Neutral Citation [2013] IEHC 130

**THE HIGH COURT**

**[2012 No. 695 COS]**

**IN THE MATTER OF THE BELOHN LIMITED, AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 316 OF THE COMPANIES ACTS 1963 TO 2012**

**BETWEEN**

**THE MERROW LIMITED**

**APPLICANT**

**AND**

**BANK OF SCOTLAND PLC AND DAVID O'CONNOR**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Gilligan delivered on the 22nd day of March, 2013**

1. The applicant is the sole member of Belohn Limited (hereinafter referred to as "the Company"). The common directors of the applicant and the company are Mr. Sean Foley and his wife, Ms. Sherry Yan. The Company was incorporated on 24th July, 1973, and at all material times owned and operated licensed premises known as Foley's Bar and O'Reilly's Bar, premises situated at 1 Merrion Row, Dublin 2 and 17 Merrion Street, Dublin 2.

2. The Company has extensive loan facilities with Bank of Scotland Plc (hereinafter referred to as "the Bank"), and the balance due on the loan accounts attributable to these facilities as of 3rd October, 2012, amounted to a sum in the region of €4,000.000.00.

3. The Company formerly banked with the Industrial Credit Company Limited who on 7th August, 1981, created a charge over the premises known as No .1 Merrion Row, Dublin as well as all of the Company's undertakings and assets, uncalled capital, goodwill and moveable plant.

4. Further, Bank of Scotland (Ireland) Limited on 3rd April, 2008, also created a charge over premises of the Company and more generally the dwelling house, shop and premises on the corner of Merrion Street and Merrion Row known as 17 Upper Merrion Street.

5. On 25th March, 2002, the Industrial Credit Company Limited changed its name to Bank of Scotland (Ireland) Limited. Thereafter, the business of Bank of Scotland (Ireland) Limited became vested in the Bank on 31st December, 2010, on foot of an order of the Scots Court of Session pursuant to the provisions of the Companies (Cross-Border Mergers) Regulations, 2007 United Kingdom.

6. Consequently, by virtue of the foregoing the Bank became entitled to all rights under the said charges, including the appointment of a receiver and manager over the Company and its business and indeed the Bank invoked this power on 10th October, 2012, and appointed the second named respondent as receiver.

7. The 1981 debenture contains a clause at para. 7 as follows:-

> "The lender may at any time after the mortgage debt shall have become payable appoint by writing under its seal a receiver of the mortgage property or any part thereof and remove any receiver so appointed and appoint another receiver in his stead and the following provisions shall have effect…"

8. There is a further provision at para. 10 of the mortgage debenture which provides that:-

> "The provisions of s. 24 of the Conveyancing and Law of Property Act 1981, with the exception of subs. (1) and (8) thereof shall apply to this Deed and to any receiver appointed by the lender hereunder."

9. The interesting feature is that pursuant to para. 10 of the mortgage debenture the possibility of the respondent bank making an appointment "by writing under hand" under s. 24(1) of the Conveyancing and Law of Property Act 1881, is expressly excluded.

10. The 2008 mortgage debenture specifically provides at s. 7 that:-

> "The respondent at any time after the power of sale has become exercisable, whether or not the Bank has entered into or taken possession of the secured assets, or at any time after the mortgagor so requests the Bank from time to time to appoint under seal or under hand a duly authorised officer or employee of the Bank any person or persons to be receiver and manager or receivers and managers…"

11. Accordingly, pursuant to the mortgage debenture of 3rd April, 2008, the Bank is entitled to appoint a receiver either under seal or under hand of a duly authorised officer or employee of the Bank any person or persons to be receiver.

12. The applicant accepts that it is in default in respect of the payments due under both mortgage debentures.

13. Following the merger of Bank of Scotland (Ireland) into Bank of Scotland Plc on 27th January, 2012, the respondent Bank appointed Derek Woodhead as director of Ireland Business Support Unit and, *inter alia*, gave him authority to "at any time in connection with any specific named transactions or proposed transaction appoint one or more persons to act as a delegate attorney for the Bank in his place with power to exercise all or any of the powers conferred on the attorney by this power of attorney other than the power to appoint a delegate attorney as are required for that specific transaction."

14. Subsequently, on 26th April, 2012, Derek Woodhead, pursuant to the authority given under the power of attorney granted in his

favour by Bank of Scotland Plc on 27th January, 2012, confirmed that each of the directors of Credit Risk, heads of Credit Sanctions and senior managers of Ireland Business Support Unit is an authorised signatory of Bank of Scotland Plc authorised to sign the deeds and documents specified below in connection with the Ireland Business Support Unit including, *inter alia*, at (m) appointment of receiver as insolvency petitioners.

