Neutral Citation: [2013] IEHC 559

THE HIGH COURT

[2011 No. 219 MCA]

BETWEEN

IN THE MATTER OF CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2012

TRESSAN SCOTT

APPLICANT

AND

KIERAN WALLACE, OFFICIAL LIQUIDATOR OF CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION)

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 5th day of December, 2013

1. The applicant seeks a declaration that the respondent holds a sum of €145,000 on trust for the applicant. She primarily contends that he does so by reason of a constructive trust which came into existence prior to the commencement of the winding up of Custom House Capital Ltd. ("CHC").

2. The application was brought by a notice of motion pursuant to s. 280 of the Companies Act 1963, grounded on an affidavit of the applicant. There is one replying affidavit sworn by the respondent. There is no significant dispute on the facts or as to the evidence to which the Court may have regard in this application. There is a difference as to the inferences which the Court is asked to draw from the primary facts. Similarly, there is no significant dispute as to the legal principles, but rather, a difference of emphasis and dispute as to the application of those principles to the facts herein.

Background Facts

3. The applicant is a retired solicitor who had qualified in 1980 and worked from that time until her retirement in 2009 in private practice in County Wexford. She has been widowed since 2001. Shortly after her retirement, she was recommended by her accountant to Mr. John Whyte whom she describes as the Investment Director of CHC. She was given a positive view of Mr. Whyte and CHC by her accountant and told that Mr. Whyte came to visit clients personally in Wexford. CHC, in 2009, was authorised under Regulation 11 of the European Communities (Markets in Financial Instruments) Regulations 2007 ("the MiFID Regulations"). It had previously been authorised under the Investment Intermediaries Act 1995, since 1998. Its core activities related to the provision of asset, portfolio and investment management services as well as pension advisory services as an approved Qualifying Fund Manager to Approved Retirement Funds and a PRSA provider.

4. The applicant met with Mr. Whyte in her home in April, 2009. She states that they had a preliminary meeting where she informed Mr. Whyte of her priorities and he suggested certain plans for the investment of her pension funds and money. Thereafter, there was initial correspondence from Mr. Whyte setting out how she might achieve her desired annual income.

5. The applicant and Mr. Whyte met again in May, 2009 and there was further correspondence. On 26th May, 2009, the applicant completed a mandate form exhibited by the respondent which he states governed her relationship with CHC. In that form, as is repeated in the correspondence, her desired risk strategy is identified as "low risk". She also describes her investment knowledge as limited. In section 4 of the form, there is included the following declaration:

> "In accordance with regulatory requirements and in line with Criminal Justice Act 1994 (as amended from time to time), your account(s) cannot be opened until all required documentation is provided and this Form is signed. By signing this Form, you confirm that you have read and fully understand the Terms of Business referred to below and agree to be bound by them.
>
> I/We hereby apply to open an account with Custom House Capital Ltd. I/We have read and fully understand and agree to be bound by the attached Terms of Business. I/We am/are aware that: the attached Terms of Business apply as at the date of their acceptance by me by one of the methods set out in Clause 2 and that they may be subsequently revised in the manner set out in the Terms of Business.
>
> . . ."

6. The respondent avers that it is not possible to identify which of CHC's Terms of Business were furnished to the applicant at the time and exhibits two sets of Terms of Business in use by CHC at the time. He draws attention to similar terms in both to the effect "the Company is acting in all cases as the agent and not as a trustee".

7. The applicant transferred most of her personal savings and pension funds to CHC for investment between April and July 2009. By July 2009, this amounted to €744,238.16. Part of the personal funds transferred included a deposit of €145,000. When initially transferred, the applicant states that it was held by CHC in an account in Merrion Capital.

8. The applicant avers that she discussed this deposit account with Mr. Whyte and that he suggested she could obtain a better return than that being received from a bank by investing it with CHC. Further, that he could offer interest of around €5% *per* annum if she lent the money to CHC for a period of five years. She states she recalls saying that she "did not need the money urgently and it would be great if it could grow in the way he described". The applicant avers that in the initial discussions, Mr. Whyte did not mention a 'Subordinated Loan Agreement'. She exhibits a letter of 20th July, 2009, from Mr. Whyte in which he refers to investment in a 'CHC Income Fund' and describes same as follows:

"With regards to the CHC Income Fund, this will have the ability to pay out 6% gross income per annum for the next five years, and after five years the payout will vary. I will send you further details on this when finalised."

