however, it has to be stated that same solicitor and counsel represented both James McCoy and the company. James McCoy did not advise the court that the company had gone into voluntary liquidation and it is clear that the late Mrs. McCoy was not aware that the company had gone into liquidation until the following January 2011 and that the reality of the situation in the Master's court is that entities who knew precisely what the situation was as regards the voluntary liquidation were James McCoy and the company, Varko Limited and its advisers.

35. It does appear that by letter of 12th July, 2011, the solicitors to the liquidator very fully set out the entire background to the voluntary liquidation. In essence, Ms. Fay advises that the reality of the situation is that there is no money available in the liquidation to satisfy any unsecured creditor nor indeed are there sufficient sums available if the estate were to be in a position to establish that a trust was created for the benefit of the estate.

The Law

Constructive Trusts

36. A constructive trust arises by operation of law where property is not expressly subject to a trust but which is held by a person in circumstances where it would be inequitable to allow a person to have full beneficial ownership of the property.

37. In *Muschinski v. Dodds* (1985) 160 C.L.R. 583, Deane J. stated:-

"Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle."

New Model Constructive Trusts

38. In *Hussey v. Palmer*, [1972] 1 W.L.R. 1286, Lord Denning M.R. pioneered the development of what he later described in *Eves v. Eves* [1975] 1 W.L.R. 1338 as "a constructive trust of a new model". He stated:-

"[I]t is a constructive trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution. It is comparable to the legal remedy of money had and received which, as Lord Mansfield said, is very beneficial and, therefore, much encouraged". (at p. 1290)

39. This 'new model constructive trust' has met with limited approval in this jurisdiction. In *N.A.D. v. T.D. Barron J.* stated:-

"The constructive trust is imposed by operation of law independently of intention in order to satisfy the demands of justice and good conscience. Its imposition is dependent upon the conduct of the person upon whom the trust is imposed and prevents him from acting in breach of good faith. There is no fixed set of circumstances in which such a trust is imposed."

40. Barron J. went on to state that a prerequisite in constructive trusts of this type was that there must be an element in the conduct of the person upon whom it is imposed which would make it inequitable for them to be allowed to assert his legal rights. In the circumstances, Barron J. held that there was no evidence of conduct on the part of the defendant which would make it inequitable to deny the plaintiff's claim, and the claim therefore failed.

41. In *HKN Invest Oy. v. Incotrade Pvt Ltd* [1993] 3 I.R. 152, the plaintiffs had obtained judgment against a company and the individuals responsible for conducting its affairs. The plaintiffs sought to be allowed to complete execution of this judgment. Costello J. stated that a constructive trust will arise when the circumstances of the case are such as to render it inequitable for the legal owner of property to deny another's title to it and stated:-

"[W]here a person ... holds property in circumstances which in equity and good conscience should be held or enjoyed by another he will be compelled to hold the property in trust for another." (at p. 162)

42. In *Murray v. Murray* [1996] 3 I.R. 251, the plaintiff was the defendant's nephew, who had lived in a property belonging to the defendant. The plaintiff's mother, who had also lived in the property, had paid the mortgage instalments and most of the outgoings on the house. After the death of the plaintiff's mother, the plaintiff claimed that, as her nearest kin, he was entitled to the beneficial interest in the property and argued that in the circumstances it would be unconscionable for the defendant to rely on his legal title. Barron J. held:-

"It is I think quite clear that the law will impose a constructive trust in all circumstances where it would be unjust and unconscionable not to do so."

43. Barron J. asserted *Hussey* as authority for the proposition that, where equity required it, "a debt could be secured by the device of a constructive trust on the property created by the money involved". The absence of any evidence that the plaintiff's mother intended to create a beneficial interest as a result of her actions precluded Barron J from holding that a resulting trust arose, and so he therefore made use of the more flexible constructive trust to provide a remedy.

44. Similarly, a constructive trust of the same manner was held to exist by the High Court in *Dublin Corporation v. Ancient Guild of Incorporated Brick and Stone Layers and Allied Trade Union* (High Court 1991, No. 1556P (Budd J.) 6th March 1996), although it should be noted that when the issue arose before the Supreme Court, the decision was reversed and the court did not find it necessary to consider the constructive trust issue. Budd J. identified two types of constructive trust: one which arises where there is

a fiduciary relationship and the other which arises because of the particular circumstances in which a person holds property. Although the latter category has been described as applying 'wherever justice and good conscience require it', Budd J. noted that the Irish courts have been reluctant to adopt such a nebulous concept as 'justice and good conscience'. He stated that traditional doctrines of equity permit the assertion of a constructive trust to prevent a person from asserting or exercising a legal right in circumstances where this would be unconscionable. Budd J. went on to state:-

"[A] system of rules has evolved which, on the whole, is practical and just but which cannot claim scientific precision as a whole."