15. By deed of appointment of receiver and manager as dated 10th October, 2012, in pursuance of the powers contained in the mortgage debenture dated 7th August, 1981, between The Belohn Limited and the Industrial Credit Company Limited and the mortgage debenture dated 3rd April, 2008, between The Belohn Limited and Bank of Scotland (Ireland) Limited, the Bank proceeded to appoint Mr. David O'Connor to be the receiver and manager of the whole of the property and assets referred to comprised in mortgage and/or charged by the charges set out in the schedule hereto over the premises known as No. 1 Merrion Row in the City of Dublin and the premises known as No. 17 Upper Merrion Street in the Parish of St. Anne and City of Dublin.

16. It is further set out in the deed of appointment of 10th October, 2012, that the Bank has hereunto executed this appointment as a deed and the receivers and managers as hereunto set their hand and deliver this appointment as a deed by way of receipt and acknowledgment of this appointment on 10th October, 2012.

17. Mr. O'Connor, the second named respondent, acknowledges receipt of the deed on 11th October, 2012, and accepts the appointment.

18. The applicant was apparently at all times desirous of moving to place both companies into examinership with a view to attempting to save the business being operated by the applicant in both premises and to save the jobs of some 27 employees, but it did not move within the three day window of opportunity following the appointment of the receiver and instead of taking any further step in the matter, they proceeded to retain the services of a chartered accountant with a view to assessing the chances of success in relation to an examinership and the ongoing position is that if this application is successful, the applicant wishes to apply to have the business of the applicant which is being run in both premises placed in examinership.

19. The opinion of the independent chartered accountant as retained herein for the purpose of advising on the chances of a successful examinership in respect of the business being operated by the applicant is not exhibited in the affidavit of Sean Foley, grounding the application herein, or in any of the supporting affidavits as delivered on the applicant's behalf.

20. The applicant has attempted to set up several grounds for objecting to the appointment of the receiver and having his appointment declared to be void and of no effect. It is quite clear that apart from two grounds, none of the others have any merit and because of this they were quite correctly abandoned by Mr. Maguire on behalf of the applicant herein.

21. The two remaining grounds argued before the court in seeking a declaration that the appointment of the receiver on 10th October, 2012, is void and of no effect relate to the purported appointment of the receiver not being under seal as specifically provided for in the 1981 debenture and further, that the appointment of the receiver is void due to a lack of authority by the respondent to execute the deed of appointment.

22. Whatever about the merits or otherwise of these two remaining propositions as advanced on the applicant's behalf, the respondents contend that the second named respondents appointment as receiver took place on 10th October, 2012, and the applicant did not move to impugn the said appointment until the 18th December, 2012, and in the intervening period the second named respondent has been running the business of the applicant in both premises, has rectified a number of matters pertaining to the employees in both premises and is in the process of arranging for the sale of the premises and has received a deposit subject to contract from a prospective purchaser.

23. I propose to deal firstly with the contention by the applicant that the appointment of the second named respondent was invalid due to a lack of authority to execute the deed. Under Clause 7.1 of the 2008 debenture the deed of appointment had to be executed by a "duly authorised officer or employee of the bank". The essential contention is that Mr. Whitbread was not appropriately authorised to appoint the receiver and that accordingly, the appointment of the second named respondent is invalid under the debenture. Mr. Whitbread claims the authority through the power of attorney as dated 27th January, 2012, and the letter of nomination as dated 26th April, 2012.

24. A number of propositions are put forward on behalf of the applicant but the reality of the situation is that the power of attorney was delegated by the various appointments as made and exhibited in the affidavits as delivered on the respondent behalf, and Mr. Whitbread as a senior manager of Ireland Business Support Unit is an authorised signatory of the Bank and he is authorised to sign and specifically appoint receivers as per subpara (m) of Mr. Woodhead's letter of nomination of 26th April, 2012. The thrust of the argument of behalf of the applicant appears to suggest that the attorney making the appointment would have to do so with respect to a specific named transaction or proposed transaction being, for example, the particular appointment of a receiver pursuant to the 1981 debenture and the 2008 debenture, the subject matter of this application.

25. I find no favour for that argument and, in my view, it is quite clear that what is being referred to in the power of attorney of 27th January, 2012, is that the attorney may at any time in connection with any specific named transactions or proposed transactions such as the appointment of a receiver, appoint one or more persons to act as a delegate attorney for the Bank in his place with power to exercise all or any of the powers conferred on the attorney by the power of attorney of 27th January, 2012, and accordingly, in my view, the contention that the appointment of the second named respondent is invalid due to a lack of authority to execute the deed is of no merit and is rejected.

**The Appointment of the Receiver not being under Seal**

26. Because the appointment of the receiver was not under seal in accordance with Clause 7 of the 1981 debenture, it is contended on the applicant's behalf that the appointment of the second named respondent as receiver pursuant to the two debentures is void.

27. In support of this contention the applicant contends as follows:-

> (i) The 1981 Debenture was drafted by ICC (which purportedly became the Bank) and signed by it and the Company. Under clause 7 of the 1981 Debenture the Bank could:
>
> > "...at any time after the mortgage debt shall have become payable appoint by writing under its Seal a Receiver of the mortgaged property of any part thereof... [emphasis added]".
>
> (ii) The obligation to appoint under seal was expressly included and under clause 10 of the 1981 Debenture, the possibility

of the Bank making an appointment "by writing under hand" under s. 24(1) of the Conveyancing and Law of Property Act 1881 was expressly excluded.