9. No further steps were taken in relation to the deposit prior to August 2009. Unfortunately, in August 2009, the applicant fell ill with lymphoma and commenced chemotherapy treatment. On 11th September, 2009, Mr. Whyte sent a further letter enclosing a copy of a Subordinated Loan Agreement in the following terms:

"Re: Custom House Capital (CHC) Investments
You will recall from previous discussions about investing a portion of your current funds on deposit in a CHC Income Fund that would have the ability of paying out a fixed gross coupon for a fixed period as a real alternative to low returns on deposit accounts.

The objective is to provide a better alternative to current deposit rates and also is a good diversifier to your existing investments.

I have enclosed for your attention a subordinate loan agreement between you (the 'Lender') and CHC (the 'Firm'). I would be grateful if you could review this document, sign where indicated and return to me.

The Bond carries a coupon (Interest Payment) of 5% Gross for an initial minimum fixed five years from this investment. It is ideally suited as a diversifier out of equities and property for those requiring income.

I trust this is in order and look forward to hearing from you in due course. In the meantime, if you have any questions please give myself or Harry Cassidy a call.

Kind regards,

Yours sincerely,

John Whyte

Investment Director
Custom House Capital Limited"

The applicant, who was still undergoing treatment, did not react to this letter. A further letter dated 29th October, 2009, was sent, which enclosed a summary note of the key features and risks associated with the Subordinated Loan Agreement. The letter incorrectly states that the applicant had already entered into the agreement. The summary note was in the following terms:

"Custom House Capital Subordinated Debt Agreement
This *[sic]* purpose of this document/letter is to outline the key features and risks associated with the Custom House Capital Subordinated Debt.

The primary purpose of the subordinated debt is to increase the capital of Custom House Capital in accordance with the requirements of the Financial Regulator. The money raised will be ring fenced and held in a separate bank account in an institution regulated by the Financial Regulator.

The opportunity to participate in this loan at 5% gross return is only being offered to specific clients of CHC.

The key features and risks of this subordinated debt are detailed below and reflect the terms and conditions that are included in the subordinated debt agreement.

Key Features
• Minimum Term of 5 years from the date disclosed in section 1 of the agreement

• 5% Gross Per Annum payable annually on the anniversary of the date disclosed in the agreement

• Cash raised through the Subordinated Debt will remain in a separate asset account with a regulated institution

• No right of setoff is permitted against other monies owed by the Lender to CHC

Risks
• Any loan repayments to the lender can only be made with the approval of the Irish Financial Regulator

• The annual interest payment may not be made if such payment would mean that the capital of CHC is less than the capital adequacy requirement of the Financial Regulator

• In the event of winding up of CHC, all other non-subordinated credits of CHC must be repaid before the Subordinated Debt lenders and therefore there is a risk that Lenders may not receive back the whole amount of the loan."

10. The applicant was still continuing with her treatment in October, 2009 and did not respond to this letter.

11. Ultimately, on 5th March, 2010, a revised agreement was sent by Mr. Whyte to the applicant with a request that she sign both copies where indicated and date both for Monday 8th March, 2010, and return same. The applicant states that she did sign the agreements; she had them witnessed by a friend, and has a note on the letter which she retained indicating that she returned them on 16th March, 2010. The copy of the loan agreement exhibited by the applicant has a handwritten note changing the date from 8th March, 2010, to 24th March, 2010. The applicant states this is her handwriting. This change may have been made at a meeting the applicant had with Mr. Whyte on 19th April, 2010, an email in relation to which the respondent exhibits in his affidavit. Nothing turns on this date for the purposes of this application. I have noted that, notwithstanding the change of date, it is recorded in an account statement for the applicant for the period 1st December, 2009, to 31st May, 2010, which is exhibited with her affidavit, that the monies were transferred from Merrion Capital on 8th March, 2010, and the CHC subordinated loan bought on 9th March, 2010. However, nothing turns on the dates.

