Neutral Citation Number: [2009] IEHC 454

THE HIGH COURT

2005 2463 P

BETWEEN

BRIAN CUNNINGHAM

PLAINTIFF

AND

SPRINGSIDE PROPERTIES LIMITED (IN RECEIVERSHIP)

AND

BY ORDER, ARTHUR COX

AND

FIRST ACTIVE PLC

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 31st July, 2009

1. Introduction

1.1 This case makes up part of a series of linked cases taken by the plaintiff ("Mr. Cunningham") and companies controlled by him against the third named defendant ("First Active") and a receiver appointed to many of those companies, Ray Jackson ("Mr. Jackson"). A summary of the facts relevant to the history of events between the parties was set out in a judgment dismissing the majority of the claims against First Active and Mr. Jackson (the "Moorview Proceedings") on 6th March, 2009 (*Moorview Developments & Ors v. First Active plc. & Ors* [2009] IEHC 214). At a subsequent case management hearing on 31st March, 2009, Counsel for Mr. Cunningham identified two issues that remained in existence in these proceedings, being the issue of priorities as between First Active debentures and the interests of Mr. Cunningham in relation to certain properties and assets of the first named defendant ("Springside"), and secondly, issues arising out of an alleged breach of an undertaking given by Arthur Cox to this Court.

1.2 Each of the defendants have, in that context, brought an application to strike out Mr. Cunningham's claims as being bound to fail.

1.3 Having heard the applications of each of the defendants and taken time to consider the matters raised, I indicated to the parties that I had concluded that each of the defendant's applications should succeed and that I would subsequently give detailed reasons for that finding. This judgment is directed to those reasons. However, for a proper understanding of the issues which arose before me it is necessary to turn first to the factual background to those issues, with particular reference to the facts that are relevant to the undertakings which are at the heart of the proceedings against Springside and Arthur Cox, together with the facts relevant to the priorities issue that gives rise to the dispute as against First Active.

2. Factual Background

2.1 On 3rd November, 2003, Mr. Jackson was appointed receiver and manager of all the undertakings, property and assets of Springside, a company of which Mr. Cunningham was a shareholder and a director. The appointment was made pursuant to mortgage debentures between Springside and First Active dated 6th September, 1999 and 2nd November, 2000. On 1st September, 2004, Mr. Cunningham obtained a default judgment against Springside and on 15th September, 2004, Mr. Cunningham registered that judgment as a judgment mortgage against certain properties owned by Springside, the relevant properties being Units 13 and 14 Drogheda Mall (the "Properties").`

2.2 On 27th October, 2004, Mr. Cunningham issued a special summons seeking a well charging order, the taking of an account, an order for vacant possession and an order for sale of the Properties. In May 2005, Mr. Cunningham's well charging application in respect of the Properties came before the Court. The matter was heard by Dunne J. in this Court on 9th May, 2005 and a well charging order was granted. However, Dunne J. declined to make an order for sale, because of the fact that Mr. Jackson was in the process of marketing the Properties and on the basis that it was argued that the interests of Mr. Jackson as receiver had priority over those of Mr. Cunningham as judgment mortgagee.

(a) Undertaking given by Arthur Cox, Mr. Jackson and First Active in relation to the Proceeds of sale of the Properties.

2.3 During the course of the hearing before Dunne J, Arthur Cox instructed Counsel to give an undertaking to the Court that upon the completion of a sale by Mr. Jackson, Mr. Cunningham would be notified of such completion and the relevant proceeds of sale would be held for a further 14 day period. It is also said by Arthur Cox that the Court was informed at that time that there was the possibility of a sale by First Active as mortgagee in possession and that the same undertaking would apply in that event. However this was not expressly reflected in the Order made by the Court, which stated as follows:-

> "And the solicitor for the Defendant undertaking that any sums realised in the sale of the lands comprised in the second Schedule hereto will not be discharged without prior notification to the Plaintiffs and such monies be retained for fourteen days by the Defendants from the date of such notification."

In the context of the Order the reference to the defendant is, strictly speaking, a reference to Springside although it is not disputed but that the necessary instructions came from Mr. Jackson in his capacity as receiver of Springside.

2.4 In substance the process identified by Dunne J. in her order was that Mr. Cunningham was to be notified of a sale of the Properties and, in effect, given 14 days in which to bring any proceedings or applications that might be considered appropriate in the light of the sale concerned. Mr. Cunningham stated that the purpose of this undertaking was to allow him the opportunity to apply to the Court in respect of the proceeds of sale which he alleged were payable to him in priority to any other person. Between 9th May,

2005 and 27th July, 2005, correspondence passed between Arthur Cox and the solicitors for Mr. Cunningham in which it was stated that there was a possibility that First Active might sell as mortgagee in possession and that, in such an event, the undertaking given to the Court was that a period of 14 days notice would be given to allow Mr. Cunningham to a bring any fresh application that he might wish to bring.