(iii) It is common case that the Deed of Appointment was not "under its seal" by the Bank. In appointing the Receiver the Bank did not comply with one of the two formalities in the 1981 Debenture. It is contended on the applicant's behalf that the Bank's failure in this regard renders invalid the Receiver's appointment and causes him to be a trespasser on the Company's property.

28. *Bank's obligation to appoint in accordance with Debentures.*

The Bank purported to appoint the Receiver without reference to the court and pursuant to its contractual rights under the 1981 and 2008 Debentures and it is clear that the Receiver's authority is derived from those contracts. In *R Jaffe Ltd. (in liquidation) v. Jaffe (No.2)* (1932) NZLR 195 Smith J. considered the law in this area and held:

> "The receiver and manager here to be appointed is to be appointed without the aid of the Court. He is to be appointed according to the terms of the contract between the parties. In my opinion, the position is governed by the terms of the contract. Palmer, in his Company Precedents, speaking of a receiver appointed without the aid of the Court, says: "The receiver derives his appointment and authority from the parties themselves in pursuance of the powers of the contract. This is the point to be attended to."

In *Kerr & Hunter on Receivers and Administrators* it is also said with reference to a receiver appointed out of court by the debenture-holders of a company that "the position and powers of such receivers are derived from and depend upon the contract between the parties expressed in the authorising instrument".

29. Since a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument. This principle has been recognised by the leading commentators in this area and accepted and applied by the courts throughout the common law world.

30. Courtney, in *The Law of Private Companies* (3rd Ed.) has observed that:

> "[t]he validity of the appointment of a receiver is dependent upon compliance with the terms contained in the debenture and the capacity of the company and authority of its officers to create the debenture ab initio."

31. Lynch-Fannon *Corporate Insolvency and Rescue* (2nd ed.) has noted that "[t]he penalty for non-compliance with the formalities for the appointment of the receiver is that such appointment is void". She has also observed that non-compliance with formalities of appointment amounts to an abuse of process.

32. In *The Law of Company Insolvency* (2008), Forde has commented that "[t]here is no prescribed form for appointing an out-of-court receiver. Formalities set out in the security instrument must be scrupulously followed; if they are deviated from to any appreciable extent the appointment will be a nullity and the so-called receiver will be a trespasser on the company's property".

33. In *The Law of Administrators and Receivers of Companies* (2007), Lightman & Moss have noted that "[a] receiver must be appointed in accordance with the terms of the debenture." Finally, in *The Law Relating to Receivers, Managers and Administrators* (4th Ed.) Picarda has observed that:-

> "There is no set statutory form for the appointment of a receiver and manager out of court. On the other hand any formalities laid down by the relevant debentures or trust deed must be followed. If the debenture requires the appointment to be made in writing or under hand an oral appointment is not sufficient. Again, if the appointment is required to be by deed that formality must be observed".

34. The importance of strict adherence to the terms of the debenture was recognised by the Supreme Court of Western Australia in *Wrights Hardware v. Evans* (1988) 13 A.C.L.R. 631. The plaintiff had, by deed of charge, charged its stock and book debts to Euro-Nat to secure repayment of $700,000 lent to it by the latter. Under clause 4.3 of the charge, Euro-Nat could "appoint in writing any person to be a receiver or receiver and manager ... of the mortgaged premises" and under clause 4.4, Euro-Nat could "in addition ... appoint in writing any person to be an additional receiver or receiver manager" who had "full powers and authority to exercise all or any part of the powers expressed to be conferred on a receiver appointed pursuant to the last preceding sub-clause...".

35. Euro-Nat appointed the defendants "jointly and severally to be receivers and managers" of the plaintiff. The plaintiff sought interlocutory relief restraining the defendants from acting as receivers and managers on the basis that the appointment was invalid, there being no power in the charge to appoint receivers and managers jointly and severally. The defendant argued that the proper construction of the charge authorised the appointment of joint and several receivers and managers or, in the alternative, the appointment was nevertheless valid insofar as it authorised the defendants to act jointly.

36. The Supreme Court of Western Australia held that the relevant clauses could not have the meaning contended for by the defendants and granted the injunction. Franklyn J. emphasised the importance that the terms of the debenture be complied with by stating:

> "I am satisfied that the relevant law applying to the appointment of a receiver or receiver and manager, and receivers or receivers and managers pursuant to the charge is as follows:
>
> > 1. The manner in which a receiver is to be appointed is prescribed by the debenture deed, in this case the charge, and must be strictly followed: Blanchard P, The Law of Company Receiverships in Australia and New Zealand, Butterworths (Rust), 1982, poro 402: Farwell G, on Powers 3rd edn, (Stevens) 1916, p 147; Donovan, Company Receivers and Managers 1981 edn p 19; Guthrie v Armstrong B & Ald 628 [emphasis added]."

