[2017] IEHC 393

THE HIGH COURT

[2015 No. 77 COS]

IN THE MATTER OF THE COMPANIES ACT 1963-2009

AND IN THE MATTER OF ETEAMS (INTERNATIONAL) LIMITED (IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF SECTION 280 OF THE COMPANIES ACT, 1963

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

APPLICANT

-AND-

ETEAMS (INTERNATIONAL) LIMITED (IN VOLUNTARY LIQUIDATION)

RESPONDENT

JUDGMENT of Mr Justice Keane delivered on the 15th June 2017

Introduction

1. This case presents the following mixed question of fact and law. What is the proper characterisation of the written contract ('the agreement') that Eteams (International) Limited ('the company'), now in liquidation, entered with Bank of Ireland ('the bank') on 5 July 2007?

2. The bank submits that the agreement is, as it states on its face, a debt purchase agreement, under which the bank acquired ownership of the company's book debts ('the debts'). The company submits that the agreement is a loan agreement, under which the bank merely took a charge over those debts.

3. What turns on the resolution of this controversy? Well, if the company assigned the debts due to it to the bank, then those debts - whether already collected by the company or the bank, or still outstanding - are the property of the bank and fall outside the liquidation, whereas if the company merely created a charge over those debts in favour of the bank, then they remain funds in the liquidation, and the bank ranks as an unsecured creditor in respect of the loan finance that it provided to the company, because that charge is void against the liquidator under s. 99 of the Companies Act 1963, as amended ('the 1963 Act'), as it was never registered in accordance with the requirements of that section.

The application

4. The liquidator raised the question in the guise of an application for directions brought by notice of motion dated 18 February 2015. In a pleonastic fashion, the liquidator seeks directions on: (i) whether the agreement constitutes a charge registrable pursuant to s. 99 of the 1963 Act; (ii) whether the agreement is void as against the liquidator; (iii) how to proceed in the liquidation in respect of the collection of monies from debtors in light of the agreement; (iv) whether the bank is entitled to retain the sum of €82,339.52, representing debts already collected and lodged in an account held by the company with the bank; (v) whether the bank is entitled to retain the monies it has collected pursuant to that agreement since the liquidation commenced; and (vi) whether the bank is obliged to repay the monies it has collected to the company.

5. By Order made on 8 June 2015, Costello J permitted the bank to take carriage of the application, so that the bank is now applicant and the company has become respondent.

6. By further Order made on 23 June 2015, Costello J permitted the bank to bring its own application for directions. The directions that the bank seeks are: first, one recognising that the agreement effects a valid purchase of the company's debts by the bank and does not constitute a registrable charge for the purpose of s. 99 of the 1963 Act; second, one directing that the liquidator pay to the bank forthwith the proceeds of all of the debts which he (or the company) has collected and received; and third, one directing the liquidator to provide the bank with all such documentation and information within his possession, power or procurement that the bank requires in connection with the collection of the debts.

Background

7. The company was incorporated on 5 July 1994 and had its registered office at Bridge House, Main Street, Scariff, County Clare. Initially, it offered translation, research, IT training, and design and print services. From 2005 onwards, it focussed on the provision of translation services.

8. On 28 February 2013, the company's directors resolved to wind it up. A liquidator was appointed at a creditors' meeting on 27 March 2013.

The agreement

9. As already noted, the company and the bank entered into the agreement on 5 July 2007. The copy of the agreement exhibited for the purpose of the present application comprises two parts: the formal agreement itself, including the associated particulars of agreement; and the bank's standard terms and conditions for the purchase of debts (Edition A/2005) ('the conditions'). Each part identifies the agreement as a debt purchase agreement. The agreement is signed by two directors of the company and by two authorised signatories on behalf of the bank. The conditions are signed for identification by one of the company's directors.

10. Part 1 of the agreement is headed 'Summary'. It provides, at paragraph 1.1 that the bank was to purchase the debts owing to the company, then and in the future, and that the bank was to become the owner of those debts. The funds that the company was to receive in return are described as 'payments'. As might be expected, this language is consistently used throughout the agreement and in the associated conditions. Nowhere in the agreement or the conditions is there any reference to the provision of funds by the bank as a 'loan' or to the creation of a 'charge' over the company's debts in favour or the bank in return, nor does any cognate term appear.

11. Michael Martin, a senior credit manager with the bank, swore an affidavit on its behalf on 12 March 2015 in support of its application for directions and in opposition to that of the company. Mr Martin avers that the agreement is an invoice discounting agreement of a type commonly used in the asset based finance industry. The bank is a member of the Asset Based Finance

Association ('ABFA'), which is a UK-based trade association for the asset based finance industry in the UK and Ireland. Its members represent approximately 95 per cent of the UK and Irish market in the provision of such finance. The ABFA website includes a section providing an overview of asset based finance, defining and distinguishing 'factoring', 'invoice discounting', and 'asset based lending'. Each of those expressions is a term of art within the industry but none is legally defined.

12. The ABFA website describes 'invoice discounting' as an arrangement whereby a company obtains immediate cash to the value of 80/85% of its approved customer invoices, retaining responsibility for its sales ledger operation (which would normally be taken over by a factor), but lodging the payments that it receives into a bank account administered by the invoice discounter from which it is credited with the balance, less charges. The use of the service is not normally disclosed to the company's customers.