2.5 In a letter of 13th June, 2005 from Arthur Cox to the solicitors for Mr. Cunningham the final sentence states:-

> "I confirm, as indicated to the Court, that in the event of a sale by the bank as mortgagee in possession the sale proceeds will be held by this office in accordance with the spirit of our undertaking as the sale had been effected by the defendant."

There is nothing in that correspondence which disputes, on behalf of Mr. Cunningham, the description of what happened in court or the characterisation of the status of the undertaking in the event of a sale by First Active as mortgagee in possession.

2.6 On 6th December, 2005 Mr. Jackson, as receiver, entered into a contract for the sale of the Properties to a James McCartan, as purchaser. The relevant contract expressly provided, at special conditions 5 and 6, for a deed of transfer to be supplied either by Springside (acting through the receiver) or by First Active, selling as mortgagee in possession. A sale as mortgagee in possession was thought possibly to be required, in order to sell clear of subsequent encumbrances.

2.7 On 18th December, 2005, First Active went into possession as mortgagee and agreed to sell the Properties in that capacity so that the proceeds of sale would go directly to First Active, or more accurately would go to Arthur Cox, in the capacity as the solicitors who acted for First Active. It was, of course, in those circumstances, First Active who would execute and deliver the relevant assurance as mortgagees in possession.

2.8 Subsequently, on 1st June, 2006, the sale to Mr McCartan was closed by Arthur Cox, acting for First Active. In accordance, it is said, with the Order of the Court of 9th May 2005, notification was given to Mr. Cunningham by Arthur Cox that the sale had closed and that the proceeds were being held for a 14 day period. This was done by a letter, also of the 1st June, 2006. The letter concerned refers to the Court Order of 9th May, 2006 and states as follows:-

> "As you are aware, on that occasion, counsel for Mr. Jackson undertook to the Court that as soon as the sale of the two units relevant to your proceedings was completed you would be notified and further that the sale proceeds would be held for a period of 14 days. In addition counsel for Mr. Jackson indicated that the sale might be concluded by First Active as mortgagee in possession and this is what has now transpired."

2.9 The relevant 14 day period was extended by agreement, because of an intervening court vacation, until a hearing on 18th July, 2006. In a letter of 8th June, 2006, from Arthur Cox to Mr Cunningham, Arthur Cox stated that Arthur Cox would continue to hold the purchase monies for a 14 day period before paying out same to First Active. In this letter, Arthur Cox's client is stated as being Mr. Jackson. Mr. Cunningham issued a motion with a return date of 19th June, 2006 seeking an order to restrain Springside from discharging or otherwise paying the proceeds of sale to any third party other than with the prior approval of the Court.

2.10 The application came for hearing before me on the 18th July, 2006. At that hearing I was informed that the sale had, in fact, been effected by First Active. In a judgment delivered on that occasion I set out the history of how the matter had come to be before the Court. It is also clear that I was, on the occasion in question, satisfied that counsel had in fact informed Dunne J. of the possibility of a sale being effected by First Active as mortgagee in possession rather than by Mr. Jackson as receiver.

2.11 In the course of that judgment I also made clear that the correspondence which passed between Arthur Cox and the solicitors for Mr. Cunningham, subsequent to the matter being before Dunne J., was such that it ought to have been clear to Mr. Cunningham that the sale had been closed by First Active acting as mortgagee in possession.

(b) Priority between First Active Debentures and Mr. Cunningham's Interests: The 2001 and 2002 Guarantees

2.12 Further to the debenture of 6th September, 1999, Springside executed a second mortgage debenture in favour of First Active on 2nd November, 2000. On 21st December, 2001, Springside purported to execute a guarantee of the debts of another company in which Mr. Cunningham was a shareholder, Salthill Properties Limited ("Salthill"), (the "First Guarantee"). This document was signed at the request of First Active in order to provide extra security for the debt of Salthill. Mr Cunningham's case is that Springside had no interest in guaranteeing Salthill's debts and, on that basis, it is said that the guarantee was *ultra vires* and void.

2.13 On 24th September, 2002, Springside's then debt to First Active was repaid following a sale of other property and assets, not including the Properties. Mr. Cunningham's case is to the effect that the payment of the debt automatically released the debenture of November 2000 as well as that of September 1999.

