Neutral Citation [2015] IEHC 521

THE HIGH COURT

[RECORD NO. 2014/5205 P]

BETWEEN

KIERAN WALLACE

PLAINTIFF

AND

ROBERT ROCHE AND SALTEE HOTEL (WEXFORD) LTD.

DEFENDANTS

JUDGMENT of Ms. Justice Kennedy delivered on the 30th day of July, 2015.

1. In these proceedings, the plaintiff seeks a declaration that the plaintiff stands lawfully appointed as receiver over the lands and premises described in the schedule to the plenary summons pursuant to a legal charge dated 11th May, 2005. The plaintiff also seeks damages for trespass.

Background

2. Certain loan facilities were provided by Investec Bank Plc, formerly known as Investec Bank (UK) Ltd, (hereinafter "the Bank") to Glynn Properties Ltd, the parent company of the second named defendant; Saltee Hotel (Wexford) Ltd, (hereinafter "the Company"). The loan facility was provided pursuant to a facility letter dated 26th April, 2005 and was secured through a legal charge dated 11th May, 2005, whereby the Saltee Hotel was charged to the Bank. As additional security to this loan and pursuant to the facility letter, the second named defendant executed a deed of guarantee and indemnity whereby it guaranteed the liabilities of Glynn. This guarantee was executed on 11th May 2005. By letter of demand dated 11th April, 2014, the Bank demanded immediate repayment of the outstanding sum from Glynn Properties pursuant to the facility letter and from the second named defendant pursuant to the said guarantee. By Deed of Appointment dated 9th June, 2014, the plaintiff was appointed receiver over the secured lands which included the property known as the Saltee Hotel.

3. By way of further background, on 13th June, 2014, the first and second named defendants issued proceedings entitled *Robert Roche and Saltee Hotel (Wexford) Ltd v. Investec Bank PLC (formerly known as Investec Bank UK Ltd) and O'Riordan.* Those proceedings have already been determined wherein the plaintiffs were unsuccessful. Mr. Roche was cross examined by Mr. Howard, S.C., for the Bank, in the course of the abovementioned proceedings regarding aspects of the receivership. Mr. Molloy, S.C., for the defendants, accepted that the issues for the Court's determination in these proceedings are technical in nature. It was not disputed that the demands for immediate repayment of the outstanding sum were not met and that the loan therefore remains extant.

4. The defendants prepared an issue paper setting out the technical issues which are now in dispute, of which there are eight in total. In the course of these proceedings the defendants conceded the eighth issue, the remaining issues on the issue paper are as follows:-

> 1. "The mortgage deed dated 11th May 2005 is not admissible in evidence due to not being properly stamped. If inadmissible there is no proof of power of appointment of a receiver.
>
> 2. The nature of the mortgage and the consequences of the variation clause.
>
> 3. The guarantee was for a 24 month period only and the alleged guarantor was not informed of any extension and as such the guarantee is unenforceable. At the termination of the facility letter dated the 27th May 2005, the contracts extending the term, the exit fees, the rollover of these facilities was without the consent in writing of the surety. This submitted that these were fresh contracts which were not the subject of any guarantee in writing.
>
> 4. There is no valid Deed of Appointment of the receiver dated 9th June 2014.
>
> 5. Certain terms of the guarantee purportedly given was ultra vires the powers of Saltee, to the knowledge of the bank.
>
> 6. Any variations had the effect of discharging the guarantee.
>
> 7. The entity appointing the plaintiff is not the legal owner of the registered charge."