37. The courts in New Zealand have also declared invalid appointments which were not made in accordance with the terms of the debenture. In *R Jaffe Ltd. (in liquidation) v. Jaffe (No.2)* a debenture provided that:

> "The debenture-holder may at any time after the principal moneys hereby secured shall have become payable appoint by writing a receiver and manager of the property hereby charged, and may from time to time remove any receiver and manager so appointed and appoint another in his stead [emphasis added]".

38. The day before he was entitled to, the debenture holder purported to appoint a receiver in writing. No subsequent appointment in writing was made. It was not argued that the premature appointment was valid but that the "writing" was evidentiary only in character and was a matter of form, not substance. The Supreme Court of Auckland rejected that argument and held the receiver had not been validly appointed.

39. Smith J. reasoned that, since the receiver derived his authority from the contract (the debenture), the appointment had to be in accordance with the terms of the contract. He held that the requirement that the appointment be made "in writing" was a condition of his appointment:-

> "The question, then, is, what is the nature of the power of appointment contained in the contract between the company and the debenture-holder? Clause 14, set out above, provides for the appointment of a receiver and manager by writing. Upon construction this means, 1 think, that the only receiver and manager which the debenture-holder can appoint is one which he appoints by writing. It appears to be a condition of his appointment."

40. In *Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd* [1961] 1Ch. 375 the primary issue was whether a document which intended to be a deed but failed in that regard, could nonetheless take effect as an instrument "in writing". Although the facts are somewhat different to the present case, the House of Lords was concerned that the appointment was made in accordance with the terms of the debenture.

41. Condition 12(1) of the relevant debenture provided:

> "At any time after the principal moneys hereby secured shall have become payable the registered holder of this debenture may at any time appoint by writing any person or persons to be a receiver or receivers of the property charged by this debenture and may from time to time by writing remove any receiver so appointed and appoint another in his stead" [emphasis added].

42. In examining the validity of the receiver's appointment, Lord Evershed M.R. reviewed the above clause and held at pp. 394 to 395:-

> "The words are quite simple words: 'Appoint by writing, and in construing them it is fair to note that the condition also empowers the debenture holders by writing to remove. 1 should have thought that those words would be satisfied if something was done - if the person acting for the debenture holders so conducted himself that one could say that he was appointing someone to be a receiver, and if he accompanied that by handing a writing which was the company's writing to the receiver."

43. Donovan L.J. was equally concerned that the appointment was in accordance with the terms of the debenture. He stated:-

> "In the way in which this case has come before the court, and has been argued here, it seems to me that two questions arise: First, whether the document purporting to appoint the receiver is such a "writing" as satisfies condition 12 of the debenture ; and secondly, whether, if so, the appointment was invalid as being premature".

44. *Penalty for non-compliance with Debenture.*

It is clear from the foregoing that a receiver who is not appointed in accordance with the terms of the debenture is not validly appointed. In addition, an invalidly appointed receiver may be a trespasser on Company property. In *Wrights Hardware v Evans* [1988] 13 A.C.L.R.631 Franklyn J. held that:

> "...2. The existence of a power in the debenture holder to appoint in a particular manner will not relieve a de facto receiver from liability for trespass if the appropriate appointment procedure is not strictly observed: *Harold Meggitt Ltd v Discount and Finance Ltd* (1938) 56 WN (NSW) 23; Blanchard, supra, para 402; *Donovan, supra,* pp 19-20..."

45. *Rationale for strict compliance with Debenture*

The applicant submits that there are good reasons why the Bank ought to be held to the terms of the Debenture. While basic fairness implies that the Bank should be obliged to comply with the terms it chose to impose upon itself, several policy considerations were also identified by Smith J. in *R Jaffe Ltd. (in liquidation) v. Joffe (No.2):*

> "The importance of the strict observance of these requirements is shown, 1 think, by other considerations. A receiver is not an officer of the Court, but, if he is duly appointed, his title is superior to that of a person interfering with the assets under his control, and the Court will then grant an injunction: Polmerl6. If a receiver were unable to prove his title according to the terms of his contract, then I doubt whether he would be entitled to an injunction. Furthermore, while the company is a going concern, a receiver, if the conditions of the debenture so provide, may be the agent of the company, and the company will then be responsible for his contracts. This is particularly important if the debenture-holder has power to appoint not merely a receiver, but a receiver and manager. Under such circumstances the company must be entitled to insist 1 think, upon the fulfilment of the terms of appointment as a condition of its liability".

46. In *Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd* Donovan L.J. noted the far reaching effects of a receiver's appointment and emphasised that precision was required in this context:

> "As to the second question, the argument is that the receiver was appointed the moment the document was signed, and so before the debt became payable. I agree that in a context where precision is not required, one might speak of the document loosely as appointing a receiver. But in this context precision is required. What the debenture holder wants to do is to levy equitable execution, and for that purpose to have some person in being clothed with the necessary authority to take possession of the company's property, to carry on its business, to act in its name, and pay the debt, and the company has to submit to the exercise of these powers by the person having such authority...".