2.14 On 9th October, 2002, Springside purported to execute a second guarantee of the debts of another of Mr. Cunningham's companies, Moorview Developments Limited ("Moorview") (the "Second Guarantee"). Mr. Cunningham submitted that this guarantee was unsecured as, on his case, the relevant mortgage debenture had been released in the circumstances described in the preceding paragraph. In April 2003, First Active issued demands for payment against Salthill and Moorview. On 23rd October, 2003, First Active issued a demand against Springside under the First and/or Second Guarantees ("the Guarantees") which Mr. Cunningham argues were either void, or in the case of the Second Guarantee, unsecured.

2.15 As pointed out earlier, the issue which I had to decide is as to whether each of the defendants was entitled to have Mr. Cunningham's claim dismissed, at this stage, as being bound to fail. I will refer briefly, in due course, to the jurisprudence in respect of such applications which was not in dispute between the parties. However, in order to assess the argument made by each of the defendants as to Mr. Cunningham's case it is necessary to set out the argument put forward on behalf of Mr. Cunningham in favour of his case, and the response by each of the defendants to that argument. In that context I turn firstly to Mr. Cunningham's case.

3. Mr. Cunningham's case

(a) Priority of judgment mortgage over First Active's charges

3.1 I turn first to the issues relevant to the priorities claim against First Active. Mr. Cunningham submitted that the First Guarantee was not entered into for any proper company purposes and that First Active was aware of that fact. It was claimed that the guarantee was *ultra vires* the memorandum and article of association of Springside on the grounds of the principle set out in *Rolled Steel Products (Holdings) Ltd v British Steel & Corp* [1985] 3 All E.R. 51. This argument is to the effect that a group of companies can validly cross-guarantee each other's liabilities provided that it can be shown that it is in the interest of each of those companies, as a

member of the group, to do so, because each of those companies might need to borrow money and might need the cross-guarantee from the others.

3.2 Mr. Cunningham submitted that there was no possibility that Springside would have needed to borrow any more money from First Active so that the relevant principle did not apply. Thus, it was argued, the relevant Guarantees were invalid.

3.3 Mr. Cunningham also claimed that the debentures were automatically released when Springside discharged the balance of all its indebtedness to First Active after the sale of its properties and receipt of the sale proceeds on 24th September, 2002, as there was no contingent liability under what is said to be the invalid First Guarantee. Mr. Cunningham submitted that, by the date of the Second Guarantee, the debenture had been released and the liability under the Guarantees was unsecured and that, therefore, First Active was an unsecured creditor of Springside so that the well charging order had priority. Those two propositions, i.e. that the relevant Guarantees were invalid and the Second Guarantee was unsecured in any event, lay at the heart of Mr. Cunningham's case against First Active. However, it is also necessary to touch on another point which arose at the hearing. This point relates to *res judicata* and Abuse of Process.

(b) *Res Judicata* and Abuse of Process
3.4 This question arises in the context of an argument put forward by First Active to the effect that questions concerning the validity of the Guarantees can no longer be raised by Mr. Cunningham. In the Moorview Proceedings an issue was raised and then dropped as to the invalidity of the Second Guarantee on the ground that there was no board meeting of Springside at which the company resolved to enter into the guarantees and to alter its memorandum and articles. This point is not raised in these proceedings. Counsel for Mr. Cunningham submitted that there is nothing in the Court's judgment of 6th March, 2009, in the Moorview Proceedings, ruling on the *Rolled Steel* point in the consideration of the damages issue. Accordingly, it was submitted that Mr. Cunningham is entitled to raise this point again as the Court has not previously ruled on it. Counsel for Mr. Cunningham further argued that there was no *res judicata* in relation to any point other than the fraud issue in relation to the First Guarantee. Counsel for Mr. Cunningham argued that the debentures were automatically released when Springside discharged the balance of its indebtedness on 24th September, 2002, there being no contingent liability under the invalid First Guarantee. Therefore, Counsel for Mr. Cunningham submitted, there is a remaining argument over whether Mr. Cunningham's judgment mortgage will have priority over First Active's charges. It is next necessary to turn to the issues relevant to the claim against Springside and Arthur Cox.

(c) Breach of Undertaking
3.5 The claim as against Springside (in effect relying on the actions of Mr. Jackson as receiver) and Arthur Cox derives, as pointed out earlier, from an undertaking given to Dunne J. As has also been noted, correspondence followed that undertaking and it is said that the combined effect of the undertaking and the relevant correspondence gives rise to a misrepresentation on the part of the receiver and/or Arthur Cox. Likewise, an estoppel is said to arise out of the same set of facts. Mr. Cunningham argued that the undertaking, properly construed, precluded a sale by First Active as mortgagee in possession. It was submitted that Arthur Cox undertook that Arthur Cox would treat the proceeds of sale as though they were the proceeds of sale by Springside even if same were received by Arthur Cox as the proceeds of sale by First Active as mortgagee in possession. Counsel for Mr. Cunningham asserted that the contract for sale of the Properties was a contract between Springside and the purchaser and it follows that Springside was entitled to receive the purchase price. Counsel for Mr. Cunningham claimed that Springside, First Active and Arthur Cox agreed to instruct the purchaser to pay the money to First Active rather than to Springside, in breach of the judgment mortgage, the well charging order and the undertaking.