The evidence

4. The plaintiff relied on the sworn affidavits and documents exhibited thereto. Factual matters were not in dispute. Ms. Duddy, Company Secretary to the Bank, gave evidence that Investec Bank was incorporated in England and Wales, in 1950 and that the bank is currently known as Investec Bank Plc. She stated that the bank came to Ireland in 2000 and opened an Irish branch through which Investec Bank Plc carries on its business in this jurisdiction. She explained that the Irish branch is not a separate legal entity but has a separate registration number, with the Companies Registration Office in Ireland. She referred to the aforementioned debenture between Glynn Properties Ltd and Investec Bank (UK) Ltd (Irish branch) and stated that the document was duly stamped by the Revenue Commissioners with a fee of €630 on the 24th June, 2005. The original document bearing the seal of the Revenue Commissioners was produced in court. Ms. Duddy also examined the legal charge between Saltee Hotel (Wexford) Ltd and Investec Bank UK Ltd (Irish branch) wherein, she stated that stamp duty in the sum of €12.50 was paid and duly stamped with the seal of the Revenue Commissioners and bearing the letters COL which she indicated meant collateral. The original of this document was produced to the court. In cross examination, Ms. Duddy was referred to "variation of terms" clauses in the legal charge and the debenture.

5. It was submitted on behalf of the plaintiff by Mr. Howard, S.C. that the vast majority of the issues contained in the issue paper had not been pleaded. It is the position that on 4th September, 2014 the defendant delivered a defence and counterclaim in the proceedings and that the only issue that was pleaded is that at point 3 of the issue paper. Mr. Howard submitted that this was unfair and the Court should not consider any issue other than that raised at point 3. I am satisfied that the plaintiff was in a position to address the issues raised by the defendants and that in this instance the plaintiff is not prejudiced. Therefore, I will proceed to deal with each issue in turn.

Issue 1
6. Mr. Molloy, S.C. submitted that the mortgage deed relied upon by the plaintiff was not stamped for full value and was therefore inadmissible in evidence. Ms Duddy gave evidence for the plaintiff that the debenture, as principal security was correctly stamped in the sum of €630 and that the legal charge, as collateral to the principal security was stamped in the sum of €12.50.

7. The relevant portions of Schedule 1 of the Stamp Duties Consolidation Act 1999 as amended by the Finance Act, 2001 provide *inter alia* that any:-

> ***"MORTGAGE, BOND, DEBENTURE, COVENANT*** (except a marketable security) which is a security for the payment or repayment of money which is a charge or incumbrance on property situated in the State other than shares in stocks or funds of the Government or the Oireachtas."

Being a collateral security, where the amount secured exceeds €254,000, the security shall be stamped in the sum of €12.50 in accordance with Schedule 1 of the 1999 Act. Where the security is the principal security and where the amount secured exceeds €254,000. it shall be stamped in the sum of €630.00.

Decision on issue 1
8. It is clear from the facility letter dated 26th April, 2005, that the charge was collateral to the principal security, the composite debenture of 11th May, 2005. The legal charge and the debenture were each dated 11th May, 2005. The original documents demonstrate that such documents were stamped and accepted by the Revenue Commissioners. I am satisfied that the documents were properly stamped for the purposes of the Act of 1999.

Defendants submissions on issues 2, 3 and 6

Issue 2
9. Mr. Molloy referred to clause 19 of the guarantee and indemnity dated 11th May, 2005 and clause 26 of the deed of legal charge over real property dated 11th May, 2005. Clause 19 provides as follows:-

> "No variation of this guarantee shall be considered valid and as constituting part of this guarantee unless such variation shall have been writing and signed by the bank and the guarantor".

Clause 26 is in the same terms save, and insofar as it refers to the Mortgagor.

10. Mr. Molloy, S.C. submitted that the aforementioned clauses are unique and must be given their express meaning. In the context of any variation; such variation must be in writing and signed by the Bank and Guarantor. Mr. Molloy, S.C. also submitted that different considerations apply when the Guarantor is a company and that in those circumstances assent must be given by a person so authorised on behalf of the company. He submitted that the within proceedings relate to a land charge and consequently security on foot of such charge can only be realised by the Bank if monies are due and owing by the second named defendant. The focus of Mr. Molloy's submission was in respect of the guarantee and indemnity of 11th May, 2005 which he argued applied equally to the legal charge.