47. Even if no policy considerations applied, the Applicant submits that the Company would still be entitled, as a matter of principle, to insist that the Receiver be appointed in accordance with the Debentures. Support for this submission may be found in *R (on the application of Mercury Tax Group Ltd) v. Revenue and Customs Commissioners* [2008] EWHC 2721 where Underhill J. saw nothing wrong with holding parties to strict formal requirements when it came to the execution of certain agreements.

48. There, the respondents had successfully argued that there was a reasonable suspicion that a serious tax fraud had occurred and had obtained warrants under s. 20C (1) of the Taxes Management Act 1970, to enter a number of premises associated with the claimants and its clients to search for documents. The claimant sought judicial review of the decision to grant the warrants.

49. The claimant operated a tax avoidance scheme under which clients had to sign documents intended to be deeds. Its practice was to ask clients to sign incomplete drafts of the documents and when the final versions came into being, to detach the signature pages from the previous versions and attach them to the final versions. The defendants believed that this practice impugned the validity of the documents giving rise to a suspicion that a tax fraud had occurred. The claimants argued that there was nothing wrong with the practice provided that the alterations to the documents were authorised by the relevant party. Underhill J. noted the reason why the respondents were entitled to rely upon "formal" flaws in the deeds:-

> "...I see nothing wrong in applying a strict test of formality to the validity of the agreements with which we are concerned in this case. Their entire raison d'etre is to create--and demonstrably to create--a series of formal legal relationships: if they do not do that, they do nothing."

50. *The Bank's Memorandum and Articles of Association*

Mr. Kevin Whitbread, on behalf of the Respondents, makes the following averment at paragraph 16 of his affidavit:-

> "I say that by virtue of the Bank's Memorandum and Articles of Association it is not required to have a seal and therefore it is not possible for the Bank to have executed the Deed of Appointment of the Receiver under seal, as to do so would be in breach of its Memorandum and Articles of Association. A copy of the Memorandum and Articles of Association is at Tab 7 of the Booklet. For reasons that will be proffered by way of legal submission 1 say that Mr. Foley's argument on this basis must fail".

51. None of the documents in "Tab 7" are entitled "Memorandum and Articles of Association" in the manner averred to by Mr. Whitbread. Further, none of the above documents support Mr. Whitbread's particular argument that since the Bank was "not required" to have a seal "therefore, it is not possible to have executed the Deed of Appointment of the Receiver under seal, as to do so would be in breach of its Memorandum and Articles of Association".

52. Further, or in the alternative, even if the Bank would have been in breach of its Memorandum and Articles of Association by sealing the Deed of Appointment, that cannot in any way affect its obligations to the applicant Company under the 1981 Debenture.

53. It must be recalled that the Bank's predecessors were the author of the 1981 Debenture and imposed on itself the obligation to seal the document appointing the receiver. The Bank also deliberately excluded the provisions of s. 24(1) of the Conveyancing and Law of Property Act 1881, which would have allowed it to make the appointment without using its seal. The Bank made no attempt to alter the contractual terms between the parties when it came to realise that clause 7 of the 1981 Debenture was allegedly contrary to its Memorandum and Articles of Association.

54. It is contended on the applicants behalf that there is no doubt that the Bank was obliged to appoint the receiver in accordance with the terms of the 1981 Debenture and therefore, that it ought to have appointed the receiver "by writing under its Seal". The Bank's failure renders invalid the receiver's appointment over the property covered by the 1981 Debenture. By practical and logical extension, the Receiver's appointment over the property covered by the 2008 Debenture is also invalid".

55. It is submitted on behalf of the respondent that the applicant does not either contend that the Bank were not entitled to appoint the second named Respondent (whether under the 1981 or the 2008 debenture) nor that the execution requirements of the 2008 debenture were not fully complied with. Hence, were this Honourable Court to accede to the Applicant's objection the second named respondent would nevertheless remain validly appointed under the 2008 debenture.

56. Further, pursuant to Section 64 (2) (b) (iv) of the Land & Conveyancing Law Reform Act, 2009 it is specified that an instrument executed after the commencement of the relevant chapter (i.e. after 1 December 2009) is a deed:-

> "if made by a foreign body corporate, it is executed in accordance with the legal requirements governing execution of the instrument in question by such a body corporate in the jurisdiction where it is incorporated..."

57. In this instance, the Bank is incorporated under Scottish Law and the applicant has not adduced any legal opinion of a Scottish lawyer that the deed of appointment does not so conform. This is contrary to the approach which was adopted in *Jennings & another v. Bank of Scotland Plc & Others* (Unreported, High Court, McGovern J., 5th December, 2012). The Bank has exhibited its regulations from 2007 and which at regulation 102 deals with the Bank's seal and execution of documents and specifically at Regulation 102A dealing with the execution of documents it is provided:

> "Subject to the provisions of the legislation [the United Kingdom Companies Act] and to Regulation 102, documents may be signed by a Director or by the Secretary or by some other authorised person or persons. A person may be authorised by the Directors or by a committee authorised by the Directors or by a person so authorised by the Directors or such a committee. Provided that this Regulation is without prejudice to any other manner of execution of documents permitted or prescribed by the legislation."