3.6 Counsel for Mr. Cunningham claimed that as a result of the above, Arthur Cox, First Active and Mr. Jackson are liable to restore to Springside the whole of the proceeds of sale and / or are liable to Mr. Cunningham for breach of trust and knowing assistance or deceit. If Arthur Cox received the proceeds of sale for First Active, it was claimed that this was in breach of the judgment mortgage, the well charging order and the undertaking. If, on the other hand, Arthur Cox received the proceeds of sale for Springside, it was claimed that its later payment out to First Active was a breach of the judgment mortgage and the well charging order and that the court was mislead on 18th July, 2006.

3.7 Counsel for Mr. Cunningham submitted that Mr. Jackson was entitled to receive the proceeds of sale as receiver, as the other contracting party to the contract of sale, but instead of receiving it himself he allowed it to be paid to First Active contrary to the undertaking that was given. Counsel for Mr. Cunningham also pointed to the fact that it was Mr. Jackson who received the deposit for the Properties.

(d) Estoppel
3.8 Mr. Cunningham also alleged that he relied on the representations of Arthur Cox acting for First Active, Mr. Jackson and Springside, and conducted himself and the legal proceedings as such and expended costs on them up until 18th July, 2006. Mr. Cunningham claimed that, therefore, Arthur Cox, First Active and Mr. Jackson were estopped from denying that Springside received the proceeds of sale and that same was held by Arthur Cox as Springside's agent.

(e) Misrepresentation by Arthur Cox
3.9 There are three sets of misrepresentations alleged against Arthur Cox. In his Amended Statement of Claim dated 2nd February, 2007, Mr. Cunningham alleges that Arthur Cox made the following misrepresentations:

> I. That Springside was in the process of selling the Properties;
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> II. That the proceeds of the sale by Springside of the Properties would be held for 14 days after the sale and that in the event of any mechanism used other than a sale by Springside, specifically the sale by mortgagee in possession, the proceeds of the sale would be held by Springside as if the sale had been effected by Springside; and
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> III. That the sale of the Properties had been completed and that the proceeds of the sale were being held by Arthur Cox on behalf of Springside, and that Arthur Cox was acting on behalf of Springside in respect of the proceeds and that they would continue to hold the proceeds on behalf of Springside up until 22nd June, 2008.

3.10 Counsel for Mr. Cunningham pointed to the letter of 8th June, 2006 and argued that Arthur Cox misrepresented that that the proceeds of sale were held on behalf of their client, Mr. Jackson. Counsel for Mr. Cunningham argued that, if Arthur Cox received the proceeds of sale as agent for First Active, then the representation of 8th June, 2006 was false or was made negligently. It was claimed that Arthur Cox owed a duty of care to Mr. Cunningham in making representations to him as to the sale and sale proceeds and that Mr. Cunningham relied on those representations. In relying on the representation, Mr Cunningham claims that he lost the opportunity to bring certain proceedings prior to the handover of money to First Active.

(f) Damages
3.11 Finally, in the context of an argument put forward by each of the defendants to the effect that there could be no loss, it was claimed that Mr. Cunningham suffered loss by reason of the misrepresentation made by Arthur Cox and by the breach of undertaking to the court by Arthur Cox, as Mr. Cunningham's judgment mortgage had priority over any unsecured debt owing to First Active. Mr. Cunningham also claimed for wasted legal costs. I turn next to the submissions made on behalf of the respective defendants.

4. Submissions of Springside
4.1 Counsel for Springside argued that Mr. Cunningham had incorrectly joined Mr. Jackson to the proceedings. As pointed out earlier Springside have brought an action to dismiss the claims of Mr. Cunningham and argue that the claims are frivolous and vexatious. Counsel for Springside argued that any claim as to whether Mr. Jackson was validly appointed was determined in the Moorview Proceedings and therefore does not arise in this matter.

4.2 Springside submitted that the undertaking given to the Court on 9th May, 2005, should be seen in the light of the circumstances as of that time so that Mr. Jackson never personally gave such an undertaking but instructed that the undertaking be given by the company in receivership. It is further argued that, on a proper construction of same, any undertaking given was complied with and any representations made were true.