Issue 3
11. Mr. Molloy referred to the facility letter of 26th April, 2005 which he argued was for a period of two years, expiring on 29th April, 2007. He referred to subsequent correspondence extending the repayment date of the loan and, in particular, referred to a letter dated 8th February, 2008, which he argued introduced more onerous conditions, than those specified in the original facility letter. The main trust of his argument was that the purported variations were between the Bank and the Borrower (Glynn) and were not signed off by the Company. He submitted that it is well established that a Guarantor is released from liability under a guarantee where the creditor and the principal debtor have entered into an agreement, which has the effect of alternating the contractual position between them to the disadvantage of the guarantor, without his prior consent and referred to the decision of *Holme v. Brunskill* [1877] 3 QBD 495. In this respect he argued that in each instance a Guarantor must not only know about any variations, but must also assent to those variations in writing.

Issue 6
12. Mr. Molloy submitted that any variations had the effect of discharging the guarantee. He submitted that whilst the guarantee and indemnity is described as a guarantee and indemnity, such only had effect for the first twenty-four month period and did not extend beyond the first extension period. He submitted that if the guarantee and indemnity amounted to an indemnity, it was for a limited period and could only be varied on terms which complied with the law of guarantees.

The Documents

A) Legal charge
13. Clause 4.2 provides:-

> "Neither the security nor any remedy of the bank in respect thereof shall be prejudice by any unenforceability or invalidity or any other agreement or document or any time or indulgence granted to the Mortgagor by the Bank or any other act or thing whatsoever, which but for this Clause, would or might prejudice the security or the right of the Bank to any remedy."

Clause 26 provides:-

> "No variation of this Charge shall be considered valid and as constituting part of this Charge unless such variation shall have been made in writing and signed by the Bank and the Mortgagor".

B) Guarantee and Indemnity
14. Clause 2(a) provides:-

> "In consideration of the Bank agreeing to make the Facility available to the Borrower pursuant to the Facility Letter, the Guarantor hereby irrevocably and unconditionally:
>
> (a) guarantees to the Bank the due and punctual, payment, observance, performance and discharge of, and undertakes forthwith on demand being made on the Guarantor by the Bank to pay or discharge when due, all of the obligations, indebtedness and liabilities of the Borrower to the Bank under or pursuant to the Facility Letter or this Guarantee or on account of any breach thereof; and

15. Clause 3 provides:-

> "The security created by this Guarantee shall be a continuing security to the Bank notwithstanding any discharge, intermediate payment or settlement of the whole or part of any account or any other matter or thing whatsoever and shall be without prejudice and in addition to an independent of any other right, remedy or other security which the Bank may now or at any time hereafter hold in respect of the liabilities hereby secured or any of them or any part thereof.
>
> This Guarantee is in addition to and shall not affect any other right, remedy, guarantee, indemnity or security now or hereafter available to or held by the Bank in relation to the Borrower and it may be enforced notwithstanding the existence of the same and this Guarantee may be enforced by the Bank against the Guarantor without taking any steps or proceedings against the Borrower.

16. Clause 4 provides:-

> "The liability of the Guarantor hereunder shall be as sole and primary obligor and not merely as surety and shall not be impaired as discharged by reason of any matter, act or omission whereby the liability of the Guarantor would not have been discharged if the Guarantor had been the principal debtor and the Guarantor hereby waives all and any of its rights as surety which may at any time be inconsistent with any of the provisions of this Guarantee."

17. Clause 5 provides *inter alia*:-

> "The liability of the Guarantor shall not be affected nor shall this Guarantee be discharged or diminished by reason of:
>
> (a) Any increase or decrease in the Facility or any other amendment (however fundamental) to the Facility Letter.'

18. Clause 19 provides:-

> "No variation of this guarantee shall be considered valid and as constituting part of this guarantee unless such variation shall have been in writing and signed by the Bank and the Guarantor."