Sale or security?
13. The proper characterisation of such arrangements is the subject of a very substantial jurisprudence. In Donnelly, *The Law of Credit and Security,* (2nd edn), (Dublin, 2015), the author first identifies the problem (at para. 11-43) in a section headed 'Quasi-Security Interests':

> 'Irish (and English) law adopts a formal approach to the categorisation of interests in property. Thus, security over property is treated differently to interests in respect of property which fulfil a similar economic function, often described as quasi-security. The task of distinguishing between a security interest and a quasi-security can occasionally be difficult and, in these instances, can introduce unwelcome uncertainty into the law. This uncertainty creates a risk that a transaction will retrospectively be re-characterised as a security interest requiring registration (sometimes characterised as a "re-characterisation risk").'

14. The problem is later addressed in a section of the text headed 'The Re-Characterisation Risk: Sale or Security?' (at paras. 11-88 to 11-96), which considers the principles applied to determine whether an individual arrangement comprises a sale or a (registrable) security.

15. The company submits that the agreement at issue here properly characterised is one whereby, rather than selling its book debts to the bank, it provided the bank with a registrable security over them in the form of a charge, which the bank has failed to register, thus rendering it void.

The law
16. In *Re George Inglefield Ltd* [1933] Ch. 1, the Court of Appeal for England and Wales was required to consider whether various agreements by a furniture company, which later went into liquidation, for the sale to a finance house of various debts due to it from its customers under hire purchase agreements, represented the true sale or assignment of each of those book debts or instead amounted in substance to the creation of a mortgage and charge over each in exchange for loan finance. If it were the latter, or the agreements fell otherwise within s. 79 of the UK Companies Act 1929, or s. 93 of the UK Companies (Consolidation) Act 1908, then they would be void against the creditors in the winding-up as not having been registered under one or other of those sections.

17. Addressing that question, Lord Hanworth MR observed (at 17):

> 'It is old law, and plain law, that in transactions of this sort the Court must consider whether or not the documents really mask the true transaction. If they do merely mask the transaction, the Court must have regard to the true position, in substance and in fact, and for this purpose tear away the mask or cloak that has been put upon the real transaction. In *Helby v Matthews* [1895] A.C. 471 Lord Herschell states the principle that we have to follow in the opening sentences of his speech [at 475]: "My lords, it is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement," and Lord Macnaghten and the other learned lords express the same opinion.'

18. Applying those principles to the appeal before the Court, Lord Hanworth MR found little difficulty in concluding (at 23) that, as was clear on their face, the documents concerned created a transaction of assignment to the discount company and not merely one of charge.

19. Dealing with the argument that a court should be disposed to find something improper in a company obtaining finance through a sale of assets rather than by the creation of a mortgage and charge over them, and should thus lean in favour of characterising a given arrangement as one of the latter type rather than the former, Lord Hanworth MR commented (at 22):

> 'There is nothing improper or wrong in obtaining money in this way any more than there is in going to your banker and obtaining money upon documents. There are, no doubt, provisions such as that in s. 79 which require a charge to be registered, but if you enter into a transaction outside these provisions which require registration as a condition of validity, you are unaffected by the law. It is not a question of evasion. A transaction is either within or without the law, and malice is not to be attributed to a person who so carries out a transaction that it remains outside the law.'

20. In a separate concurring judgment, Lawrence LJ put the matter in this way (at 23):

> 'In the first place, it is necessary to bear in mind that in this case no evidence was adduced to show that the transaction as recorded in the documents which the Court is asked to construe did not contain a true record of the transaction entered into by the parties, and therefore the only question which the Court has to consider is whether the substance of the transaction so recorded is one of sale and purchase, or is one of loan and charge. In the next place it is well to bear in mind that, although the Legislature has been careful to safeguard all person having dealings with a limited company by providing for the registration of any charge which such a company may create on its assets, the Legislature has not introduced the doctrine of reputed ownership into the winding-up of companies. As the law stands at present, there is nothing to prevent a limited company from selling its assets without giving notice of that sale to the public or to anyone else, remaining in possession of the assets so sold, with the consent of the buyer, and obtaining credit on the faith of that possession. If such a state of things ought to be remedied it is for Parliament to provide the remedy. All that the Court has to do, in circumstances such as those to which I have referred, is to ascertain whether there has, in fact, been a sale of the assets, and to give effect to the transaction if that be the case.'

21. Having echoed the observations of Lawrence LJ just quoted in a further concurring judgment, Romer L.J. then stated (at 27-8):

> 'The only question that we have to determine is whether, looking at the matter as one of substance, and not of form, the

> discount company has financed the dealers in this case by means of a transaction of mortgage and charge, or by means of a transaction of sale; because, of course, financing can be done in either the one way or the other, and to point out that it is a transaction of financing throws no light upon the question we have to determine.
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> It appears to me that the matter admits of a very short answer, if one bears in mind the essential differences that exist between a transaction of sale and a transaction of mortgage or charge. In a transaction of sale the vendor is not entitled to get back the subject matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mortgage or charge, the mortgagor is entitled, until he has been foreclosed, to get back the subject matter of the mortgage or charge by returning to the mortgagee the money that has passed between them. The second essential difference is that if the mortgagee realizes the subject-matter of the mortgage for a sum more than sufficient to repay him, with interest and the costs, the money that has passed between him and the mortgagor he has to account to the mortgagor for the surplus. If the purchaser sells the subject-matter of the purchase, and realizes a profit, of course he has not got to account to the vendor for the profit. Thirdly, if the mortgagee realizes the mortgage property for a sum that is insufficient to repay him the money that he has paid to the mortgagor, together with interest and costs, then the mortgagee is entitled to recover from the mortgagor the balance of the money, either because there is a covenant by the mortgagor to repay the money advanced by the mortgagee, or because of the existence of the simple contract debt which is created by the mere fact of the advance having been made. If the purchaser were to resell the purchased property at a price which was insufficient to recoup him the money that he paid to the vendor, of course he would not be entitled to recover the balance from the vendor.'