Consequently, it is submitted that the Bank has followed the requirements of this regulation.

58. Further, in *Windsor Refrigerator Company Limited v. Branch Nominees Limited and Others* [1961] 1 All E.R. 277 Lord Evershed M.R. at page 281 stated:-

> "The question is not whether these two gentlemen, when they put their names on this document, were purporting to execute a document under their hands as agents for the company, or had any authority to do so. The question, as I conceive it to be, is: can this document, albeit purporting to operate as a deed, but failing to do so - can it nonetheless be the instrument of the company in writing? I have come to the conclusion that that question ought to be answered in the affirmative."

This statement was adopted in the case of *Byblos Bank SAL v. Al-Khudhairy* [1987] 1 BCLC 232. *Windsor Refrigerator* was cited in the Jennings case where at para. 12 of his judgment the learned judge states:-

> "But even if it was not a deed, it is clear that it had all the requisite qualities to be an instrument in writing under Mr. Bruce's hand and, for the reasons 1 have outlined above, I accept that Mr. Bruce had authority to create such an instrument."

59. Therefore, it is submitted that the issue comes down to whether or not Mr. Whitbread had the requisite authority to execute the deed of appointment on 10th October, 2012. It is further submitted that the following passage from Lynch Fannon & Murphy "*Corporate Insolvency & Rescue*" (2nd Ed. 2012) is pertinent and covers the situation which purportedly pertains where at paragraph 6.39 the authors state:-

> "A debenture document will normally provide for an appointment under seal but this is not necessary. Where the documents are required to be under seal this may cause delay in appointment as the seal of the debenture - holder (if a corporation) will have to be attested by director's signatures. The latter may not be readily accessible. Therefore, it is practical and permissible for a debenture- holder to provide for the appointment of a receiver to be made under hand of an authorised officer. The appointment deed may be in the form of a deed poll executed by the debenture-holder only or, more typically, the receiver may be a party to it."

60. As a matter of fact the respondent does not satisfy the court that it may not have a seal.

61. The difficulty I perceive from the first named respondent's perspective is that Clause 7 of the 1981 debenture is quite clear in stating that the lender may at any time after the mortgage shall have become payable appoint by writing under its seal a receiver of the mortgage property and the 'may' runs with the appointment of a receiver under its seal, and in my view no other construction is open on the face of Clause 7.

62. Further, to compound the situation from the first named respondent's point of view, the possibility of making the appointment of a receiver under hand is specifically excluded pursuant to subs (1) of s. 24 of the Conveyancing and Law of Property Act 1881. It had to be evident to the first named respondent at all times that in taking over responsibility for the debenture of 1981, the appointment of a receiver had to be under seal and in the particular circumstances as Irish law applies the situation is well summed up in Lynch, Fannon & Murphy *Corporate Insolvency and Rescue* (2nd Ed.) 2012 at para. 6.39 where it is specifically pointed out that in circumstances where documents are required to be under seal this may cause delay in appointment as the seal of the debenture holder (if a corporation) will have to be attested by directors signatures. The latter may not be readily accessible. Therefore, it is practical and permissible for a debenture holder to provide for the appointment of a receiver to be made under hand of an authorised officer.

63. As previously referred to, the appointment of a receiver to be made under hand is expressly excluded in para. 10 of the debenture of 1981. In this instance the appointment of the receiver pursuant to the debenture of 1981 is made contractually as between the applicant and the first named respondent without recourse to the courts and is not dependent on legislation. In this instance it is dependent on its own contractual arrangement as entered into between the parties and is governed by Irish law.

64. I take the view having regard to the specific contractual arrangements as entered into between the applicant and the first named respondent, the various authorities as relied on by the applicant and as set out in the submissions, that in order for the first named respondent to validly appoint Mr. O'Connor as receiver pursuant to the two debentures and for the appointment to be in compliance with the debenture of 1981, the receiver had to be appointed in writing under the seal of the respondent, and quite simply this proviso is copper fastened by the expressed prohibition as contained in para. 10 of the agreement against the appointment of a receiver in writing under hand, and necessarily has to lead to a conclusion at law that the appointment of the receiver pursuant to the terms of the debenture of 1981 is void, and as I accept the submission that the applicants business is run from both premises as one business and are inextricably intertwined, it follows that the appointment of the receiver pursuant to both debentures in respect of the applicants business is void.

65. It is now necessary to turn to the respondents contention that notwithstanding the possibility of a finding that the appointment of the second named respondent is void for non-compliance with the contractual terms of the 1981 debenture, the applicant is estopped from maintaining that stance by reason of its delay in moving to impugn the appointment from 10th October, 2012, until 18th December, 2012.