C) The Facility Letter
19. The purpose of the facility letter dated 26th April, 2005, was to assist with the cost of the acquisition of 100% of the shareholding of the Saltee Hotel Ltd. (the Company). Security for such facility is set out in clause 8 of the facility letter as follows:-

> "(a) "Composite Debenture to be entered into by the Borrower and the Company, which will charge and assign all assets of both companies, including but not limited to
>
> (i) the property know as the Saltees Hotel, Kilmore Quay, Co. Wexford (the "property");
>
> (ii) the Borrowers shareholding in the Company; and
>
> (iii) the seven day liquor license
>
> (b) a guarantee of the borrower's obligations to the bank to be granted by the company in favour of the bank
>
> (c) a guarantee in the amount of the facility signed by Robert Roche (the guarantor) supported by a first legal charge over ninety-eight acres of land at Gentstown, Kilmore, Co. Wexford;"

The plaintiff's Submissions on Issues 2, 3 and 6
20. Mr. Howard, S.C. submitted that the legal charge, dated 11th May, 2005, is not specific to, or dependent upon, the facility letter. He submitted that the legal charge was never varied and that such charge is provided to the bank, until the charge is released. He submitted that the same position applied to the debenture dated 11th May, 2005. It was submitted that the facility letter simply required that certain securities were to be provided and that there is no condition indicating that the security, whether it be the debenture or the legal charge may not be relied upon should there be a variation in the facility letter.

21. It was submitted, on behalf of the plaintiff, that the guarantee was not for a twenty-four month period, as alleged by the defendant. Mr. Howard submitted that while the facility letter provided for an original final repayment date of twenty-four months, from the date of drawdown, this did not affect the liability of the Guarantor under the Saltee guarantee. The plaintiff sought to rely upon clause 2(a); clause 3.1; clause 4 and clause 5 of the guarantee and indemnity, which Mr. Howard, S.C. submitted, contradicted the defendant's assertion that the Company was released from its obligations pursuant to the guarantee and indemnity by reason of the extension of the underlying facility. It was further submitted that the company consented to the terms of the guarantee, which provides at clause 5.1(a) that the company liability should not be affected nor shall the guarantee be discharged or diminished, by any increase or any other amendment to the facility letter.

22. It was submitted that the guarantee was not defined as meaning the guarantee in its own right, but was defined as meaning "this

guarantee and indemnity." Mr. Howard submitted, in this context, that if one is indemnifying a third party in respect of the advance of monies or indeed a bank in respect of the advance of monies to a third party, it is being effected pursuant to a guarantee and indemnity which is being underwritten. He submitted, that even if there is an inherent defect in the lending which would otherwise excuse a guarantor, that the entity is also an indemnitor underwriting the liability, even if a claim and a guarantee simpliciter were to fail. Mr. Howard, S.C. referred to *Banking Law* (3rd Edition) para. 14-06:-

> "The principal feature which differentiates the nature of the obligation arising on foot of a guarantee, on the one hand, and an indemnity, on the other, is the dependent nature of the guarantor's obligation- as opposed to the independent nature of an indemnitor's obligation. A guarantor assumes an obligation to answer for the debt of another; this is a secondary obligation, dependent on the existence- and validity- of the underlying (principal) debt. Accordingly, the guarantor is liable under the guarantee only if the principal debtor is liable. Equally, if the guarantee is referable to a particular loan agreement which never came into effect because conditions precedent were not satisfied, no guarantee obligation comes into being. By contrast, an indemnitor owes an obligation to make good the primary liability but this does not depend on the validity of the obligation to which the indemnity is referable. "An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promise." A guarantor may be able to resist liability if it can demonstrate a legal infirmity in the obligation to which the contract of suretyship is referable. An indemnitor is liable notwithstanding the particular liability could not be assumed by the debtor."

23. Counsel for the plaintiff submitted, that on any reading of clause 5, it encapsulates an extension of the repayment date on foot of the facility letter, any addition of a higher interest rate and/or the addition of an extra facility charge to the Bank. He submitted that there is no distinction to be drawn between the position of an individual and a corporate vehicle, which was the core issue in *McFadden,* he submitted that the Guarantor in *Danske Bank A/S (T/A National Irish Banks) v. McFadden* [2010] IEHC 116, could just as easily have been a corporate emanation of Mr. McFadden.