12. The applicant, in her affidavit, draws attention to clauses 6 and 7 of the subordinated loan agreement which sets out the subordinated status of the loan and states that the clauses were not explained to her or specifically pointed out to her. She also states she was not advised to obtain legal advice and was not legally advised before she signed the agreement. She was still recovering from her chemotherapy treatment and states she was very weak and may not have been functioning at her "optimum cognitive level" when she signed the loan agreement in March, 2010. Mr. Whyte was aware of her illness at the time, as is reflected in the correspondence.

13. In August 2010, the applicant received a letter from Mr. Whyte enclosing the audited accounts of CHC for the year ending March, 2010. She was sent this by reason of her subordinated loan to CHC and was told that the accounts would be forwarded every year for the duration of the loan. The letter did not draw her attention to any particular information in the accounts and she states that, accordingly, she did not read the accounts in detail, and that apart from noticing a long list of properties, which she thought were personal investments of Mr. Harry Cassidy and Mr. John Mulholland, she did not notice anything of significance in the accounts.

14. In this application, she now draws the Court's attention to a portion of the independent auditor's report and maintains that the accounts were deficient by reason of the findings in the inspectors' report to which I will refer below.

15. Subsequently, the applicant received a letter dated 13th September, 2010, signed by Mr. Harry Cassidy, Chief Executive Officer of CHC. The letter is addressed to the applicant personally and bears her name at the top. It stated, *inter alia*:

> "I would like to draw your attention to an article that appeared in the Sunday Times business section yesterday - 12th September 2010.
>
> The article has been attached for your information.
>
> I would like to clarify a number of issues raised in the piece:
>
> *'Custom House Capital has been forced to cease writing new business'.*
>
> The board of directors of Custom House Capital (CHC) took a decision on April 15th 2010 not to accept any new clients until our administration issues were resolved.
>
> This decision was taken in advance of any request from the Financial Regulator.
>
> *'The Regulator is believed to have raised concerns about how CHC segregates its clients' assets from the firm's own assets'.*
>
> CHC can categorically state that no client funds or other assets held on behalf of CHC clients are in jeopardy.
>
> The CHC board is not aware of any regulatory concerns surrounding the segregation of client assets.
>
> CHC is in compliance with the Client Asset Requirements (CAR) issued by the Financial Regulator.
>
> . . ."

16. The applicant avers that although she was somewhat concerned at the statements in the newspaper article, that the "categorical" statements in this letter made by Mr. Cassidy on behalf of CHC put her mind at ease. She further avers that she was reassured that her investments were safe and saw no reason to contact the company.

17. However, she states that also about this time, Mr. Whyte telephoned her and said he would be in Wexford on 13th October, 2010, that he would like to meet her and he would call to her home, which he did, and that no-one else attended the meeting. As that meeting is central to the primary submissions made on behalf of the applicant, it is necessary to set out in full her evidence of the meeting given in her affidavit to the Court.

> "46. At this meeting, either Mr Whyte or I raised the recent newspaper reports, and Mr Whyte informed me that I had nothing to worry about. He explained that the difficulties with the Central Bank concerned 'general housekeeping'. He informed me that the Company had already stopped taking new business before the Central Bank had requested it to stop. He said the problems would be resolved internally and were a 'tidying up exercise' to do with 'internal administration'.
>
> 47. I expressed some concern to Mr Whyte about the Company's accounts. I specifically recall raising with Mr Whyte the 'Related Party Transactions' which were set out at pages 21 to 25 of the Accounts for the Period Ended March 2010. I did not understand why there appeared to be so many property transactions and I asked for clarification on them. I recall that Mr Whyte made light of my queries about the accounts and told me I had nothing to worry about.
>
> 48. At the meeting, having spent some time appeasing my concerns, Mr Whyte produced a letter from the Company which was addressed to me and dated 6th October 2010. I beg to refer to a copy of the letter, which is behind ***Tab 18*** of the Booklet.
>
> 49. The letter had not been sent to me in the post before the meeting and I never saw it before the meeting. I did not have time to consider it, or to obtain legal advice on its content. Mr Whyte simply handed the letter to me at the meeting. He told me that the letter related to the €145,000 which I had put on deposit. He said that the Central Bank wanted customers to understand the agreements they had signed and the letter was for that purpose.
>
> 50. Before I signed the letter or even read it, Mr. Whyte reassured me that 'nothing had changed'. He specifically told me that my investment was safe and that I should have no concerns. I cannot recall precisely the language that he used, however the import of what he said was that I did not have to worry about the Company or my investment I was reassured by this.
>
> 51. As can be seen, the letter stated *inter alia*:
>
> *We have been directed by the Financial Regulator to clarify the main features and risks associated with this loan and to ensure your understanding of the same.*

The primary purpose of the loan was to increase the capital of CHC as directed by the Financial Regulator. The money raised is held in a separate bank account with Ulster Bank . . .