5. Submissions of Arthur Cox
5.1 Arthur Cox pointed out that the only head of relief claimed against them by Mr. Cunningham was damages for misrepresentation and misstatement. It was argued by Arthur Cox that there was no breach of the undertaking concerned given that the relevant 14 day notice was given and the proceeds of sale were, in fact, held for 14 days. In relation to the alleged misrepresentations, Arthur Cox denied any such misstatement but also argued that there was no detriment caused by any misrepresentations (so far as the representation at Paragraph 3.9(I) was concerned), or that same were not representations of present fact but were promissory representations (relating to the representations at Paragraph 3.9 (II) and as such are not actionable under tort law, or same were in fact accurate representations (so far as the representations at Paragraph 3.9 (III) were concerned).

5.2 In relation to the alleged misstatement that Springside was in the process of selling the Properties, Arthur Cox denied any such misstatement but also argued that any reliance on this misstatement, if it were true, did not cause any detriment to Mr Cunningham. It was submitted by Arthur Cox that the misrepresentations complained of could not reasonably have been relied upon by Mr. Cunningham. It was pointed out that the possibility of a sale by First Active had been adverted to when any possible representation might have been given.

5.3 Arthur Cox further argued that without damage there can be no claim in tort, and that there could be no claim in breach of contract as no contract existed between Arthur Cox and Mr. Cunningham. Arthur Cox asserted that, in circumstances where Mr. Cunningham made applications to court before the 14 day time limit ran out on 15th June, 2006, there was, it was said, no statable basis to say that any alleged misrepresentations were relied on, or were relied on in any manner that caused loss. Arthur Cox further argued that there was no basis to suggest that a duty of care arose between it and to Mr. Cunningham. Arthur Cox asserted that it was acting at all times on behalf of its client and not on its own behalf. Arthur Cox also pointed to the correspondence with the solicitors for Mr. Cunningham from 9th May, 2005 to 27th July, 2005, in which the possibility of a sale as mortgagee in possession was stated, and which, it was submitted, puts to rest any claim of misrepresentation.

5.4 In relation to the representation that the proceeds of sale were held on behalf of Springside, it was argued that the interpretation of the letters of 8th June, 2006 was incorrect and unreasonable given the previous correspondence passing between Arthur Cox and the solicitors for Mr. Cunningham. In this regard, Arthur Cox referred to the judgment of this Court in this matter of 18th July, 2006, where at p. 12, it is stated as follows:-

> "while it is undoubtedly the case that some of the correspondent from Messrs Arthur Cox refers to their client as being Mr. Jackson, it seems to me that taking the correspondence as a whole it ought to have been clear to the Plaintiff that the position was that the sale had closed by the bank acting as mortgagee in possession and that the money was held on behalf of the bank."

It is said that that question cannot now be re-visited.

6. Submissions of First Active
6.1 Counsel for First Active agreed with Arthur Cox's submissions in relation to the issue of the undertakings and further argued that the issue of the priority of charges were dealt with in the Moorview Proceedings and as such were not open to be determined in these proceedings.

First Active submitted that the issue as to whether the Guarantees given by Springside were *ultra vires* was one of the issues raised and ruled on in the Moorview Proceedings and as such is *res judicata*. Alternatively it was argued that a revisiting of issues arising out of the validity of the relevant Guarantees was debarred by the rule in *Henderson v. Henderson* (1843) 3 Hare 100.

6.2 First Active further argued that the closing of the sale of the Springside properties in September 2002 did not automatically release the debenture. In respect of this argument, Counsel or First Active referred the Court to clause 18.1 of the debenture of 2nd November, 2000 which provides:-

> "This debenture shall be a continuing security and shall extend to the ultimate balance of the secured liabilities and shall continue in force notwithstanding any intermediate payment or discharge in whole or in part of the secured liabilities."

First Active submitted that the Court's judgment dismissing the plaintiffs' claims in the Moorview Proceedings, *Moorview Developments & Ors -v- First Active PLC* & Ors [2009] IEHC 214, was a final judgment on the merits in relation to these proceedings, which involve the same parties and as such gives rise to *res judicata*.

7. Analysis
7.1 I should first note that the test by reference to which I should judge the competing arguments is clear and was not disputed. The jurisdiction to dismiss has been established since *Barry v. Buckley* [1981] I.R. 306. However, it is well settled that the relevant jurisdiction can only be exercised where is it has clearly been established that the case sought to be made by the plaintiff concerned is bound to fail. It is also clear that it is a jurisdiction to be exercised sparingly. On the basis of that test, I propose to return to that aspect by the case which was concerned with the undertakings/representation given by Arthur Cox.