24. Mr. Howard, S.C. argued, in the present case, the company is the corporate emanation of Mr. Roche, he being the controlling personality, the Director and the Company Secretary. He further submitted that Mr. Roche signed the facility letter, signed his personal guarantee, signed the guarantee and indemnity and other security documents for the Company and the security documents for Glynn. All such documents were witnessed by his Solicitor.

25. Mr. Howard, S.C. submitted that that there could be a variation of the facility letter and that the Company accepted such risk pursuant to the guarantee and indemnity, that there was no question of the Company having to consent to any variation, as it assumed that risk from the outset. Counsel for the plaintiff submitted that any variation within the facility letter is of no consequence, by virtue of clause 5.1(a) of the guarantee and indemnity. He submitted, that the suggestion that the variation clause was in some way unique, is of no moment.

26. It was submitted on behalf of the plaintiff, in reference to *McFadden*, where a Guarantor assents to a variation, he will not be discharged from his guarantee. Finally, it was submitted, that the Company expressly consented to the guarantee being a continuing security, and relied upon the meaning and effect of a continuing security summarised by Finlay Geoghegan J. in *Bank of Scotland v. Fergus* [2012] IEHC 131.

Law

27. In *McFadden,* a series of loans were advanced to a company; Naldin Ltd, to enable it to takeover a group of companies. The relevant loan in that instance was a bridging loan, in respect of which the defendant gave a personal guarantee. Contained within that guarantee was a handwritten insertion which added an additional clause 3.3 to the bridging loan in the following terms:-

> "This guarantee of Niall McFadden relates only to the Loan Agreement in connection with the acquisition of Buy and Sell by Naldin Ltd (and any amendments agreed in writing to that Loan Agreement) and may not be used for any other purpose now or in the future by the Bank. And this clause overrides any conflicting clause in this guarantee agreement."

28. The bridging facility lasted for a longer period than had been originally envisaged. This continuation came about by virtue of requests in correspondence and at meetings from directors of Naldin where an extension of the facility was agreed by NIB. For most of this period the defendant was not a director of Naldin. However, the defendant executed a guarantee whereby he agreed to guarantee the liabilities of Naldin under the bridging loan to NIB. Clarke J. considered whether the fact that the bridging facility continued beyond the original maximum period amounted to an "amendment" of the bridging facility, in the sense in which that term was used in the handwritten clause of the guarantee. The issue was whether the series of extensions of the facility amounted to amendments. A second issue arose being, by whom had such amendments to be agreed in writing, so as to satisfy the terms of clause 3.3. In effect, the question arose as to weather the Bank's agreement (with or without a written request from the company), was sufficient, or did the defendant also have to agree in writing. Clarke J. accepted that the 'giving of time' amounted to a material change, he also found that clause 3.3 referred to the loan agreement; therefore the parties who would have to agree to an amendment, were the parties to the agreement.

29. Clarke J. was of the view that where a Guarantor agrees to a variation, he will not be discharged from his guarantee. He stated at p. 30:-

> "It does not appear that it is necessary that there be a formal assent by the guarantor to the relevant change. A guarantor who is a principal or significant player in a corporate entity whose liabilities are guaranteed may be taken to assent by virtue of active participation in the relevant changes. In *Grubbs v. Bouwhuis* [2007] BCSC 887, and *High Mountain Feed Distributors Limited v. Paw Pleasers Limited* [2004] NBQB 220, the Canadian Courts refused to discharge a guarantor from liabilities in circumstances where, in the case of *Grubbs*, the guarantor was "the managing director of (the debtor) and had full knowledge of the deviation from the contract…and acquiesced in and consented to the business relationship that grew up…" while, in *High Mountain Feed*, the guarantor was president of the defendant corporation and in the words of the court "must have not only known of…. but actively participated" in the relevant variations."

I note that in the present case, Mr. Roche was the Director and Secretary of the Company and the Director of Glynn.