66. In this regard the respondents rely on the dicta of Lord Selborne in *Lindsay Petroleum Company v. Herd* [1874] L.R. 5. p.c. 221 at p. 239 wherein he stated:-

> "Now the doctrine of laches in court of equity is not an arbitry or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

67. It is further submitted on the respondent's behalf that this Court in assessing the extent of the applicant's delay is obligated to work from the time the applicant became aware of the facts giving rise to the relief it seeks. Mr. Foley at paragraph 13 of his first Affidavit unequivocally acknowledges that the validity or otherwise of the appointment of the second named Respondent was in his mind from the outset, averring:-

> "We suspected that the appointment of the Receiver was unlawful and, further, that the Company would have been a good candidate for examinership. We obtained legal advice confirming our suspicions regarding the invalidity of the appointment of the Receiver. However, a declaration that the Receiver was not validly appointed would have served no useful purpose unless the Company succeeded in obtaining the protection of the court."

68. Whether or not the rationale proffered by Mr. Foley for failing to bring an application which he expresses himself as being urgent is a matter for this Honourable Court to consider, it takes absolutely no account of the fact that the second named Respondent since 11 October 2012 has incurred the costs and expense of managing the Company's business and he has openly advertised for sale the Company's premises in November 2012.

69. It is contended the case of *Archbold v. Scully* (1861) 9 H.L.C. 360 is apposite and as Lord Wensleydale at p. 383 stated:-

> "if a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition he

may be said to acquiesce."

70. Allied to this, it is contended on the respondents behalf that the applicant is estopped from disputing the validity of the second named respondent's appointment more than two months after it was effected, or purportedly effected as the applicant contends. The principle of such an estoppel arising in a receivership situation is exemplified by the case of *Bank of Baroda v. Panessar & Others* [1987] W.L.R. 208. In that case the lack of objection to the receiver's appointment and the fact that thereafter the company directors dealt with the receiver was highlighted.

71. In this case the respondent contends that the applicant at no stage after becoming aware of the second named respondent's appointment made any objection until these proceedings were maintained nor did the applicant or Mr. Foley put the second named respondent on notice that they had legal advice his appointment was invalid and that he should operate under this apprehension until the applicant saw fit to challenge the appointment. The respondent submits that patently the applicant and Mr. Foley stood by while the second named respondent made it known the Company's two properties were being sold as one unit.

72. The respondents submit the applicant's action, or inaction as it were, has created an estoppel warranting the applicant being precluded from maintaining the application.

73. The reality of the situation is that there was little interaction between agents of the applicant and the second named respondent subsequent to the appointment of the second named respondent as receiver. The receiver has run the business since the date of his appointment from the two premises and has achieved what in his view he considers to be a reasonable offer for the purchase of the properties and has sought and received a booking deposit in respect thereof subject to the contract.

74. I do not consider that any irrevocable steps have been taken by the receiver in the course of his duties, and the situation does not arise where he has committed himself to any significant legal arrangement.

75. In the particular factual circumstances of this case it is not a situation whereby the applicant actively assisted the appointed receiver with respect to either the running or the disposal of the business and its financial adviser, Paul Carroll, has specifically denied that a purported offer for the properties was made on behalf of the applicant indicating that at all times he had indicated to the respondents that he was acting for an independent third party. I am satisfied to accept that in the particular circumstances of this case, the applicant did not make any offer to purchase either of the properties from the appointed receiver and the reality of the situation appears to have been one of little or no interaction. Further, it appears that in fact what happened was that subsequent to the appointment of the receiver the applicant was taking legal advice and did become aware that there was a possibility that the appointment was invalid and then sought accounting advice as to whether or not there was any reasonable prospect of the companies surviving if placed in examinership.

76. I accept accordingly that there was a degree of delay and there was a degree of acquiescence. However, when I turn to the judgment of Walton J. in *Bank of Baroda v. Panesar & Ors* W.L.R. 30th January, 1987, it is clear that the basis upon which the defendants would in any event have been estopped both as against the receiver and as against the Bank from maintaining the invalidity of the receiver's appointment, is factually very different to the circumstances that pertain in this instance. The matter is dealt with extensively at p. 220 of the judgment where in Walton J. states as follows:-