7.2 As is clear from the account of the arguments advanced on either side as set out in sections 3 to 6 of this judgment, a significant

number of different issues were canvassed in the course of the hearing before me. However, it was also clear that many of those issues only arose as fallback arguments put forward on behalf of the various defendants which might be relevant in the event that I did not accept the primary arguments put forward. It seemed to me, therefore, that it was appropriate to commence by considering those primary arguments. So far as the case made arising out of the undertaking given to Dunne J. and associated correspondence is concerned, it seemed to me that the first question that needed to be addressed was as to the proper construction of that undertaking and any associated representations that might, arguably, be said to flow from it and the surrounding correspondence. If there was not an arguable case to the effect that the undertaking concerned and any potential representation bore the meaning asserted on behalf of Mr. Cunningham such that there would not be, in turn, any arguable case that any such undertaking had been breached, or that any such potential representation was false, then it logically follows that any case under this aspect of the proceedings was bound to fail. Likewise, in assessing Mr. Cunningham's case in relation to the priorities between his interest in the Properties and those of First Active, it was necessary to consider whether there was an arguable case to the effect that either or both of the First and Second Guarantees were invalid in circumstances where any asserted invalidity could still be pursued, notwithstanding the rule in *Henderson v. Henderson.* Likewise, it seemed to me to be important to consider whether there was an arguable case to the effect that the Second Guarantee (if it should be valid) was not secured on the Properties. Both of these points were of considerable importance in that if there were no arguable case which could now be permitted to be brought concerning the validity of the Guarantees, and no arguable case concerning the fact that any such Guarantees might be secured on the Properties, then it would follow that Mr. Cunningham's case in respect of priorities was bound to fail. Against that background, I propose to set out my analysis of the key points which I have sought to identify.

7.3 So far as the case arising out of the undertaking given to Dunne J. and the alleged associated misrepresentations are concerned then a key question, as I have pointed out, is as to the nature of any undertaking or representation which can be said to have been given. If there was no breach of any such undertaking or no false representation then none of the other issues which were debated in the course of the hearing before me could arise for there could, in those circumstances, be no claim for breach of undertaking or misrepresentation.

7.4 It is also important to note that the question of the surrounding circumstances and nature of the undertaking, together with the relevant correspondence which passed between the parties thereafter, has already been the subject of a ruling by me made on the 18th July, 2006.

7.5 Furthermore, it is important to note that the factual basis for any alleged misrepresentation is to be found only in correspondence so that the court, on the consideration of a motion such as this, may well be in as good a position to interpret the relevant correspondence as a judge at a plenary hearing.

7.6 I have already ruled that counsel, when addressing Dunne J. on the occasion of the hearing before her, did advert to the possibility that a sale might be given effect to by First Active as mortgagee in possession rather than Springside acting through Mr. Jackson as receiver. (See my judgment in that regard on the 18th July, 2006). In that regard it is important to note that when writing to solicitors for Mr. Cunningham some three weeks after the matter was dealt with by Dunne J. on the 9th May, 2006, Arthur Cox referred to the fact that it had been indicated to the court "that the sale might concluded by First Active as mortgagee in possession". No correspondence followed to suggest that this statement was inaccurate.

7.7 I have also previously ruled (again in my judgment of the 18th July, 2006) that taking the relevant subsequent correspondence as a whole "it ought to have been clear to the plaintiff that the position was that the sale had closed by the bank acting as mortgagee in possession and that the money was held on behalf of the bank".

7.8 The way in which the case was, at the hearing, put on behalf of Mr. Cunningham was to suggest that a proper construction of the undertaking and the relevant correspondence is such that same amounted to an undertaking that the money would be retained by Springside rather than First Active. It did not seem to me that such an argument had any prospect of success. In circumstances where it had been expressly stated by counsel that the sale concerned might be given effect to by First Active rather than by Springside acting through Mr. Jackson as receiver, it is inconceivable that the undertaking could be interpreted as one in which it was being accepted that First Active would not sell the property. In those circumstances there is no basis on which it can be said that the undertaking concerned implied that First Active would not receive the purchase price.

7.9 Insofar as reliance is placed on the fact that Mr. Jackson, as receiver, (rather than First Active) had received a deposit on the occasion of the original contract being entered into with the purchaser, it seemed to me that the argument put forward on behalf of Mr. Jackson in that regard is correct. Mr. Jackson pointed out that a debenture holder, as mortgagee, is entitled to demand possession from a receiver, so that Mr. Jackson, as receiver, was obliged to cede his position to First Active as soon as First Active determined that it wished to take possession. First Active's position as mortgagee entitled it to override Mr. Jackson's earlier contract with the purchaser concerned. That purchaser was, of course, in accordance with the terms of the contract which I have already cited, obliged to close directly with First Active if that option was elected for. Mr. Jackson, as receiver, was obliged to go along with such an arrangement in the event that First Active required it and entered into possession. I can see no stateable basis, therefore, for the suggestion that the receipt by Mr. Jackson of the deposit affected any entitlements.