In the circumstances, he held that a constructive trust had arisen.

45. In *Kelly v. Cahill* [2001] 1 I.R. 56, the deceased had informed his solicitor that he no longer wished to benefit his nephew, the second defendant, under his will, but wished to leave all his property to his wife, the first defendant. His solicitor advised him to execute a deed transferring the property into the joint names of himself and his wife to avoid a probate tax. However, through the inadvertence of the solicitor, some of the lands were not transferred and would pass on the deceased's death to the second defendant for life, with remainder to the first defendant. Barr J. stated:-

"[A] 'new model' constructive trust... the purpose of which is to prevent unjust enrichment is an equitable concept which deserves recognition in Irish law."

46. Budd J. held that, in the circumstances, 'justice and good conscience' required that the second defendant should not be allowed to inherit the property and the interest in remainder under the will should be deemed to be subject to a constructive trust in favour of the first defendant.

Tracing

47. In *Foskett v. McKeown* [2001] 1 A.C. 102, Lord Millett stated:-

"A beneficiary is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a *bona fide* purchaser for value without notice."

For a beneficiary, the tracing mechanism will allow him to take priority where a trustee is insolvent. Further, where trust property comes into the hands of an innocent volunteer who has no actual or constructive knowledge of it, the volunteer will not be liable as a constructive trustee but tracing may enable a beneficiary to identify property belonging to him and proceed to assert a proprietary claim against the volunteer.

48. Equitable tracing can function even in the absence of a physical asset and, although the common law cannot trace into a mixed fund, equity can identify funds even where they have been electronically transferred- see *Millett* (1991) 107 L.Q.R. 71.

49. Tracing in equity allows a beneficiary to "follow and recover property with which, in equity at all events, [they] had never really parted."- *Sinclair v. Brougham* [1914] A.C. 398, 418. The right to trace in equity exists against third parties into whose hands the property may have come. Tracing will apply to an innocent volunteer who comes into possession of the trust property, but it does not extend to purchasers for value of the property without notice of the right to trace.

38. James McCoy in his personal and familial capacity and James McCoy and Richard Doggett in their respective capacities as directors of Varko Limited had every opportunity to deliver a replying affidavit to that of Charlotte McCoy in the High Court proceedings bearing Record No. 2010 No. 8282P brought before the Master of the High Court which resulted in judgment being obtained both against James McCoy and Varko Limited.

39. Ms. Donnelly in her submissions to the court on behalf of the liquidator contends that the applicant has a fundamental problem in that wrongdoing has to be established and that there is no evidence to establish a resulting trust. Further, in effect, the monies are gone and at this late stage, it would be impossible to trace them. It is accepted at best that the estate of the deceased is an unsecured creditor but it is unlikely that in such capacity the estate would be entitled to any monies and even if the estate is to be deemed to be a secured creditor it is unlikely that any demand will be met. Ms. Donnelly contends that all the peripheral evidence appears to indicate that the money involved was loaned to the company and that even the settlement agreement of 23rd July and its content all point to a loan and there is nothing as such that points to a trust being created and further that no conclusion could be drawn from the information available. She accepts that the facts and circumstances do not make for pleasant reading but there is no indication of a trust being created.

40. A principle reason for attempting to set out the background so fully is that primarily there is not a significant dispute with all of the major contentions in relation to the circumstances surrounding the obtaining of the loan in April 2008 from First Active over Mrs. McCoy's home in Kinsale. It is the case at the point in time when the loan was drawn down from First Active and Mrs. McCoy's home was mortgaged that her son, James McCoy was a joint tenant by the consent of the late Charlotte McCoy but all the surrounding circumstances including the ongoing behaviour of James McCoy, assist in demonstrating the type of person that he is and in the absence of any denial as regards the facts contended for in the affidavit of Charlotte McCoy in the proceedings bearing Record No. 2010 8282P that led to judgment being obtained against James McCoy and the company and the various other affidavits as referred to herein, the applicants discharge the onus of satisfying this Court that on the balance of probabilities the manner in which the mortgage of Mrs. McCoy's home in Kinsale was obtained from First Active Building Society was unconscionable and that unfair advantage was taken of the late Mrs. McCoy and that the demands of justice and good conscience dictate that as regards the sum of €200,000.00 being part of the aforesaid mortgage, such said sum was at all material times in the circumstances as herein as outlined held by the company Varko Limited in trust for the late Charlotte McCoy and on her death forms part of her estate and is not available for distribution in the voluntary winding up of the company.

41. I will hear the submissions of counsel as to the appropriate steps and orders that follow.