22. In the subsequent English case of *Olds Discount Co. Ltd. v. John Playfair Ltd* [1938] 3 All E.R. 275, the issue was whether a particular finance arrangement was properly characterised as one for the purchase by the plaintiff of the defendant's book debts or should, instead, be considered a moneylending transaction on the security of those debts. In addressing that question, Branson J observed (at 277):

> 'After the decision of the Court of Appeal in *Re George Ingerfield Ltd* [1933] Ch 1 and the decision of Porter J., as he then was, in *Olds Discount Co. Ltd v Cohen,* [1938] 3 All ER 281, unreported, 22 Oct. 1938, there is no doubt that, if it be the fact that the agreement entered into between these parties was an agreement for the purchase of book debts, the agreement is a perfectly good and lawful agreement, notwithstanding that the operative reason in the minds of the defendants for entering into it was that they desired to raise money as a temporary matter in the same way as they would have raised it if they had merely entered into a transaction of loan. In other words, it is the nature of the agreement entered into, and not its object, at which the court has to look in order to decide whether in any particular case the agreement is a moneylending agreement or otherwise.
>
> I do not think that it is necessary for me to refer in any further detail to the two cases which I have cited. There is no distinction between them, and they both lay down the law in perfectly clear language. What remains for me to do is to look at the circumstances of the present case, and to see whether or not the allegation made by the defendants that this was a moneylending transaction is made out. As I have said, there is no doubt that, if the agreement between the parties is properly represented by the contracts into which they have entered, then beyond question it is not a moneylending agreement, but an agreement for the purchase and sale of certain book debts.'

23. Having carried out that exercise, Branson J concluded (at 280):

> "The result of the whole thing is that I have before me formal agreements formally entered into and signed by the parties on both sides, and those agreements, if they represent the true agreement between the parties, are clearly not moneylending agreements. Unless there was evidence upon which it would be proper for the court to act that the parties had deliberately entered into those documents knowing that they did not represent what had been agreed between them, but that what had been agreed between them was something quite different, it seems to me that the proper course for the court to take is to accept the formal agreements between the parties, and to decide their rights according to those agreements."

24. The question later came before the Privy Council in *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1962] AC 209. That was a case involving a finance arrangement whereby discounted payment was given in exchange for post-dated cheques, which were subsequently dishonoured. The issue was, once again, whether the cheques were provided as 'repayment for money lent', which would amount to unlawful moneylending, or simply sold in exchange for payment. The Privy Council held that the arrangement between the parties was not a loan agreement. Lord Devlin stated as follows (at 215):

> 'The business of buying bills at a discount, that is, for their value at the date of purchase, is well known and is quite distinct from moneylending. Nowadays the buyer is usually a bank or a discount house, but the fact that he cannot be put into either of those categories does not alter the nature of the transaction, neither does the designation of the discount as interest. There is here no loan of money and no promise of repayment. Their Lordships' conclusion on this point is in accordance with the decision of Branson J. in *Olds Discount Co. Ltd. v. John Playfair Ltd* that a purchase of book debts for a specific sum was not a moneylending transaction.'

25. Lord Devlin continued (at 216):

> 'The fundamental error that underlies the defendants' case on both groups of cheques is that because they were, so they say, in need of ready cash, and because the plaintiff supplied them with it and made, if he did, a profit out of doing so, therefore there was a loan and a contract for its repayment. There are many ways of raising cash besides borrowing. One is by selling book-debts and another by selling unmatured bills, in each case for less than their face value. Another might be to buy goods on credit or against a post-dated cheque and immediately sell them in the market for cash. Their Lordships are, of course, aware, as was Branson J., that transactions of this sort can easily be used as a cloak for moneylending. The task of the court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money. But if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan which they disguised, for example, as a discounting operation, then the court will call it by its real name and act accordingly.'

26. The House of Lords took the same approach in the case of *Lloyds & Scottish Finance Ltd. v. Cyril Lord Carpets Sales Ltd. & Ors* [1992] BCLC 609. The appellants were a Northern Irish company, which had entered liquidation, and the liquidator of that company.

The respondent was a finance house. The company entered into a 'block discounting' agreement, which involved assigning customer credit sale debts in blocks to the finance house in return for a lump sum payment. The arrangement was based upon a trading agreement, as a form of master agreement, governing all subsequent individual transactions for the sale of each block of debts.

27. Yet again, the issue was whether the appellant company's book debts had been assigned by way of sale or security. Having described the trading agreement; the form of 'initiating' letter dealing with the assignment of each block of debts pursuant to that agreement; the executed assignment in relation to each block of debts; and the guarantee executed by the parent company of the appellant company in respect of all of the company's obligations under the master agreement, Lord Wilberforce then stated (at 613):

> 'Certain comments may be made, at this stage, upon these documents. First, the appellants expressly disclaimed any contention that the trading agreement was a 'sham' or a 'cloak' for some other bargain or transaction which might represent the true intention of the parties.
>
> Secondly, if the case had to be decided on the trading agreement alone as a matter of construction, it would be impossible, consistently with the decided cases, to conclude otherwise than that it amounted to an agreement to sell and purchase book debts, and that it did not amount to a charge upon book debts. Thirdly, if the assignments were to be considered independently of the trading agreement, then, although they are expressed in the form of absolute assignments, it would be possible for the 'vendors' to show by an examination of the whole transaction of which they formed part that they were intended to operate as assignments by way of security or charge….'