Risks

- *In the event of insolvency or winding up of CHC, all other non-subordinated credits [sic] of CHC must be repaid before the Loan Lenders, i.e., you, and therefore there is a risk that you may not be repaid some or all of your loan . . .*

Please read this letter in conjunction with CHC's financial statements for 31 March 2010, which have previously been issued to you.

CHC are now offering you the option of either:

- *Continuing to participate in the CHC subordinated loan, or*
- *Repaying the loan to you together with interest due on a pro rata basis.*

52. As can be seen, the letter contained a 'Confirmation' at the bottom, which gave the recipients of the letter the option (by ticking a box) of either continuing to participate in the loan or opting out and receiving their money back.

53. At the meeting on 13th October 2010, I asked Mr Whyte whether some of the investors/lenders in deposit agreements like mine had withdrawn their money. Mr Whyte responded that 'one had, one had not', or something to that effect. However what I recall most distinctly was that he stressed to me that my investment was safe. I trusted Mr Whyte and he had never given me any reason in the past not to believe him.

54. Having been reassured by Mr Whyte that the loan funds were safe, Mr Whyte asked me did I want to opt in or out. I actually felt in some ways that if I opted out I would be breaching Mr Whyte's trust.

55. I went ahead and ticked the box at the bottom of the letter there and then at the meeting, indicating my intention to continue to lend the money to the Company. I also signed and dated the letter.

56. Had I believed that there was any risk in my investment I would not have agreed to continue to lend money to the Company. However I was so persuaded by Mr Whyte's conviction and insistence that the money was safe that I left the meeting with no concerns. I trusted Mr Whyte based on the relationship we had developed since April 2009. Also, since I was paying Mr Whyte for his services, I felt he had my best interests at heart and would not try to mislead me. I believed he was interested in taking care of my financial affairs. I felt I was a 'valued' customer of the Company.

. . .

59. However, in my case, I say and believe that I was entirely misled and I was not provided with an opportunity to make an informed decision. I was given no opportunity to actually consider the letter."

18. The intervening paragraphs omitted contain what are, essentially, arguments rather than evidence. Their substance will be dealt with later.

19. The respondent, in his affidavit, in response to these paragraphs, exhibits what he believes to be an email of 19th October, 2010, from Mr. Whyte to internal colleagues in CHC. The respondent has not sought to adduce evidence from Mr. Whyte; the Court is unaware whether he is in a position to do so. The respondent refers to this email as setting out a contemporaneous note by Mr. Whyte of the meeting, and then, in paragraph 10 of his affidavit, essentially makes a number of submissions to the Court in relation thereto.

20. For the purposes of this application, I am satisfied to accept in full the account given by the applicant in her affidavit of the meeting with Mr. Whyte on 13th October, 2010. The applicant, in the evidence given, as distinct from any submissions which she has also included in her affidavit, is, in my judgment, giving the Court a full and frank description of her dealings with Mr. Whyte and CHC. There was no application to cross-examine the applicant. Insofar as the applicant's evidence on affidavit differs from Mr. Whyte's email, I prefer and accept the applicant's evidence.

21. The respondent, in his affidavit, refers to the fact that there was a further meeting between the applicant, Mr. Whyte and Mr. Kevin Menton of Appian on 30th June, 2011. He exhibits an email from Mr. Whyte to colleagues dated 11th July, 2011, with a note of the meeting. This, coincidentally, appears to be the day upon which Mr. Whyte met, at his request, with his solicitor with the Central Bank (see Inspectors' Report referred to below at p. 76, para. 6.1). The respondent refers to the fact that it would appear the Subordinated Loan Agreement was referred to at that meeting and that Mr. Menton suggested that he would try and arrange an exit from it as soon as possible. That did not occur, presumably by reason of the subsequent events.