7.10 It seemed to me, therefore, that there was no stateable case for the proposition that the undertaking implied that a sale would not be effected directly with First Active and the money be First Active's money, subject only to the undertaking that the money would be kept for 14 days to allow an application be made the court. The money was, in fact, kept for such period. An application to court was, in fact, made. There was, therefore, in my view, no stateable basis for the suggestion that there had been a breach of the undertaking.

7.11 Likewise, for the reasons which I set out in my judgment of the 18th July, 2006, there was no basis for the suggestion that the subsequent correspondence, properly interpreted, could amount to a representation which went beyond the terms of the undertaking. It follows, therefore, that that correspondence does not involve a representation other than that the money would be held by Arthur Cox, in the events that happened on behalf of First Active, for a period of 14 days so as to enable Mr. Cunningham to make any application to court which he wished. I was not, therefore, satisfied that there was any proper basis for maintaining an allegation of misrepresentation.

7.12 Finally, in relation to this aspect of the case, I should note that counsel for Mr. Cunningham placed reliance on the fact that applications had previously been made seeking to have the undertaking/misrepresentation issues removed from the proceedings. While that is true it does not seem to me that any application previously made was such that it would debar me from exercising the jurisdiction identified in *Barry v. Buckley* [1981] I.R. 306, if I was satisfied that the proceedings were bound to fail. In all those circumstances it seemed to me that those elements of the proceedings arising out of the undertakings and/or alleged representations were bound to fail and it was appropriate that same be dismissed. I was also satisfied that, in those circumstances, it was

unnecessary to consider any of the other potential issues of defence raised in respect of this aspect of the case.

7.13 It is next necessary to move to those aspects of the applications which were concerned with the priorities case as against First Active. The primary case put forward on behalf of First Active was based on two propositions:-

> A. That Mr. Cunningham is debarred from raising the validity of either the First Guarantee or the Second Guarantee in these proceedings arising out of either the judgment given in the Moorview Proceedings (*res judicata* or issue estoppel) or a failure to actively pursue the guarantee issues in those Moorview Proceedings such that their being raised now would infringe the rule in *Henderson v. Henderson.*
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> B. Secondly, it is said, placing reliance on clause 18.1 of the debenture of 2nd November, 2000, (to which I have referred at para. 6.2 above), that the debenture remained as continuing security even after an intermediate payment or discharge had occurred.

7.14 Thus it is argued that there can be no question concerning the validity of either the Guarantees or the fact that the Guarantees were secured. In those circumstances it is said that there can be no question of First Active not having priority over Mr. Cunningham's judgment mortgage. On that basis it is argued that Mr. Cunningham's claim is bound to fail.

7.15 In that context I turn first to the issues under the heading of *res judicata* and issue estoppel.

8. *Res Judicata* and Issue Estoppel

8.1 First Active submitted that the issue as to whether the Guarantees given by Springside were *ultra vires* has been ruled on in the Moorview Proceedings and as such was *res judicata*. The issue was dealt with at paragraphs 15.15 and 15.16 of the judgment in the Moorview Proceedings, *Moorview Developments & Ors v. First Active PLC & Ors* [2009] IEHC 214, where, in relation to the guarantees concerned, I said the following:

> "This claim was dropped by the Cunningham Group in April 2008 but was revived and is dependant on the fraud claim. While the Cunningham Group originally challenged the validity of the relevant resolutions in respect of guarantees given by Valebrook and Springside, that aspect of the claim was not persisted with so that, as of the close of the hearing, the remaining challenge to the relevant guarantees rested on allegations of non-disclosure and misrepresentation and is closely linked, therefore, with the issue of the guarantees given by Mr. Cunningham.
>
> For the reasons set out in the previous paragraphs I was not persuaded that either the Cunningham Group or Mr. Cunningham had made out a *prima facie* case in relation to the relevant allegations of non-disclosure or misrepresentation. It follows that the remaining claim under this heading also fell on the same basis"

8.2 Alternatively First Active argued that, under *Henderson v. Henderson,* Mr. Cunningham is barred from making any additional case in relation to the validity of the guarantees of Springside. In so far as Mr. Cunningham did not make or pursue a stand alone case in that regard, it is said that a claim as to an alleged invalidity of either or both of the Guarantees concerned was a claim which should have been brought and pursued in the Moorview Proceedings (in which Springside was, of course, a co-plaintiff) and that same not having been done, it would be an abuse of process to permit same to be done now.