28. Noting that the appellants' arguments were directed towards establishing the third of those propositions, Lord Wilberforce examined it closely, before concluding that the total dependence of the assignment of the debts upon the trading agreement, and the importance attached to the completion of the trading agreement before any money was advanced, demonstrated beyond doubt that the trading agreement was an essential element of the parties trading intentions, and that the assignments could not be considered to be independent of it. He then continued:

> 'To suppose…that the assignments were made not by way of sale but by way of security would be to impose upon the parties a form of transaction totally different from that which they had selected, namely one of sale and which there is no evidence whatever that either of them desired. Indeed there was evidence – uncontradicted – from the respondents' witnesses and accepted by both courts below that the respondents 'had no intention of creating any charge over book debts or merely making a series of loans'. It would be a strange doctrine of 'looking for the substance' or 'looking through the documents' which would produce a contractual intention so clearly negated by the documents and by oral evidence'

29. Lord Wilberforce proceeded to discuss the distinction between the interest payable on a loan and a discounting charge applicable to invoice discounting agreements (at 616):

> '[I]t has to be appreciated that block discounting is essentially a method of providing finance. Commercially and in its economic result, it may not differ from lending money at interest: the 'discounting charge', which represents the finance house's profit, is stated in terms of so much per cent per annum, which percentage is no doubt based upon current interest rates. Legally, however, there is no doubt that discounting is not treated as the lending of money and that the asset discounted is not considered as the subject of a charge'

30. Similarly, in considering the practice of 'block discounting', Lord Scarman stated (at 619):

> 'Of course, the facility offered is money. The finance house advances money in reliance upon obligations that have not yet matured. But is it the lending of money? The question was answered (at first instance) 40 years ago. If the transaction be genuine and not a sham to cover something different, the judges held it to be a sale, not a loan. The three cases in which this answer was given have stood over the years unchallenged – and are, no doubt, the basis of City practice. They are Re *George Inglefield Ltd, Olds Discount Co Ltd v Cohen and Olds Discount Co Ltd v Playfair Ltd* [citations omitted].
>
> I think that these decisions are sound law. If the method employed constitutes a sale, the mere fact that its purpose is an advance of money will not convert the transaction into a loan.
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> The law is, however, astute to expose and avoid any sham or colourable device intended by the parties to conceal from others (including the court) the true nature of their business. This has been unquestioned law since Madell v Thomas & Co [1891] 1 QB 230.'

31. The question was considered once again by the Court of Appeal for England and Wales in *Welsh Development Agency v. Export Finance Co. Ltd.* [1992] BCLC 148. The case concerned a rather complicated arrangement for the provision of export finance to a company that subsequently went into liquidation. At first instance, the High Court (*per* Browne-Wilkinson V.C.) found that the effect of the arrangement was to create a charge over certain of the company's assets (specifically, certain of its goods for export), rather than to effect the sale of those assets to the provider of the relevant finance, the Export Finance Co. Ltd ('Exfinco'). The Court of Appeal reached the opposite conclusion and reversed that decision. Dillon L.J. explained (at 161):

> 'In my judgment there is no one clear touchstone by which it can necessarily and inevitably be said that a document which is not a sham and which is expressed as an agreement for sale must necessarily, as a matter of law, amount to no more than the creation of a mortgage or charge on the property expressed to be sold. It is necessary therefore to look at the provisions in the master agreement as a whole to decide whether in substance it amounts to an agreement for the sale of goods or only to a mortgage or charge on goods and their proceeds. In doing that I would in a case such as the present apply the law as stated by Lord Herschell in *McEntire v Crossley Bros Ltd* [1895] AC 457 at 462–463, [1895–9] All ER Rep 829 at 831 where he said:
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>> "... I quite concede that the agreement must be regarded as a whole—its substance must be looked at. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered. If the words in one part of it point in one direction and the words in another part in another direction, you must look at the agreement as a whole and see what its substantial effect is. But there is no such thing, as seems to have been argued here, as looking at the substance, apart from looking at the language which the parties have used. It is only by a study of the whole of the language that the substance can be ascertained."

In the same case Lord Watson said ([1895] AC 457 at 467, [1895–9] All ER Rep 829 at 833–834):

"As is usual in cases of this kind, we have heard a great deal in the course of the appellants' argument of the necessity of attending to the substance of the agreement which we have to construe. My Lords, that is a canon of construction which is applicable to all agreements; but it must always be borne in mind that the substance of the agreement must ultimately be found in the language of the contract itself. The duty of a Court is to examine every part of the agreement, every stipulation which it contains, and to consider their mutual bearing upon each other; but it is entirely beyond the function of a Court to discard the plain meaning of any term in the agreement unless there can be found within its four corners other language and other stipulations which necessarily deprive such term of its primary significance."

Having carried out such an examination, Lord Watson's conclusion was that 'the whole stipulations of the agreement appear to me to be in entire conformity with the express intention of the parties' (see [1895] AC 457 at 468, [1895] All ER Rep 829 at 834.)…

Indeed the similarity in result between a loan and a sale to which Lord Wilberforce referred would make it virtually impossible to decide which the transaction was if it was not permissible to have regard to the words the parties had used in their agreement in describing that transaction on which they had agreed. There is nothing illegal in a party raising finance by a sale of book debts or goods, rather than by mortgage or charge, if he chooses to do so.'