Clarke J. continued:-

> "It would seem, therefore, that at the level of principle a guarantor will not be discharged where the guarantor actually agrees or assents to a change which might otherwise give rise to a discharge. In addition, a guarantor will not be discharged where that guarantor is an active participant in arranging the alteration concerned, albeit not in the capacity

of guarantor but rather as a significant player in the entity that is the principal debtor."

Decision on issues 2, 3 and 6

30. By means of the facility letter, dated 26th April, 2005, Investec Bank PLC formerly Investec Bank (UK) Limited, provided loan facilities to Glynn the parent company of Saltee Hotel (Wexford) Limited. The facility letter provided expressly that the loan facilities were repayable on demand. The facilities were extended from time to time by letters of extension; which were signed by Robert Roche, director of Glynn. Robert Roche is a Director and company Secretary of the Company.

31. The legal charge and guarantee and indemnity each contain a variation clause, in the aforementioned terms and were signed by Robert Roche. I am satisfied that the legal charge was executed by the company, in favour of the Bank and that this charge was pledged as security for the aforementioned loan facilities, provided to Glynn by the Bank. I am also satisfied that the Company expressly agreed to accept the terms of the guarantee and indemnity.

32. It was submitted on behalf of the defendants that the guarantee was for a 24 month period only. However, whilst the facility letter initially provided for a repayment date 24 months from the initial drawdown, this does not affect the Company's liabilities under the guarantee. In the present case, the loan facility was between Glynn and the Bank, therefore, applying the rationale in *McFadden*, the only parties able to effect an extension of that facility were the parties to that agreement, being Glynn and the Bank. Each letter of extension was signed by Mr. Roche, the director of Glynn thus validly extending the time in each instance.

33. There was express agreement and consent on the part of Mr. Roche, in his capacity as Director of Glynn to each variation to the terms of the loan facility, it should be noted that the extension of the repayment date operated to the defendant's benefit. Furthermore, each letter of extension contained the following paragraph:-

> "Save for the variations set out in this letter, the Facility Letter will remain in full force and effect and each party will be entitled to rely on the terms and conditions of it."

I do not accept that the Company was released from its obligations pursuant to the guarantee by virtue of variations, extending the repayment date for the loan facility, which were to the benefit of the defendants and which were executed by Robert Roche, the Director and Secretary of the Company.

34. Further support for my conclusion is drawn from the terms of the guarantee specifically the clauses to which I have referred above; clauses 2(a), 3.1, 4, and 6. Clause 3 of the guarantee contains express continuing security provisions. Clauses 5 and 6 expressly provide that the underlying loan facility agreements may be amended and that the Bank is free to continue to deal with the borrower (Glynn) without affecting the enforceability or the validity of the guarantee. I consider Clause 5 to be apposite, it provides:-

> "The liability of the Guarantor shall not be affected nor shall this Guarantee be discharged or diminished by reason of any increase or decrease in the Facility or any other amendment (however fundamental) to the Facility Letter".

This clearly indicates that the Company's liability shall not be affected and nor shall the guarantee be discharged or diminished by any increase or any other amendment to the facility letter. I am satisfied that the terms of the guarantee are clear and unequivocal, therefore the Company's liability is not released from its obligations by reason of the extension of the loan facility.

35. Mr. Roche was the director and Company Secretary of Saltee and Director of Glynn, he signed the facility letter, the personal guarantee, the guarantee and indemnity and other security documents for Saltee and for Glynn, which were witnessed by his solicitor. I am satisfied in the circumstances that Mr. Roche assented to the extension of the repayment date. The Company cannot therefore be discharged from the guarantee. He was undoubtedly in terms of *McFadden*, at the very least, an active participant in the relevant changes, he being the Director of the Principal Debtor and the Director and Company Secretary to the Guarantor.