22. By Orders of the High Court commencing with an *ex parte* application by the Central Bank on 15th July, 2011, Mr. Noel Thompson and Mr. George Tracey of the Central Bank were appointed as inspectors pursuant to Regulation 166(2) of the European Communities MiFID Regulations 2007, to investigate the affairs of CHC and report to the Court. A series of interim reports were prepared and, ultimately, the final report dated 19th October, 2011 was presented to the Court. By Order of 21st November, 2011, an order for the winding up of CHC was made and the respondent appointed as official liquidator.

23. The applicant has exhibited to her affidavit the final report to the High Court by the Court-appointed Inspectors ("the Inspectors' Report"). It is dated 19th October, 2011, in the version authorised by the Court for publication *i.e.* with client names and account numbers redacted. No objection has been taken on behalf of the respondent to the contents of the report being taken into account for the purposes of this application.

24. The practical reason for this application is based on what was stated by the Inspectors at p. 190 of the report, in relation to

cashflows prepared for CHC at 10th October, 2011:

> "The cashflows provided made reference to cash reserves of €414,000 (which have not been included in the table above) which the Inspectors understand relate to the two deposit accounts (an Ulster Bank Debenture Account and Bank of Ireland deposit account). These funds have not previously been considered part of available cash in earlier CHC cashflows and the Inspectors have concerns as to whether the majority of this cash is indeed available to CHC. The Ulster Bank Debenture Account contains €360,000 and relates to subordinated loan capital raised from clients. The raising of this subordinated debt was the subject of Central Bank concerns in 2010 and following an inspection on this issue the Central Bank requested that all contributors be contacted by CHC and offered to have it repaid. This was completed and the amount in this account represents money from those clients who decided not to request repayment. The Bank of Ireland deposit account contains €54,000 and relates to money being held separately by CHC to use to pay the interest amounts due on the subordinated debt and some other expenses."

Applicant's Claim

25. The applicant does not seek, in this application, an order that the respondent pay to her any portion of the €360,000 identified by the Inspectors as held in the Ulster Bank debenture account relating to subordinated loan capital from clients. She seeks a declaration, in substance, that on or before the date of commencement of the winding up, CHC held the €145,000 (originally the subject matter of the Subordinated Loan Agreement) on trust for her. If she is successful in that claim, it is accepted that the respondent will have to take steps to ascertain whether the €145,000 transferred on 9th/10th March, 2010, is traceable to or comprised in the monies held in the Ulster Bank debenture account immediately prior to the commencement of the winding up.

26. The primary submission made by counsel on behalf of the applicant is that on the facts herein, a constructive trust had arisen in favour of the applicant on a date prior to the commencement of winding up by reason either of the fraudulent or unconscionable behaviour on behalf of CHC in September/October 2010, or the unjust enrichment of CHC by the retention of the applicant's loan in October, 2010.

27. A subsidiary submission was made in the alternative that CHC, through Mr. Whyte, had a fiduciary relationship with the applicant such that CHC, acting through Mr. Whyte, acted in breach of trust, either at the time of the loan agreement in March 2010, or, in the alternative, in retaining the loan in October, 2010. It is necessary to firstly consider this subsidiary submission in order to determine the relationship of the applicant and CHC prior to the events in the autumn of 2010, relied upon to establish a constructive trust.

28. The facts do not, in my judgment, support the existence of a fiduciary relationship between CHC and the applicant. The applicant entered into a commercial agreement with CHC to provide advisory and financial management services to her. That agreement included Terms of Business which expressly provided that the company was acting as an agent and not a trustee. The applicant was aware that Mr. Whyte was the investment director of CHC, and at all material times appears to have acted in that capacity in his dealings with the applicant. Notwithstanding that he may have created such a positive impression on the applicant that she had trust and confidence in him, it was as the Investment Director of CHC that he did so. The payments made by the applicant to CHC were pursuant to the contractual arrangements. The Court, in considering whether, either by March 2010 or October 2010, there existed a fiduciary relationship between CHC and the applicant, must be informed by a consideration of what is meant by being a fiduciary. Fennelly J. in *McMullen v. Clancy (No. 2)* [2005] IESC 10, [2005] 2 I.R. 445 at p. 470, cited with approval the description given by Millet L.J. in *Bristol & West Building Society v. Matthew* [1998] Ch. 1 at p. 18:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