32. In an illuminating gloss upon the three points of distinction suggested by Romer LJ in *Re George Inglefield Ltd*, Dillon LJ quoted the dictum of Lord Wilberforce cited at paragraph 23 above, before continuing:

'Even the "the right of redemption" is not inconsistent with the transaction being one of sale. Taking all factors urged in favour of the master agreement being held to be, in substance, merely an agreement for secured loans, I would none the less hold that it is valid as what it purports to be, namely an agreement for the sale by [the company] to Exfinco, by acceptance of a standing offer, of goods about to be sold by [the company] to overseas buyers.'

33. In his separate concurring judgment, Staughton LJ discussed the principle whereby statute law that enacts rules to be applied to particular transactions must be applied according to the legal nature of a given transaction and not its economic effect. Noting the dictum of Lord Devlin in *Chow Yoong Hong* that, where money has been raised through another form of transaction, it is irrelevant to point out that the same result could have been produced more conveniently by borrowing and lending money, Staughton LJ then observed (at 186):

'There are in my opinion two routes by which this principle can be overcome. The first, which I will call the external route, is to show that the written document does not represent the agreement of the parties. It may, if one wishes, then be called a sham, a cloak or a device. The second is the internal route, when one looks only at the written agreement, in order to ascertain from its terms whether it amounts to a transaction of the legal nature which the parties ascribe to it."'

34. Dealing with the internal route, as it might be applied to the transaction then at issue, Staughton LJ continued (at 187):

'There was here no sham, no collateral agreement or common intention to be bound by different terms, and no subsequent variation to that effect. So I can leave the external route, and turn to an internal consideration of the master agreement itself. This must be carried out on the basis that the parties intended to be bound by its terms, and by nothing else.

If one part of the agreement purports to create a particular legal transaction, it may happen that other provisions are inconsistent with such a transaction. The task of the court is then to ascertain which is the substance, the truth, the reality. That was plainly the approach of Lord Herschell LC in *McEntire v Crossley Bros Ltd* [1895] AC 457 at 463-466, [1895-9] All ER Rep 829 at 832-833, where there are repeated references to inconsistency. See also the speech of Lord Watson where he said ([1895] AC 457 at 467, [1895-9] All ER Rep 829 at 834):

"The duty of a Court is to examine every part of the agreement, every stipulation which it contains, and to consider their mutual bearing upon each other; but it is entirely beyond the function of a Court to discard the plain meaning of any term in the agreement unless there can be found within its four corners other language and other stipulations which necessarily deprive such term of its primary significance."'

35. While there is no jurisprudence in this jurisdiction directly on the narrow point of the distinction between a transaction of sale and a transaction of mortgage and charge, there is much helpful authority on the correct approach to the construction of contracts.

36. *Carroll v. Bourke* [1990] 1 IR 481 was a case concerning the interpretation and application of what have come to be known as 'retention of title clauses'. The retention of title clause at issue there expressly envisaged the onward sale of the goods concerned by the purchaser prior to payment, in which event the proceeds of all such sales were to be lodged in a separate account established for that purpose by the purchaser to be held on trust for the vendor. The purchaser sold on the goods but did not open a separate account, instead lodging the proceeds of sale into its own trading account. It later went into liquidation. In considering how the separate trust account would have functioned, if it had been properly opened and operated, Murphy J pointed out that it would necessarily have contained funds in excess of those to which the vendor would be entitled for two reasons: first, because the onward sale of the goods would almost certainly have occurred at a mark up; and second, because, the purchaser would almost certainly have already paid the vendor for some of the goods. In other words, the trust account would comprise a fund to which the vendor could have recourse to obtain the monies due to it, even though it would not be entitled to the entire of the fund. Murphy J. concluded (at 485) that '[a]ccordingly, the fund agreed to be credited would possess all the characteristics of a mortgage or charge as identified by Romer LJ in *Re George Inglefield Ltd.'*

37. On the proper construction of contracts, Murphy J observed (at 486):

'The fact that a vendor may seek to protect his commercial interests and in particular his right to recover the purchase price of goods sold by him by retaining the title to property which he has agreed to sell and of which he has delivered possession to the purchaser does not convert the contract for sale into a mortgage which may require registration in accordance with the provisions of s. 99 of the Companies Act, 1963. It would be wrong to infer that a particular

> transaction constituted a mortgage merely because the vendor structured it in such a way as to protect his commercial interests. On the other hand parties cannot escape the inference that a transaction constitutes a mortgage registrable under s. 99 of the aforesaid Act by applying particular labels to the transaction. The rights of the parties and the nature of the transaction in which they are engaged must be determined from a consideration of the document as a whole and the obligations and rights which it imposes on both parties. This is a principle of general application. Not infrequently efforts have been made to treat a document which is in truth a lease as a licence by so describing it. The description may be a material consideration but clearly it cannot be decisive. Specifically in relation to mortgages registrable under the Companies Acts it has been held that it is the substance of the transaction as ascertained from the words used by the parties and the context in which the document is executed that determines registrability under the Companies Acts (see *In re Kent and Sussex Sawmills Ltd.* [1947] Ch. 177). It seems to me that the bargain between the parties insofar as it relates to the transaction subsequent to a sale by Bourkes is in substance - though not in terms - the same as that which existed in *In re Interview Ltd*. [1975] I.R. 382 in that effectively Bourkes were creating or conferring a charge on the proceeds of sale in substitution for the right of property which Carrolls had previously enjoyed. The charge so created required registration under s. 99 of the Companies Act, 1963, and in the absence of such registration was invalid.'