8.3 In relation to the question of issue estoppel, it is pointed out that a litigant may not make the same contention in legal proceedings which had been determined in previous litigation, *Carroll v. Ryan* [2003] 1 IR 309. In *McCauley v. McDermott* [1997] 2 ILRM 426, the Supreme Court set out the requirements for a successful plea of estoppel, which are that the same questions have been decided in earlier proceedings, the judicial decision which is said the create the estoppel is final and that the parties to the decision or their privies are the same persons. At page 498 of the judgment in *McCauley,* Keane J. states as follows:

> "(T)he courts have power to put an end to such attempts by unsuccessful parties to escape from judgments binding on them, without doing violence to the established principles of issue estoppel. The inherent jurisdiction of the courts to stay proceedings which are an abuse of the process of the court is undoubted, although it is a jurisdiction to be exercised with great caution at an early stage of the proceedings. That it can be invoked in a case such as the present was made clear by the decision of the English Court of Appeal in *Stephenson* ***v****. Garnett* where all three members of the court were satisfied that there was a difficulty in treating the matter as *res judicata* , but A.L. Smith LJ said:
>
> > "The court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous or vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court.""

8.4 Keane J then quotes from the judgment of *Reichel v. McGrath* 1889 14 AC 665 where Lord Halsbury states:

> "I think it would be a scandal to the administration of justice if, the same question having disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

8.5 The Supreme Court in *Belton v. Carlow County Council, Prendergast & Another* [1997] I I.R. 172 adopted with approval the law as to issue estoppel stated by Sir Owen Dixon in *Blair v. Curran* (62 C.L.R. 464) (High Court of Australia) at p.p. 531/2 as follows:-

> "A judicial determination directly involving an issue of fact or of law disposes once [and] for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the formal proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order".

8.6 I was not however, satisfied that First Active had established that Mr. Cunningham's case against it in relation to the priority question was bound to fail on the basis of the relevant issues being *res judicata* or subject to issue estoppel. The precise question of whether the Guarantees were invalid as being *ultra vires* was not determined as such nor was it an issue which was decided so as to give rise to an issue estoppel.

8.7 However it is important to note that, in my judgment in the Moorview Proceedings on 6th March, 2009, dismissing the majority of the plaintiffs' claims on the basis of allowing a non suit application, I dismissed the claims in relation to invalid cross-guarantees on the grounds of misrepresentation. The question which arose is as to whether there should also have been a direct challenge to the Guarantees on any other grounds raised in the Moorview Proceedings? The point made by First Active is that such circumstances bring the matter within the rule in *Henderson v Henderson* in the sense that, if and insofar as there might be distinct arguments in relation to the validity of Guarantees, the arguments now sought to be litigated are additional arguments directed to the same end (*i.e.* the invalidity of either or both of the Guarantees) which should have been raised in the course of the original proceedings.

8.8 In my view First Active are correct on this point Springside challenged the validity of the Guarantees in its pleadings and at trial. Whatever about the First Guarantee, there was a direct challenge to the validity of the Second Guarantee on the basis of fraudulent misrepresentation. If there was a second basis for challenging the validity of the Second Guarantee it should have been pursued. There are, in my view, no special circumstances such as would require the court to depart from an application of the rule in *Henderson v. Henderson*. While the *Rolled Steel Products* point was raised, the same only arose in the context of an argument as to damages.

8.9 In those circumstances I was satisfied that it would be an abuse of process to permit Mr. Cunningham (who had control over the Moorview Proceedings on behalf of Springside) to now challenge the Second Guarantee on a new basis, the first challenge on the ground of fraudulent misrepresentation having failed.

8.10 I was also satisfied that the only construction possible for clause 18.1 of the debenture of the 2nd November, 2000, was that that debenture remained in force even though the amounts due were paid so that the charge thereby created extended to any future liabilities of Springside which might come into effect, including any liabilities under guarantees.

8.11 It follows that I was satisfied that there was no case to be made but that there was a continuing valid security over Springside's assets in favour of First Active and that Mr. Cunningham was no longer entitled to question the validity of at least the Second Guarantee. In those circumstances I was persuaded that Mr. Cunningham's claim was bound to fail as First Active were secured on the assets of Springside in priority to Mr. Cunningham's judgment mortgage.

8.12 In those circumstances it did not seem to me that any of the other issues canvassed under the aspect of the case concerned with First Active's priority required determination.

9. Conclusions

9.1 It follows that I was satisfied that all of the claims made in these proceedings were bound to fail and for those reasons I dismissed the proceedings.