29. On the facts herein, I am not satisfied, notwithstanding the relationship with Mr. Whyte as described by the applicant that the Court could determine that either CHC or Mr. Whyte was a fiduciary in relation to the applicant in the sense described above. At all material times, Mr. Whyte was acting on behalf of CHC in his dealings with the applicant. The relationship between the applicant and CHC was a commercial one founded on contract for the provision of investment services.

30. It follows that in the absence of a fiduciary relationship, there is no breach of duty alleged against CHC which could give rise to a claim that CHC held the loan monies on trust from March, 2010. Hence, my conclusion is that following the execution of the Subordinated Loan Agreement in March, 2010 and transfer of the monies, CHC held the sum of €145,000 as a loan from the applicant pursuant to the terms of the written agreement and the subsequent events must be considered in that context.

Constructive Trust

31. The primary submission made by counsel on behalf of the applicant is that by reason of the events which took place in September/October 2010, when the applicant was induced by fraudulent and false representations made by or on behalf of CHC to opt to continue to participate in the CHC Subordinated Loan rather than then seeking repayment of the loan together with interest due, that thereafter, CHC held the sum of €145,000 on a constructive trust in favour of the applicant. This submission is not dependant on the existence of a fiduciary relationship.

32. Counsel for the applicant relies upon the description of a constructive trust in Hilary Delaney, *Equity and the Law of Trusts in Ireland* 5th Ed. (Dublin, 2011), at pp. 215 and 216:

> "A constructive trust is one which arises by operation of law and which ordinarily comes into being as a result of conduct and irrespective of the intention of the parties. In general terms it can be described as a trust which is imposed by equity in order to satisfy the demands of 'justice and good conscience' and to prevent a person deriving profit from fraudulent conduct or taking unfair advantage of a fiduciary position. As Deane J stated in the Australian decision of *Muschinski v. Dodds*:
>
> > 'Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude

> the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.'
>
> . . .
>
> The constructive trust is often regarded as a residual category which arises where fairness demands it. In *Lonrho plc. v Fayed (No. 2)* Millett J spoke in terms of 'the independent jurisdiction of equity as a court of conscience to grant relief for every species of fraud and other unconscionable conduct' although he stressed that equity's intervention 'must be based on principle; there must be some relationship between the relief granted and the circumstances which give rise to it'. In his view, when appropriate the court will grant a proprietary remedy to restore to the plaintiff property of which he has been wrongly deprived, to prevent the defendant from retaining a benefit which he has obtained through his own wrongdoing and specifically to require a defendant to disgorge property which he should have acquired, if at all, for the plaintiff."

33. Counsel for the respondent, whist not disputing the above principles, drew attention to the potential effect of a proprietary claim, such as the applicant's, on the rights of other creditors in the winding up of CHC. He also emphasised the necessity of avoiding what Keane J. in the Supreme Court in the context of a claim based upon unjust enrichment described as "palm tree justice": *Corporation of Dublin v. Building and Allied Trade Union* [1996] 1 I.R. 468 at p. 484. Counsel also referred to the comments of Deane J. in *Muschinski v.Dodds* [1986] 160 C.L.R. 583 at p. 615:

> "The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate process of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles…"

34. In a context such as the present, an insolvent winding up, counsel submitted that the Court must have regard to the fundamental distinction between the effect of personal and proprietary rights and that the Court should only make a finding of the existence of a constructive trust where the claim is "rooted in something akin to fraud". Counsel submitted that there is no evidence of fraud on the application before me.

35. It appears to me correct on the authorities cited above that the Court would have to be satisfied that in October 2010, CHC fraudulently procured from the applicant a decision that she wished to continue to participate in the CHC subordinated loan rather than opting to be repaid the loan together with interest due in order for the Court to determine that, as from that date, a constructive trust came into existence and thereafter CHC held the monies on trust for the applicant. To put it another way, the Court must be satisfied that it was by reason of fraudulent conduct by or on behalf of CHC that it retained the monies in October, 2010 in order to make a finding of a constructive trust in the applicant's favour.