38. It would be wrong to leave *Carroll v Bourke,* without emphasising that Murphy J was there seeking to ascertain whether the substance of the transaction at issue entailed the creation of a trust fund (in respect of which the remedy of tracing would be available to the vendor as the beneficiary of that trust) or the creation of a charge over certain funds in favour of the vendor. Murphy J considered a wide range of specific facts as material to that analysis. Those facts are succinctly summarised in the recent decision of the Court of Appeal in *Unitherm Heating Systems Ltd v Wallace* [2015] IECA 191 (at para. 44 of the judgment of Irvine J).

39. The correct approach to the principles of the construction of contracts governing questions of form and substance was set out by the Supreme Court in the case of *Kearns v. Dilleen* [1997] 3 IR 287. Barron J. approved the dictum of Hanworth MR in *Re George Inglefield Ltd* [1933] Ch. 1, already cited (at paragraph 17 above), having first declared:

> 'The general principle is that parties are entitled to carry out their legal transactions in whatever form they wish. In construing the substance of those transactions the courts look not to the intention behind the transaction but to the form in which the transaction takes place and to the rights and duties imposed by the transaction itself.'

The arguments

40. The company raised a series of different and, dare I say, increasingly unfocussed arguments in support of its contention that the agreement, properly construed, is one of loan and charge, rather than one of sale and purchase.

i. a different agreement in substance?

41. The first is one of fact. The liquidator avers, in the affidavit that he swore on 18 February 2015 to ground the company's application for directions, that he has spoken to the former directors of the company and that one of them, Christiane Luke, told him that the directors understanding of the agreement was that it 'was just a way of providing security for a loan without debts passing to the [bank] in reality.'

42. Insofar as that averment is intended to provide the basis for the argument that the agreement was in substance one of loan and charge, rather than one of sale and purchase, it can carry no weight for two reasons. First, it is hearsay. Ms Luke has not sworn an affidavit. Michael Martin, who was a signatory to the agreement on behalf of the bank, has averred in reply in his affidavit sworn on 12 May 2015 that he was involved in putting the agreement in place and that at no stage did he, or any representative of the bank, say or do anything that would cause the directors of the company, including Ms Luke, to have such a fundamental misunderstanding of the clear terms of the agreement.

43. Second and more important, the argument cannot be reconciled with the applicable principles of law on the interpretation of express contractual terms, as identified by the Supreme Court in *ICDL v European Computer Driving Licence Foundation Ltd* [2012] 3 I.R. 327, endorsing the five principles of interpretation described by Lord Hoffman in *I.C.S. Ltd v. West Bromwich B.S.* [1998] 1 W.L.R. 896 (at 912-3). The third of those principles is that, in determining the meaning which the document concerned would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.

44. Fennelly J then elaborated on the correct approach to interpretation in the following way (at 352):

> '[69] [These principles] should not be misunderstood as advocating a loose and unpredictable path to interpretation. A court will always commence with an examination of the words used in the contract. Moreover, words will, as Lord Hoffman emphasises, normally be interpreted in accordance with their "natural and ordinary meaning…". Business people will be assumed to know what they are doing and will normally be bound by what they have signed. The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract. Keane J. summarised the law briefly but comprehensively in the High Court in *Lac Minerals Ltd. v. Chevron Mineral* [1995] 1 I.L.R.M. 161.
>
> [70] Evidence of the surrounding circumstances, but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words should be understood as referring to. Such evidence will not normally be allowed to alter the plain meaning of words.'

ii. does failure to pass risk result in a loan and charge rather than a sale and purchase?

45. The second argument put forward by the company is that the judgment of Charleton J in *Hagemeyer Ireland plc v The Revenue Commissioners* [2007] IEHC 49 has clarified or altered the law by establishing that, where a sale and purchase agreement does not have the effect of assigning the risk associated with a book debt from the assignor to the assignee, what ensues is a charge and not a debt factoring agreement.

46. In advancing that argument, the company points to the fact that two directors of the company executed personal guarantees in favour of the bank in respect of the company's obligations under the agreement.

47. In *Hagemeyer Ireland plc*, Charleton J was not addressing, as a matter of construction under Irish law, the distinction between a

sale and purchase agreement and a loan and charge agreement. Rather, he was dealing with the proper construction under EU law of the term 'factoring' as an exclusion from the exemption from VAT in respect of 'transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments' provided for under Article 13B(d)(3) of *Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment* ('the Sixth Directive').

48. Charleton J noted the unhelpful absence of a definition of the term 'factoring' from a Directive that has as one of its objects the harmonisation of 'the concepts of chargeable event and the charge to tax' (at paragraphs 8 and 11 of the judgment), before going on to state:

> '18. Crucial to the definition of factoring is that the risk of the payment not being made should be passed from the seller to the factor. If there is recourse to the seller in the event of default, the arrangement cannot be defined as factoring. Salinger [*Factoring: The Law and Practice of Invoice Finance*, (3rd edn) (London, 1999)] treats this at para. 1-44 by stating:-
>
> > "For those clients who need finance for the trade credit requirements of their debtors but no administrative service or protection, another service is provided extensively by factors. By the [simple] expedient of releasing the client from the need to notify the debtors to pay direct to the factor and by providing that all debts sold to the factor should be subject to full recourse, factoring is changed to a purely financial service sometimes referred to as 'confidential factoring' or, more commonly, 'invoice discounting'."
>
> 19. In this case it is claimed by the applicant that they have no recourse to the seller of the debt. Those debts, however, continue to be collected by the seller. Salinger at p. 16 gives a useful description of what he calls "factoring in its full form". This he describes as:-
>
> > "…a continuing relationship between a factor and supplier (the client) of goods to trade customers in which the factor purchases substantially all the trade debts of his client arising from such sale of goods or the provision of such services as they arise in the normal course of business. The client in turn for agreed fees and finance charges is thereby relieved:-
> >
> > (a) from the need to administer and control a sales ledger and collect amounts payable from the debtors; and
> >
> > (b) from losses arising from the inability of the debtor to pay; and
> >
> > (c) from the provision of trade credit to debtors, to a substantial degree."'