36. In *Bank of Scotland Plc. v. Charles Fergus* [2012] IEHC 131, the borrower had provided a number of guarantees to the bank, the bank initially issued proceedings in respect of some of the guarantees provided by the borrower and certain of the guarantees were no longer relied upon. The guarantees purported to relate to the debts due by the borrower, in respect of the loans for which the guarantees had been given. Finlay Geoghegan J. observed at para. 38 as follows:

> "The terms of the guarantee, when construed objectively, means that it is a continuing guarantee for all monies then due or which might become due in the future by the Company to the bank. Hence, it appears to me that the onus shifts to Mr. Fergus to establish as a matter of probability that the guarantee, despite its express written terms was given for a particular facility or transaction."

37. In the present case the, legal charge was provided as part of the security, on foot of a facility letter of 26th April, 2005, which was executed by Mr. Roche and extended from time to time and in respect of which Mr. Roche signed the letters of extension. This is the evidence before the Court. There was no other evidence adduced in respect of any other factor which could indicate that the charge, debenture or the Saltee guarantee were discharged.

38. The deed of guarantee and indemnity defines a guarantee as meaning this guarantee and indemnity. I am therefore satisfied that there was a guarantee and indemnity. I am satisfied that there is a distinction between the facility letter, the security documents and that the express terms of the guarantee and indemnity permit an increase or a decrease in the facility or any other amendment which does not affect the liability of the guarantor or discharge or diminish the guarantee. I am satisfied that the Guarantor has obligations pursuant the guarantee and indemnity to the bank, even if the bank were not in a position to recover the debt from the borrower, Glynn. Having regard to clause 4.2 of the legal charge, I am satisfied that by extending the facility letters, this did not constitute a release by the bank of the defendants from their liabilities and that the security continued.

Issue 5

39. Mr. Molloy, S.C. submitted that the terms of the guarantee and indemnity relied upon were ultra vires the powers of the Company. He submitted that the memorandum and articles of association of the Company were furnished to the Bank prior to the drawdown and that therefore the bank were aware the transaction was *ultra vires*, the powers of the Company.

40. The plaintiff submitted that the memorandum of association of the Company expressly provides the objects for which the Company was established, including the necessary powers pursuant to clause 2(15) and clause 2(17). Mr. Howard, S.C. further relied upon clause 2(32) providing a general power to the company to effect its objects and clause 2(33); to carry on any other business connected with its objects.

41. It was further submitted on behalf of the plaintiff, that actual awareness of specific corporate incapacity is a statutory prerequisite to satisfying the ultra vires rule pursuant to section 8(1) of the Company's Act, 1963. The plaintiff submitted that there was no evidence before the Court that the bank had such actual awareness of any alleged corporate incapacity on the part of Saltee.

Decision on issue 5
42. The memorandum of association of the Company, expressly provide that the objects for which the Company was established include the following:-

Clause 2(15):-

> "To guarantee, support or secure whether by personal covenant or by mortgaging or charging all or any part of the undertaking, property and assets (present and future) and uncalled capital of the Company or by both such methods, the performance of the obligations of and the repayment or payment of the principle amounts of and premiums, interest and dividends on any securities of any person, firm or company, and in particular (without prejudice to the generality of the foregoing) give (with or without consideration) security for any debts, obligations or liabilities of any company which is for the time being the holding company or a subsidiary (both as defined by section 155 of the Companies Act, 1963) of the Company or other subsidiary as defined by the said Section of the Company's holding company or otherwise associated with the Company in business."

Clause 2(17):-

> "To establish, promote and otherwise assist any company or companies or associations for the purpose of acquiring all or any of the properties or liabilities of this Company or for furthering the objects of the Company or for the purpose of prosecuting or executing any undertaking, works, projects or enterprises of any description."

43. I am satisfied that the memorandum of association of the Company provide the Company with a broad power in respect of borrowing, and other general functions and permit of the type of activity entered into by the Company. Clause 2(15) is in the broadest possible terms and I am satisfied it covers the type of activity we are concerned with. Even taking a literal approach to clauses 2(32) and 2(33), such clauses provide the requisite powers to the Company. Section 6(1)(b) of the Company's Act, 1963 provides that a company must have an objects clause, which states the purposes for which the company was formed and the legitimate activities it can pursue. I am satisfied that the memorandum of association of the Company permits the giving of the aforementioned guarantee and that such was *intra vires* the powers of the Company.