36. Contrary to the submission made by counsel for the respondent, I have concluded that the applicant has put before the Court evidence which establishes as a matter of probability that the applicant made a decision on 13th October, 2010, that she wished to continue to participate in the CHC subordinated loan, rather than then seek repayment thereof, by reason of fraudulent representations made to her by or on behalf of CHC.

37. The essential proofs for persons seeking to establish fraud or deceit are well established and were recently referred to by Hardiman J. in *McCaughey v. Irish Bank Resolution Corporation Ltd. & Anor.* [2013] IESC 17, where he quoted with approval from the judgment of Shanley J. in *Forshall v. Walsh and Bank of Ireland* (Unreported, High Court, 18th June, 1997):

> "(i) The making of a representation as to a past or existing fact by the defendant,
>
> (ii) That the representation was made knowingly or without belief in its truth or recklessly, careless of whether it be true or false,
>
> (iii) That it was intended by the defendant that the representation should be acted upon by the plaintiff,
>
> (iv) That the plaintiff did act on foot of the representation and
>
> (v) That the plaintiff suffered loss as a result."

38. On the affidavit evidence herein, I find that the applicant has established that on 13th October, 2010, she opted to confirm her agreement to continuing to loan CHC €145,000 as a subordinated loan on foot of the representations made to her that day by Mr. Whyte in his capacity as Investment Director and on behalf of CHC to the effect that her investment or loan funds "were safe" and by so acting, she has suffered loss i.e. failing to obtain the repayment of €145,000. I am also satisfied that the applicant has established that CHC, through Mr. Whyte, intended that the representation be relied upon and acted upon by her. The fact that Mr. Whyte brought the letter dated 6th October, 2010, to the applicant personally on 13th October, 2010, and having made the representations as to the safety of her loan monies, sought her decision as to whether she wanted to "opt in or out" in his presence by signing the letter evidences a clear intention that she rely upon the representations made in reaching her decision.

39. The remaining two elements of the required proofs which must be established by the applicant require more detailed consideration. Firstly, the representation must be a representation as to a past or existing fact. The issue is whether the statement by Mr. Whyte that the loan funds "were safe" may be considered to be a statement of fact or opinion for the purpose of these principles. Insofar as Mr. Whyte may be considered as stating an opinion to the applicant as to the safety of the loan funds I am satisfied on the applicant's evidence that in doing so he was, at minimum, representing and asserting to the applicant the fact that this was the opinion which he then honestly held. *Clerk & Lindsell on Torts*, 20th Ed. (Jones and Dugdale Ed.), (London, 2010) at p. 1197, para.18-13, puts the principle as follows:

> "A mere statement that one thinks a given state of affairs exists is not a statement that it does in fact exist: it follows that it cannot engender liability in deceit on that basis. However, this is not a very important limitation in practice. A statement of opinion is invariably regarded as incorporating an assertion that the maker does actually hold that opinion; hence the expression of an opinion not honestly entertained and intended to be acted upon amounts to fraud."

40. It appears to me that Mr. Whyte, in making his representations to the applicant that her loan funds "were safe" was asserting that he held that opinion and, accordingly, if this statement was made, knowing it to be untrue or without belief in its truth or

recklessly or carelessly as to whether it was true or false with the intention that it be relied upon, may amount to fraud.

41. The final issue is whether the applicant has put evidence before the Court which establishes as a matter of probability that Mr. Whyte made a representation to her that her loan funds were safe, knowing it to be untrue or without belief in its truth or recklessly or carelessly as to whether it was true or false. The representation that the loan funds were safe must be considered in the context of the nature of the Subordinated Loan and the risks identified in the letter, which Mr. Whyte handed to the applicant at the meeting, as to the circumstances in which the applicant might not be repaid some or all of her loan. The risks identified to repayment of the loan are upon the insolvency or winding up of CHC. The representation that the loan funds were safe in September/October 2010, must be considered as a representation that there were no matters then known to Mr. Whyte which identified a risk at that time of insolvency or winding up of CHC or a potential inability of CHC to repay to the applicant the Subordinated Loan.