49. On my reading of the paragraphs just quoted, and having consulted Salinger, it is clear that Charleton J is merely distinguishing between 'factoring in its full form' (dealt with at paragraphs 1-35 to 1-39 of Salinger) and 'invoice discounting or confidential factoring' (dealt with at paragraph 1-44). The descriptions quoted by Charleton J can be found under the heading 'The Full Service and Variations' in the first chapter of Salinger, entitled 'An Introduction to Modern Factoring of Debts – Its Origins and Nature'. I can find no suggestion in those paragraphs, or anywhere else in the judgment, that the presence or absence of the passing of risk serves to distinguish sale and purchase agreements from loan and charge agreements.

50. Indeed, as the bank points out in its submissions, any such proposition would be entirely inconsistent with all the jurisprudence already cited. In *Re George Inglefield Ltd*, the sale of the debts was accompanied by both a guarantee from the company that the debts would be discharged in full and the provision by it of bills of exchange in favour of the finance provider; see the judgment of Lawrence LJ (at 278). In *Olds Discount v John Playfair Ltd*, a guarantee and bills of exchange were also provided, per Branson J (at 278), and in *Chow Yoong Hong* the Privy Council (*per* Lord Devlin at 215) confirmed its understanding that this did not alter the essential nature of the underlying transaction as a sale and not a secured loan.

51. The specific contention that a failure or refusal to assume risk transforms an agreement for sale and purchase into one of loan and security instead was expressly addressed, and rejected, by Lord Wilberforce in *Lloyds & Scottish Finance Ltd v Cyril Lord Carpet Sales Ltd*, in the following terms (at 616):

> 'One further point. In block discounting 'transactions', the purchaser is acquiring an asset (viz a book debt) which he did not create, as to the validity of which he has no knowledge, which he is not going to collect, and of any default in whose realisation he may be ignorant. He naturally requires a certain margin, or reserve, or as it sometimes said, security to ensure, so far as possible, that he will get what he has bargained for. But it is a fallacy (into which the appellants' argument falls) to argue from this towards a conclusion that the transaction as a whole is one of security or charge. There are many contracts of sale, or for building work, or otherwise, where some security is required by one party that the other will fulfil his promise. But this does not alter the nature of the contract itself or turn it into a contract by way of charge. In the present case, the fact that the purchasers wanted guarantees, or security, or reserves to ensure that they received the whole of what they had bought, cannot convert a transaction of purchase into one of charge.'

52. In its submissions, the company places a heavy reliance, which appears to be entirely misconceived, on the decision in the *Welsh Development Agency* case, already cited. The relevant argument begins by quoting the following passage from Forde, *Commercial Law,* (3rd edn) (Dublin, 2005) (at p. 236):

> 'There are numerous sub-varieties of factoring. Occasionally, however, some additional safeguards and conditions introduced into these arrangements have the effect of rendering them charges and not outright legal assignments of debts.'

53. The text in Forde continues by citing the *Welsh Development Agency* case as dealing with just such a situation in which the relevant arrangement was 'held to be a charge' (at pp. 236-7). The company's submissions adopt that analysis, quoting at length (although without attribution) from the decision of Browne-Wilkinson VC at first instance in that case. Both the commentary in Forde and the company's submissions appear to overlook the contrary finding of the Court of Appeal in the *Welsh Development Agency* case that, taking the agreement concerned as a whole, it was what it purported to be, namely a sale of goods by the company to the finance provider and not a loan secured by a charge over the goods or the proceeds of the goods.

54. The *Welsh Development Agency* case is directly relevant to another argument advanced by the company, namely that the existence of a right of recourse in respect of disapproved debts under clause 9 of the conditions attached to the agreement confirms

the absence of any meaningful transfer of risk to the bank under the agreement such that, on the company's argument already described, it cannot be construed as an agreement for sale and purchase but must be considered an agreement for loan and charge. Once again, this highly artificial argument cannot be reconciled with that authority. As Dillon LJ explained (at 161):

> '[I]t is clear from Re George Inglefield Ltd, and the Lloyds & Scottish case, (a) that there may be a sale of book debts, and not a charge, even though the purchaser has recourse against the vendor to recover the shortfall if the debtor fails to pay the debt in full and (b) that there may be a sale of book debts, even though the purchaser may have to make adjustments and payments to the vendor after the full amounts of the debts have been got in from the debtors. As to the latter see especially the judgment of Lord Hanworth MR in Re George Inglefield Ltd [1933] Ch 1 at 20.'