44. Therefore, as I am satisfied that the giving of the guarantee was intra vires the powers of the Company, I do not have to proceed to decide whether the Bank was "actually aware", of the corporate capacity of the Company.

45. Even if I was not so satisfied, such powers are implied to the Company as they may "fairly be regarded as incidental to, or consequential upon", the Company's expressed objects, *Attorney General v Great Eastern Railway* [1880] 5 AC 473.

Issue 7
46. Mr. Molloy, S.C. submitted that the plaintiff was not appointed by an entity who was the legal holder of the registered charge. He submitted that only the registered owner of a charge could avail of the statutory mechanism for the enforcement of a charge and relied upon the decision of *Kavanagh & Another v. McLoughlin & Another* [2015] IESC 27.

47. Mr. Howard, S.C. submitted that the Kavanagh decision has no relevance, as the plaintiff is not seeking to exercise any power pursuant to section 62(6) of the Registration of Title Act, 1964. The plaintiff relied upon the evidence of Ms. Duddy. It was submitted on behalf of the plaintiff that while Investec Bank (UK) Ltd. became a public limited company in 2009 and changed its name accordingly to Investec Bank Plc., this was a simple name change and did not involve a transmission of interest or a merger. Mr. Howard, S.C. relied upon the decision of Costello J. in *re Bankruptcy Summons by ACC Loan Management Ltd.* [2015] 1 EHC 96, where the debtor argued that the bankruptcy summons should be dismissed, as the statutory demand and statutory summons were brought in the name of ACC Bank Plc. and the petition was brought in the name of ACC Loan Management Ltd.

48. Section 23(4) of the Company's Act, 1963 (as amended) provides:-

> "A change of name by a company under this section shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it by its former name may be continued or commenced against it by its new name."

In accordance with this provision Costello J. held at p.5:-

> "This governs the change of name from ACC Bank Plc. to ACC Loan Management Ltd. The change of status from a Plc. to a limited liability company can have no bearing whatsoever on the capacity of the creditor to collect debts due to it.

Decision on issue 7
49. I heard evidence that the Irish branch of Investec Plc., is not a separate legal entity but is a branch of Investec Bank Plc.

50. I am satisfied that the plaintiff does not seek to exercise powers conferred by section 62(6) of the Act of 1964. The matter before the court concerns the entitlement of Investec Bank Plc. to appoint the plaintiff as receiver and is not derived from section 62(6) of the Act of 1964. I am satisfied, in accordance with the decision of Costello J. in *In re Bankruptcy Summons by ACC Loan Management Ltd.*, that when Investec Bank became a public limited company, and thereby changed its name to Investec Bank Plc., that this was a change of name and not a transmission of interest or a merger. I am satisfied that this argument fails and that the entity who appointed the plaintiff is the legal owner of the registered charge.

Damages
51. The Receiver was appointed by deed of appointment dated 9th June, 2014, over the relevant lands and premises, and, on the evidence, the plaintiff notified Mr. Roche accordingly. Through his Counsel in the associated proceedings, Mr. Roche accepted, that he overreacted when the plaintiff initially sought to enter the premises. An interim injunction was granted on 11th June, 2014, *inter alia* restraining Mr. Roche from trespassing on the property and from interfering with the receivership. In the course of the proceedings, brought by Mr. Roche, I heard evidence as to the alleged ownership of kitchen appliances and other items in the hotel.

The plaintiff did not quantify any specific element of the alleged damage to the premises, and on balance, I am not satisfied to make an award of damages.

Conclusion

52. Accordingly, I am satisfied that the plaintiff was lawfully appointed as receiver over the property and I will grant the declaration sought. It will be noted in the order that the defendant has, through his counsel, undertaken not to interfere with possession of the property or the receivership.