42. As previously stated in this judgment, the applicant put in evidence the Inspectors' Report and no objection was made to reliance being placed thereon in support of the submission as to the fraudulent representations allegedly made to the applicant. The report, *inter alia*, records that Mr. Whyte provided a signed voluntary statement, and in addition, gave evidence to the Inspectors, some of which is recorded *verbatim* in the report. From a consideration of extracts of Mr. Whyte's voluntary statement and evidence which he gave to the Inspectors, as recorded in the report, I am satisfied, as a matter of probability, that in October 2010, Mr. Whyte was aware of significant improper and unauthorised transfers of monies from, *inter alia*, client cash funds to fund shortfalls in property investments made by CHC of a magnitude such that in October 2010, he knew that there was a serious risk of insolvency or winding up of CHC. Hence, I am satisfied that he either knew that the loan funds of the applicant were not safe or at minimum could not have had an honest belief in the truth of that statement, or made it recklessly, careless whether it was true or false. In reaching this conclusion, I have considered the full Inspectors' report and refer, by way of example only, to the sworn testimony of Mr. Whyte to the Inspectors and an extract from his voluntary statement in relation to the transfer of funds in 2007 from Destiny Cash funds. This appears in Part B, section 2.2 of the Inspectors' Report at pp. 12 to 13:

> **"Mr. John Whyte on 25 July 2011**
> *Q. Can I just stop you there and just, perhaps if I paraphrase it, you can correct me if I am wrong, to make sure my understanding is correct? So from about 2007 onwards shortfalls in property transactions may have been remedied through access to individual client or the PRSA cash fund?*
>
> [6:11-6:16]
>
> A. PRSA, cash, correct. [6:17]
>
> **Further on in the evidence of Mr. John Whyte**
> *Q. I am not expecting you to have the specifics on it but for the earlier ones, the client level and the PRSA cash fund, so what amounts were we talking prior to quarter four 2010? [6:23-6:26]*
>
> *A. On the PRSA cash fund you could have been looking at a figure between 10 and 11 million. [6:27-6:28]*
>
> **Further on in the evidence of Mr. Whyte**
> A. *Like the bottom line the clients believed they were in a cash fund and to me I think it is as clear as day. You may have other people who may counter argue that but my view is a cash fund is a cash fund. [10:18-10:21]*
>
> **Signed statement of John Whyte dated 17 July 2011**
> PRSA Cash Funds - paragraphs 31 to 33
>
> 31. Another issue arises is in relation to the PRSA cash funds. Over a period of four to five years, on instructions from Harry Cassidy, money was transferred from those accounts into property investments.
>
> 32. I cannot specifically tell which accounts they went into but, again, I understand there is a complete money trail as to where those monies were actually allocated within the various property SPVs.
>
> 33. Again, I would have on repeated occasions tried to challenge Harry Cassidy verbally to return these monies to the PRSA cash funds and again I was told that properties were in the process of being sold and that monies would be returned. To date this has not happened."

43. For the reasons set out I have concluded that CHC, through Mr. Whyte, made fraudulent representations to the applicant at the meeting of 13th October, 2010 that her loan funds were safe, with the intention that she rely upon them and make a decision to continue to leave the sum of €145,000 as a subordinated loan with CHC and not instead opt to then obtain the repayment thereof as she was offered. Further, I conclude that the applicant, in reliance upon the representations made, decided to continue with the loan and not opt for repayment. In accordance with the principles already set out, I have concluded that as CHC procured the retention of the loan monies on 13th October, 2010 by its fraudulent conduct the Court should determine and declare that on 13th October, 2010, a constructive trust over the loan monies came into existence in favour of the applicant and continued to subsist at the date of commencement of the winding up of CHC.

Relief
44. The applicant is entitled to a declaration that Custom House Capital Ltd. (In Liquidation) held the sum of €145,000 (being the monies lent by the applicant to the company pursuant to a Subordinated Loan Agreement dated 24th March, 2010) on trust for the applicant from the 13th October, 2010 which trust continued to subsist at the date of commencement of its winding up.

45. I will hear counsel prior to determining whether the Court should make any of the further orders sought in the notice of motion or other consequential orders in relation to the tracing exercise now to be undertaken.