55. Finally on this point, it is worth observing that, even in the quite separate context of EU VAT law (which Charleton J was considering in *Hagemeyer Ireland plc*), there is no meaningful legal distinction to be drawn between factoring agreements based on whether the risk associated with the underlying debts has passed to the factor. In Case C-305/01, *Finanzamt Groß-Gerau v MKG-Kraftfahrzeuge-Factory GmbH* ('the MKG case'), the Court of Justice observed (at para. 54) that 'there is no valid justification for treating true factoring and quasi-factoring differently from the point of view of VAT', before concluding (at para. 58) that 'the term factoring referred to [in Article 13B(d)(3) of the Sixth Directive] must be interpreted broadly, covering both true factoring and quasi-factoring, given that, as an exception to a rule derogating from the application of VAT, it must be understood as applying to all possible forms of that operation.'

iii. does the agreement provide or have the effect that the book debts are held by the company on trust for the bank?

56. The company argued that the assignment of the company's book debts to the bank was not effective because the debtors were not then expressly notified in writing of it, thereby failing to comply with the conditions for a legal assignment under s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 and creating only an equitable assignment of those debts to the bank in consequence. The bank's submission in response, which I accept, is that the absence of express written notification of the assignment of any specific debt, for as long as that remained the case, could only have been relevant to the position as between the bank and the debtor concerned, entitling that debtor to continue to exercise a right of set off in respect of any monies owed to him by the company.

57. Second, the company argued that clause 1.4 in the conditions attached to the agreement, under which the company agrees to hold on trust any debt or related right where ownership fails to pass to the bank under the terms of the agreement, creates a trust over those debts in favour of the bank comparable to the one considered by the Court of Appeal for England and Wales in *Barbados Trust Co v. Bank of Zambia* [2007] EWCA Civ. 148. I accept the bank's argument that this submission is misconceived and that the clause concerned simply performs a 'belt and braces' function in the context of the agreement as a whole. The condition whereby the company agrees to hold the debts on trust for the bank in certain circumstances is a contingent provision. According to the clear words of clause 1.4, it only becomes operative where ownership of the debts somehow fails to pass to the bank under the principle terms of the agreement.

58. Thus, nothing has been identified in statute or in the terms of the agreement that prevents the agreement from operating as, under its plain terms, it is intended to – that is, as an agreement for the sale and purchase of the company's book debts.

Analysis

59. I am quite satisfied that the settled train of authority already described, commencing with *Re George Inglefield Ltd* and steering a consistent course through to the *Welsh Development Agency* case, applies principles of law well-recognised in this jurisdiction to an issue of law – that of the distinction between an agreement of purchase and sale and an agreement of loan and charge – that our courts have not until now had occasion to consider. I have no doubt that those decisions represent good law on that issue and that it is right to follow them.

60. Counsel for the company conceded – quite correctly, in my view – that on the evidence before the court there is no suggestion whatsoever that the agreement at issue is a sham. The concern expressed by Charleton J in *Hagemeyer Ireland plc* (at para. 20) that the court, in analysing transactions, must bear in mind that the parties have reason to disguise their nature, has no evident application here. There is no question of artificially avoiding liability for VAT (or of artificially creating a liability for VAT in order to avail of a tax credit). Nor is there any question of this transaction being used as a cloak to conceal money-lending or some other ulterior purpose.

61. Instead, the practical issue is whether a transaction that was never viewed as one amounting to a charge and, hence, never registered as such, might nevertheless be deemed to have succeeded only in creating a charge captured by the registration requirements of s. 99 of the 1963 Act and, thus, void for want of registration.

62. We have already seen how, in *Re George Inglefield Ltd*, Lord Hanworth MR observed that there was nothing wrong in entering a transaction that fell outside s. 79 of the UK Companies Act 1929, or s. 93 of the UK Companies (Consolidation) Act 1908, each of which required a charge on certain company assets to be registered in order to be valid. As both Lawrence and Romer LJJ went on to observe, if permitting such transactions amounts to a mischief (and, balancing the interest of a company in having access to the broadest possible range of financing options against the competing interest of a company's creditors in knowing whether other creditors of the company are secured, it is by no means clear that it does), then the remedy for that mischief is quintessentially a matter for the legislature and not the courts.

63. Against that background, it is striking that s. 99(2)(e) of the 1963 Act, which provides that the registration requirement imposed by s. 99(1) of that Act applies to a charge on the book debts of the company, is drafted in very similar terms to s. 93(1)(e) of the UK Companies (Consolidation) Act 1908. In *Jordan v O'Brien* [1960] 1 IR 363, the Supreme Court had been referred to several English cases on certain legislation in that jurisdiction that contained a provision closely parallel to the provision of the Rent Restrictions Act 1946 that was at issue in the appeal before it. Lavery J stated (at 371):

> 'These cases are not of binding authority on any Court in this country but where one finds parallel legislation, over a number of years, obviously they afford a valuable guide as to the intention of the Legislature when enacting the statute of 1946, presumably with knowledge of the existing law both in Great Britain and in this country.'

64. In this case, the train of English jurisprudence to which I have already referred seems to me to afford a valuable guide to the reach and scope of the registration requirements of s. 99 of the 1963 Act.

65. Finally, turning to a consideration of the terms of the agreement as a whole, for all the reasons I have already given I have no

hesitation in concluding that it is in substance one of sale and purchase rather than one of loan and charge.

Conclusion
66. Accordingly, I will make Orders granting the following directions sought on behalf of the bank:

(i) A direction that the agreement effects a valid purchase of the company's debts by the bank and does not constitute a registrable charge under s. 99 of the 1963 Act.

(ii) A direction that the liquidator pay to the bank forthwith the proceeds of all the debts which he (or the company) has collected and received.

(iii) A direction that the liquidator provide the bank with all such documentation and information within his possession, power or procurement that the bank requires in connection with the collection of the debts.