> "But it is not, of course, the mere absence of objection which has created an estoppel. Thus, as early as the day he was appointed the first defendant wrote to Mr. Singla giving him notice that "we will obtain you whatever open market offer you get on the lease of" 46, Mortimer Street (Glimtone Ltd.'s premises) and stating that if he ignored the offer, he would be held responsible for the consequences. On 30 November 1983 the first defendant wrote again to the receiver stating that he had requested several people to contact him regarding the sale of the leases of 8-10 Whitechurch Lane, the property of Lowcroft Ltd. The first defendant caused his solicitors to write to the receiver on 14 December 1983, seeking his assistance as such, in relation to a claim against a third party. In December 1983 the receiver caused Lowcroft Ltd. and Glimtone Ltd. to commence proceedings against the three brothers and another of their companies. No objection was ever taken to the effect that this action was incompetent.
>
> Again, on 12 January 1984 the receiver and the first defendant met and entered into a conditional agreement for the purchase by the defendants of the stock and premises of both companies. The first defendant again caused his solicitors to write on 18 January 1984 confirming the broad principles of those proposals; and he himself wrote on 24 January 1984 stating that he was going to reconsider his offer. And so on, right down to the issue of the writ in the present action, by which time, for practical purposes, the receivership had been fully completed. The defendant companies were, by the brother who throughout was the leading member of the family, dealing with the receiver on the footing that he was validly appointed. It seems to me that, under these circumstances, there can be no real doubt but that the companies are themselves estopped from denying that the receiver was validly appointed. The principle of estoppel applicable can be taken from *Habib Bank Ltd. v. Habib Bank A.G. Zurich* [1981] 1 W.L.R. 1265, 1285 where Oliver L.J. applied the test which he had previously formulated in *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.* (Note) [1982] Q.B. 133, 151-152 in these terms:-
>
> > "whether … it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment …"

77. It is clear from the views as expressed by Walton J. that he does not consider that the mere absence of objection would create an estoppel. In the circumstances before him it was clear that the defendants were immediately offering to match whatever offer the receiver obtained in respect of the lease of the property of the defendants, but the subject matter of the charge in favour of the Bank, and threatening the receiver that if he ignored the defendants offer he would be held responsible for the consequences. Furthermore, the defendants wrote to the receiver stating that they had been out looking for people to purchase the properties and had requested several people to contact him regarding the sale of certain leases. One of the defendants in particular wrote to the receiver seeking his assistance in relation to a claim against a third party and when it was decided to commence proceedings against the defendants and their companies, no objection was ever taken to the effect that the receiver's action was incompetent. Subsequently, the receiver and the first defendant met and entered into a conditional agreement for the purchase by the defendants of the stock and premises of both companies and the first defendant caused his solicitors to write confirming the broad principles of the proposals but the relevant defendant himself wrote subsequently stating that he was going to reconsider his offer, and as Walton J. states:-

> "…And so on right down to the issue of the writ in the present action by which time for practical purposes the

> receivership had been fully completed. The defendant companies were…dealing with the receiver on the footing that he was validly appointed. It seems to me that, under these circumstances, there can be no real doubt but that the companies are themselves estopped from denying that the receiver was validly appointed"

It was against these background circumstances that Walton J. took the view that there could be no real doubt but that the companies themselves were estopped from denying that the receiver was validly appointed. All of these comments, of course, are against the background where Walton J. had already taken the view that the receiver was validly appointed. In the particular circumstances that pertain here, there could be no comparison between the actions of Mr. Foley and his wife or any other party acting on behalf of the applicant company and the actions of the defendants in *Baroda v. Panesar*. In my view, there are three significant features in this case which compel the court to decide the issue of estoppel in the applicants favour and these are:-

> 1. The applicant took no or no significant proactive step confirming its acquiescence in the appointment of the receiver.
>
> 2. The receiver, apart from running the business in the applicant's premises for a period of two months, has taken no or no significant action which commits him to an irrevocable legal situation such as, for example, a completed enforceable contract of sale in respect of the premises.
>
> 3. The reality of the situation is that the first named respondent hereto had instant access to the relevant mortgage of debenture and it had to be reasonably clear, in my view, that the appointment of a receiver had to be under seal and the appointment of a receiver under hand was specifically excluded.

78. Having regard to the fact that I have already found that the purported appointment of the first named respondent as receiver over the property and assets of the applicant company is void, the actions of the applicant insofar as I accept that there was a degree of acquiescence could not be considered sufficient to enable the respondents succeed in their claim that the actions or, as is correctly submitted, the inaction of the applicant gives rise to a situation whereby notwithstanding that the second named respondents appointment is void, he can continue to act as receiver over the property and assets of the applicant company and proceed to dispose of them.

79. I am satisfied that the property and assets of the applicants business are inextricably intertwined and run effectively as one business from the two premises. It is not possible to differentiate the subject matters of the two debentures from one another and thus, I am satisfied that in the overall context the provisions of both debentures had to be validly exercised to effect the properties and assets of the applicants business.

80. Accordingly, in accordance with the terms of the notice of motion I accede to the applicants prayer for an order pursuant to O. 316 of the Companies Act 1963, declaring that David O'Connor, the second named respondent, does not stand validly appointed as the receiver manager over the whole of the property and assets referred to comprised in mortgage and are charged by the mortgage debenture dated 7th August, 1981 between the Belohn Limited and the Industrial Credit Company Limited over the premises known as No .1 Merrion Row, Dublin and the mortgage debenture dated 3rd April, 2008, between the Belohn Limited and the Bank of Scotland (Ireland) Limited over the premises known as No. 17 Upper Merrion Street in the Parish of St. Anne and City of Dublin.

81. I am further satisfied to grant a declaration pursuant to s. 316(1) of the Companies Act 1963, that the purported appointment of David O'Connor in the manner set out above is invalid, void and of no effect.